OPEN COURTS ACT REVIEW

The Hon. Frank Vincent AO QC

September 2017

The consultations and submissions process of the Open Courts Act Review was confidential. The final report has been revised to the limited extent necessary to publish contributors' views with their consent. Minor amendments were also made to clarify expression without making any material changes.

Review of the Open Courts Act 2013

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1 Executive Summary

1. In 2016, the Victorian Attorney-General, the Hon Martin Pakula, initiated a review of the *Open Courts Act 2013* (Vic) ('the Review'). The Review formally commenced on 21 March 2017 and was completed within eight months of its commencement.

2. The Review's recommendations are based on a few simply-stated propositions, all of which were the clearly-intended objectives and principles adopted by the Parliament of Victoria when enacting the Open Courts Act:

    a. First, it is of fundamental importance that our system of justice must be open to public scrutiny and assessment to the maximum extent possible. Orders suppressing the dissemination of information should be approached as necessary exceptions to the transparent functioning of our courts and tribunals, required in the particular circumstances of the cases involved.

    b. Second, any order for suppression must be directed solely to the advancement of the interests of justice and be supported by adequate information.

    c. Third, each ground upon which an order has been made should not only be identified but separately justified.

    d. Fourth, an order should not be made if the objective to which it is directed could be achieved by other means, such as the use of pseudonyms or other non-identifying descriptions of persons or events.

    e. Fifth, the terms of an order for suppression should be clear and confined in both scope and duration to the minimum required for the purposes for which it has been imposed.

    f. Sixth, reasonably available and inexpensive opportunities should exist to challenge the making of an order, its scope and duration or, once made, to seek its review.

3. There would seem to be nothing novel or controversial about any of these propositions. These are the basic principles which underpin both the legislative framework and the decision-making in cases where orders for suppression are sought or made. Nor would it seem that their implementation should have required Parliamentary intervention as they rest on notions lying at the centre of our system of justice and have been long recognised in the common law, namely:

    a. the transparency necessary to maintain the efficacy and integrity of the system of justice;

    b. the right of those reliant upon the protection of the common law and the community generally to a fair and public hearing of the matters that come before our courts and tribunals without exposure to unnecessary danger, distress and humiliation in consequence; and

    c. the freedom to engage in open discussion of matters of public importance.

4. To a substantial degree, the workings of Victorian courts and tribunals are compliant with the fundamental need for open justice. The processes of Victorian courts and tribunals and the reasons for their decisions are overwhelmingly open to public scrutiny, reflected by the miniscule number of cases in which suppression orders have been made as a proportion of the overall caseload of courts and tribunals.

5. It does not follow, however, that, where the issue of effecting a proper balance between the necessary transparency and other values and interests does arise, it is being dealt with appropriately. It is apparent that the difficulties that can arise in the determination of an appropriate balance are substantial and only to a limited extent susceptible to resolution through legislative intervention. There is an important cultural dimension to the problem.

6. More attention needs to be given to the education of judges with respect to their obligation not only to comply with the provisions of the Open Courts Act but with its objectives and, of course, to the validity of the foundational propositions upon which orders are regularly made. In common with other institutions that have been developed over a long period to meet the varying needs of the community, increasingly rapid changes in the social and technological environments within which it must function have presented a wide range of issues for the legal system. Some of the traditionally-accepted propositions upon which its operating principles and rules have evolved have not withstood the scrutiny and investigative analyses of more recent times. Adaptation of the system to accommodate these new challenges has been slow and patchy. The courts, in particular, can be seen to have experienced difficulty in responding to the substantial changes that are required to address them.

7. This is evident in the manner in which the issues posed by applications for suppression orders and related areas have been approached. The making of some suppression orders has been based essentially upon a number of traditionally-accepted and largely-unquestioned propositions of dubious validity inherited through the common law concept of binding precedent. As they provide the foundation upon which the restriction of dissemination of much of the information currently encompassed rests, more research into their validity is required. It is proposed that this should by undertaken by the Victorian Law Reform Commission in conjunction with consideration of the related areas of contempt of court and the *Judicial Proceedings Reports Act 1958* (Vic) and the enforcement processes applicable in these areas.

8. The data collected in the course of the Review revealed that, between the period 1 January 2014 and 31 December 2016, Victorian courts and tribunals made 1,594 orders with the effect of suppressing information under various sources of power, with 1,279 orders made under the Open Courts Act. There does not appear to be a significant overall decrease in the number of suppression orders made since the Act's passage. In 12% of suppression orders made under the Act, and in clear breach of a basic and simple provision of the Act, there was no ground specified at all, general or specific. In 22% of suppression orders under the Act, 'blanket bans' were imposed that either failed to identify what was to be suppressed or more commonly stated that the order covered the 'whole or any part of the proceeding', although there appears to be at least some justification for this result. The vast majority of orders appropriately stated their period of duration; only 7% of orders were not sufficiently specific as to their date of expiry, and there appears to be no substance to the complaint that orders were too frequently being made for a period of five years. It was not possible to establish the degree to which courts and tribunals met their obligation to give interested parties such as media organisations notice of applications for suppression orders.

9. Viewed as a whole, these levels of both formal and substantive non-compliance are both surprising and unacceptable. Although the absence of grounds and specific subject matter does not of itself indicate that orders should not have been made or that their terms were inappropriate, they raise doubts, which were reinforced in

consultations conducted with stakeholders and the examination of individual transcripts and audio recordings conducted in the Review, as to the level of awareness of a number of members of the judiciary of their statutory responsibilities and their appreciation of the fundamental importance of transparency in our legal processes.

10. There can be little doubt that the approach of the judiciary to the restriction of dissemination of information has been heavily influenced by a justifiable concern about the frequency with which decisions and information concerning cases and individuals involved in them have been inaccurately, selectively and unfairly presented in the media.

11. The existence of some tension between the judiciary and the media is inevitable as they endeavour to perform their respective roles. No institution or group of human beings is likely to be entirely comfortable when their operations are subjected to external criticism or adverse comment. However, and providing that it is accurately and fairly presented, exposure of what is happening is essential to ensuring accountability.

12. The Review has not been concerned with attributing or distributing levels of responsibility for this mutual distrust but with its possible impact upon the operation of our legal system and what is happening in the courts. It is for this reason that the recommendation is made that the Department of Justice and Regulation establish a mechanism to facilitate discussion between the courts, legal practitioners and the media of their differing perspectives and legitimate expectations.

13. A number of recommendations are also advanced for consideration as to reform of the formal statutory regime governing suppression orders.

14. If adopted, the broad features of the suggested framework governing the making of orders would result in a situation where:

    a. The power to make orders would be restricted to circumstances where there were no existing statutory restrictions on disclosure of the information involved. *(This should assist in reducing the number of unnecessary orders and direct attention to what may be required in the circumstances.)*

    b. The making of orders would be approached in the understanding that the principle of open justice is fundamental to our legal system through the insertion of a preamble to the Open Courts Act and the recognition that orders constitute exceptions to open justice, where necessary in the circumstances of the case. *(This is intended to address the current treatment of the principle of open justice as nothing more than a statutory presumption in favour of transparency.)*

    c. All orders, whether by application of a party or on the court's own motion, would be treated as interim for a period of five days after which, in the absence of an application for it to be set aside or varied, it would operate according to its terms. *(This recommendation is directed to ensuring that, as far as is practicable and consistent with the purposes of the order, an opportunity must be afforded to those concerned to object to its making or terms.)*

    d. The court or tribunal would be required in the absence of good reason to the contrary to transmit all orders for inclusion in a central, publicly accessible register. *(This, it is considered, would be far more satisfactory an arrangement than the present one under which each body separately informs*

media organisations or individuals on an email list of notice of an application for suppression or the contents of an order.)

e. A judge making an order would be required to address each ground on which it is made and prepare a statement of reasons for doing so, including the justification for its terms and duration. As far as practicable in the circumstances, this would be publicly available. *(This is of special importance where the order is made on a general 'interests of justice' ground but it is principally directed to ensuring that there is both formal and substantive compliance with the statutory obligations and the principle of open justice.)*

f. Interested parties (such as media representatives) would be able to appear to object to the making of an order or its terms. The judge would be able to secure the assistance of the Public Interest Monitor as contradictor to assist in this process. *(The objective of this recommendation is to ensure that the necessity for an order is properly considered and that its terms are clear, an important consideration in the event of a possible breach.)*

g. Entry of the order on the register, supported by the reasons for its making, would be regarded as sufficient notice to any who may wish to disseminate the information that the order had been made. *(A central register would also be of value in the overall monitoring of the use of suppression orders and in their enforcement.)*

h. Orders intended to expire at the completion of a proceeding would continue in effect until the period allowed for appeal had also passed. In the event that an appeal had been instituted the order would remain in force until revoked or varied by the appellate court or on the completion of that proceeding. *(This recommendation is made to simplify the process by avoiding the necessity for applications for continuance of orders in these situations.)*

i. The distinction between proceeding and broad suppression orders would be removed. *(What is important is that the purpose, terms and duration of an order are clearly identified, not whether the order relates to a single proceeding. Removal of the distinction would produce a simpler structure and avoid the complexities and necessity for several orders to be made that can occur under the current provisions.)*

j. Enforcement of orders would be more realistic. *(The reduction in the overall number of orders, the clarification of their terms and duration and the establishment of a single central register to which the media and others who wish to disclose protected information would be expected to have recourse, should substantially improve the position. At present, the Director of Public Prosecutions encounters difficulty at all of these levels.)*

k. The Public Interest Monitor should be required to report annually on the operation of the system. *(This should involve any issues identified by the Monitor when acting as contradictor and more generally from the data obtained from the central register.)*

15. Some specific areas where reform is recommended relate to:

a. the broader context of contempt of court, the Judicial Proceedings Reports Act and other legislation under which similar restrictions of information can be imposed. *(Consideration of the law and practice in these related areas is required to ensure the development and application of consistent principle at each of these points in our judicial process.)*

b. the issue of the harmonisation of the law and practice relating to suppression orders which should be referred to the Council of Attorneys-General for further consideration, including the establishment of more satisfactory arrangements for the interstate and territory recognition and enforcement of orders. *(At the present time, restrictions on publication in one jurisdiction can be rendered substantially less effective through publication in another.)*

c. orders made to conceal the identities and whereabouts of individuals subject to supervision in the community under the provisions of the *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic). *(The making of these orders should be restricted while continuing to have regard to the ramifications of disclosure, including the personal safety of individuals.)*

d. the desirability of statutory reform to enable the disclosure of the relevant convictions of juvenile offenders who continue in serious criminal behaviour as adults. *(The justification for concealment of their earlier behaviour would not ordinarily be present in that situation.)*

e. the need to provide greater protection to victims of sexual offending at the preliminary stage of bail hearings of alleged offenders. *(There is a serious potential for additional repeated trauma and humiliation as well as the exposure of their personal information and identity to be experienced by victims when attention is not given to their situation in the early stages of the prosecution process. In addition to these personal consequences, it can operate as a powerful deterrent to the reporting of crime and the preparedness of victims to seek the justice to which they are entitled.)*

f. the concern of some victims of sexual offences or family violence that the statutory provisions designed for their protection also served to conceal the identities of perpetrators and thereby effectively limited their accountability as well as the ability of victims to speak about their personal experiences. *(Victims who as adults or previously as children have been subjected to sexual abuse should be able upon the conviction of the perpetrator to opt to have their identity publicly disclosed, unless to do so would expose that of other protected persons.)*

g. a concern that the current restrictions imposed by the *Children, Youth and Families Act 2005* (Vic) on the publication of information in relation to juvenile offending unduly limit the ability of victims to speak publicly about what has happened to them. *(Provided that this would not identify protected persons under the Act, and is consistent with the principles relating to suppression of information generally, it is important for a number of reasons and in the public interest that victims should be free to describe the nature and circumstances of the criminal behaviour to which they were subjected and its impact upon them.)*

2 Summary of Recommendations

2.1 Presumption or principle?

RECOMMENDATION 1: That sections 4 and 28 of the Open Courts Act 2013 (Vic) be amended to make clear that orders made under the Act constitute exceptions, based on necessity in the circumstances, to the operation of the principle of open justice rather than it being a matter of the operation of a presumption in favour of transparency.

RECOMMENDATION 2: That the Open Courts Act be amended to include a new preamble emphasising the fundamental importance of transparency in our legal system.

2.2 A broader context

2.2.1 Harmonising related areas of the law

RECOMMENDATION 3: That the Open Courts Act be amended to restrict the power to make suppression orders to situations not otherwise encompassed by statutory provisions prohibiting or limiting publication.

RECOMMENDATION 4: That, in order to ensure consistency of approach to principle and practice in relation to suppression orders and related areas, the Victorian Law Reform Commission be requested to report on the possible reform of the Judicial Proceedings Reports Act 1958 (Vic) and the codifying of the law relating to contempt of court, including the legal framework and processes for enforcement.

2.2.2 Unifying the law across jurisdictions

RECOMMENDATION 5:

1. *That the harmonisation of the law and practice relating to suppression orders be referred to the Council of Attorneys-General for further consideration.*

2. *That, whether or not this recommendation is accepted, the Council of Attorneys-General be requested to consider the desirability of the development of a system for interstate and territory recognition and enforcement of suppression orders.*

2.3 Reforming the Open Courts Act

2.3.1 The duty to give reasons

RECOMMENDATION 6: That, in each matter in which a suppression order is made, the court or tribunal be required to prepare a written statement of its reasons for the order, including the justification for its terms and duration. Save for restrictions and redactions reasonably required to effect the purpose and efficacy of the order, these reasons should be publicly available.

2.3.2 Notice and the opportunity to challenge

RECOMMENDATION 7: That a central, publicly accessible register of suppression orders made by all Victorian courts and tribunals containing details of their terms and duration and, to the extent reasonably possible in the circumstances the reasons for them, be established.

RECOMMENDATION 8: That all suppression orders should be treated as interim for a period of five days to enable interested parties to present submissions as to their necessity or terms. In the absence of any such challenge, the orders would continue in effect for the period and terms stated.

RECOMMENDATION 9: That, in the event of an appeal being lodged against the outcome of proceedings in which a suppression order was made, the order would continue in effect until the determination of the appeal or it is discharged or varied on application to the court or tribunal hearing the appeal.

2.3.3 Distinction between proceeding and broad orders

RECOMMENDATION 10: That the Open Courts Act be simplified by removing the unnecessary distinction between broad and proceeding suppression orders.

2.4 Participants in the process

2.4.1 The courts

RECOMMENDATION 11: That the Judicial College of Victoria be approached with a view to establishing programs and materials to improve the level of understanding within the judiciary concerning the operation of the Open Courts Act and other legislation restricting the public dissemination of information relating to legal proceedings.

2.4.2 Media organisations and legal practitioners

RECOMMENDATION 12: That a formal relationship be developed through the Department of Justice and Regulation between the media, the courts and legal practitioners with the purpose of addressing the issues presented in effecting an appropriate balance between openness and the suppression of information in our court and tribunal processes.

2.4.3 Offenders

RECOMMENDATION 13: That consideration be given to statutory reform to enable the discretionary disclosure of the relevant convictions of juvenile offenders in cases of their continuing and entrenched propensity to engage in serious offending as adults.

RECOMMENDATION 14: That section 184 should be amended to restrict the making of suppression orders concealing the identity or whereabouts of persons subject to supervision under the Serious Sex Offenders (Detention and Supervision) Act 2009 (Vic). In so restricting the making of suppression orders, the Act should continue to have regard to the ramifications of disclosure, including the personal safety of individuals.

2.4.4 Victims

RECOMMENDATION 15: That adult victims of sexual assault or family violence or who as children have been so subjected should, on the conviction of the offender, be able to opt for disclosure of their identity. In situations where there is more than one victim, the court would be required to refuse an application where disclosure of the identity of a victim or perpetrator would result in that of a non-consenting victim or impose any conditions required in the circumstances to secure the anonymity of a non-consenting victim.

RECOMMENDATION 16: That section 534 of the Children, Youth and Families Act 2005 (Vic) be amended to enable adult victims who are also witnesses to disclose their own identities, provided that to do so does not breach any other of the requirements of the section.

RECOMMENDATION 17: That it becomes mandatory at initial bail hearings consequent upon the laying of charges in relation to alleged sexual or family violence criminal offences for an interim suppression order to be issued. This order would remain in effect for five working days. Alternatively, the Judicial Proceedings Reports Act should be amended to the same effect.

2.4.5 The Public Interest Monitor

RECOMMENDATION 18: Provided the Public Interest Monitor receives the additional funding and resources necessary to perform the following functions:

1. *The Monitor should be empowered, if requested by the judge to appear as contradictor, to make submissions and ask questions when the judge is determining whether orders should be made under the Open Courts Act, on what grounds and the framing of their scope.*
2. *Orders, once made, can be referred to the Monitor for consideration by interested parties to enable the independent consideration of the need, terms and duration of the order while maintaining the security of the underlying information. The Monitor's decision whether or not to pursue the review of an order is final.*
3. *If it is considered necessary in the public interest to intervene, the Monitor should be able to seek the review of the order by the judge or prosecute an appeal.*
4. *The Monitor would report annually to the Attorney General on the operation of the Open Courts Act.*

3 Terms of Reference

3.1 Amended Terms of Reference

16. The *Open Courts Act 2013* (Vic) commenced on 1 December 2013. The second reading speech stated that the Act 'reinforces the primacy of open justice and the free communication of information in relation to proceedings in Victorian courts and tribunals'.

17. The Act has now been in operation for over two years. Media reporting has been critical of the Act and argued that there has been little if any change in the use of suppression orders in Victoria.

18. The purpose of this review is to consider whether the Act is striking the right balance between the need for open and transparent justice, and the need to protect the legitimate interests of victims, witnesses and accused persons, and to preserve the proper administration of justice.

19. What, if any, changes should be made to the Act or the procedures supporting the Act in order for it to fulfil its aim, as stated in the second reading speech, of establishing:

> a clear, fair and effective regime that reinforces the importance of open justice and confines exceptions to those limited circumstances where exceptions are justified.

20. The review is asked to consider the following aspects of the Act:

    a. The notice requirements and their impact on the courts, and on the rights of other parties, including the media, to be heard;

    b. The grounds for a proceeding suppression order and whether they are adequate for the breadth of matters that come before the courts;

    c. The requirements that a suppression order must clearly specify the information to which the order applies;

    d. The requirement that a suppression order must operate for no longer than is reasonably necessary.

21. If the review concludes that the Act is not achieving its purpose, then the review is invited to make recommendations on what steps could or should be taken to improve the operation of the Act. If further training for courts and tribunals would be helpful, the review is asked to consider what type of training would be effective.

22. It has been suggested that there should be a contradictor in applications for suppression orders, who could make submissions on public interest grounds. The review is asked to consider this idea and comment on whether it would be helpful.

3.1.1 Other Acts

23. The Open Courts Act does not affect other laws that restrict or prohibit publication. Several provisions are listed in section 8(2) to emphasise that they continue to operate as originally intended. The review is asked to consider whether this remains the appropriate outcome.

24. The *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) ('SSODSA') makes it an offence to publish any evidence given in a proceeding under the Act, or the content of any report or other document put before the court. The review is asked to consider, in general terms, what is the appropriate level of suppression to afford these proceedings? What is the appropriate balance between the need to preserve the privacy of a person who may be subject to post-sentence supervision, and the right of the public to know the details of these proceedings? The review should note that the SSODSA is currently being reconsidered after the Harper review of the post-sentence supervision scheme for serious sex offenders.

25. The review is also asked to consider whether there should be overarching consistent principles that can be applied to all Acts that contain provisions that restrict or prohibit publication.

    a. Are there principles that could usefully be applied to any new request for such provisions?

    b. Should existing provisions be reviewed in light of these principles?

26. The review is asked to report within eight months of commencement.

3.2 Reasons for amendment of Terms of Reference

27. The original terms of reference of the Open Courts Act Review included a reference to consider one of the Victorian Law Reform Commission's ('VLRC') recommendations in its 2015 review of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic). The VLRC recommended that suppression orders should be more readily available for persons found not guilty by reason of mental impairment.

28. The terms of reference for the Open Courts Act Review have been amended to remove that reference at the request of Justice Vincent, as he was one of the Commissioners who worked on the 2015 VLRC review.

4 The Task

29. The adage ‘justice must not only be done but be seen to be done’ is attractive and easily accepted but deceptive. It conceals a number of complex principles, relationships and structures, by far the most problematic of which being the notion of justice itself. Not only must this age-old aspiration for fairness and vindication in our human interactions be viewed from wide and sometimes inconsistent perspectives according to the persons and interests affected, but its translation to enforceable standards and outcomes in specific situations is inevitably assessed against a background of continually changing social expectations and environments.

30. The respective priorities to be attributed to the multiplicity of competing considerations which our courts and tribunals must take into account in arriving at what would be generally viewed as ‘just outcomes’ are regularly contested as issues and problems arise in individual cases. They are often debated in the public arena as the system endeavours to achieve results that accord with the fundamental principles on which our society is based and are regarded as consistent with the community sense of what is appropriate in all of the circumstances.

31. There has long been recognition of the crucial importance of public disclosure of what is happening in our legal processes in this search for justice. Traditionally, it was based upon the view that exposure provided a form of accountability for the processes adopted and the decisions made by non-elected and, for practical purposes, non-removable members of the judiciary.[1] In more recent times, there has been an increasing emphasis across all areas of community activity for transparency in their operations and upon the representative responsibilities of our various institutions, including the courts.

32. Encapsulated in the notion of ‘open justice’, this transparency has been described as a constitutional hallmark of the exercise of judicial as distinct from executive or administrative power and identified as a 'defining' or 'essential' characteristic of courts under ch III of the Australian Constitution.[2] This distinction is by no means as clear as regularly asserted by the courts themselves: many areas of executive decision-making are subject to similar legislative directives and the exercise of principled discretion. Nevertheless, such statements serve to draw attention to the centrality of transparency in our system of justice in ensuring its independence and integrity.

33. In the area of criminal law, for a number of reasons and from the perspectives of the community and the individuals directly affected, those who have been charged with offences must be seen to have been subjected to a fair process according to law. For this reason, openness in judicial processes is regarded as a key element in protecting the right to a fair trial in human rights instruments, such as the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (‘Victorian Charter of Human Rights’) and international conventions.[3]

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1 See 6.2 at [82] below.
2 See 6.1 at [81] below.
3 Ibid.

34. From the perspective of the community, the manner in which issues are determined and the integrity and impartiality of the legal system reflect the extent to which a society can be seen to be committed to adherence to the rule of law.

35. It is, of course, fundamentally important that, if found guilty, perpetrators can be seen to be fully and publicly accountable for their conduct and that the rights of their victims and the values of the broader society are unequivocally vindicated. If acquitted, the outcome, which may be difficult to accept for many, must observably result from the proper application of principle in a process that can be seen to have possessed integrity.

36. These objectives can only be achieved if the fairness of the trial cannot be reasonably challenged, any verdict reached can be seen to be soundly based on reliable evidence and any sentence imposed can be accepted by a reasonable observer to be within the range of those which our society perceives as appropriate in all of the circumstances.

37. There must be sufficient information publicly available for the community to be able to see that, at minimum, a serious principled attempt has been made to achieve an appropriate balance of the often competing values, priorities and interests involved, even if the outcome in an individual case is not universally approved.

38. However, to disclose publicly all of the information or evidence gathered in the process can in some situations not only militate against the attainment of a proper outcome but may also constitute a separate source of injustice or additional damage to victims or other parties.

39. The risk of such harm may arise solely in the context of the particular case or compromise an ongoing investigation, or jeopardise the life of a witness or informant, for example. But there can be much broader implications. The recent Commonwealth Royal Commission into Institutional Responses to Child Sexual Abuse, Victorian Royal Commission into Family Violence, and the Victorian Parliamentary Inquiry into the Handling of Child Abuse by Religious and Other Organisations have provided many instances of the hesitation experienced by victims to come forward and disclose what has happened to them. One of the consequences of the adoption of measures designed to vindicate their rights must not be the subjection of victims or other parties to unnecessary additional harm, embarrassment or humiliation. There would seem to be little doubt that potential exposure to damaging outcomes of this kind continues to constitute a powerful disincentive to the reporting of criminal conduct for many in our community.

40. Civil disputes have been traditionally treated in the legal system as affecting only the persons or entities directly involved, with the society being involved to reduce the potential for disharmony by the provision of mechanisms for their peaceful resolution. However, in our increasingly complex interactions, there are now many situations in which breaches of civil obligations may have massive impacts across the community and where access to knowledge of what transpires in relation to them is clearly in the public interest. This can be easily seen in the area of corporate governance, for example, where the ramifications of misconduct may be experienced by the entire society. Similar kinds of issues to those that can arise in criminal proceedings may be present in relation to the broad dissemination of information gathered in such cases.

41. As it is, for practical purposes, impossible to identify, other than in general terms, the complete range of circumstances in which the potential for damage arising from the dissemination of information can occur, there needs to be sufficient flexibility

within the system to address this possibility. Over the years a variety of mechanisms have been developed to resolve the underlying dilemma. These include some statutory restrictions, the use by the courts of contempt powers and the making of court or tribunal orders that restrict the publication of some or all the detail of the matter under consideration (compendiously referred to as suppression orders). It is upon the employment of this last mechanism that the present Review has been focused.

42. It is important to bear in mind from the outset that the justification for the making of an order of this kind is the potential impact of the prohibited disclosure upon the achievement of a proper outcome in the particular case or the system of justice more generally. In other words, just as disclosure is normally required in order to advance the public interest, prohibition must be confined to circumstances where disclosure would be contrary to those interests.

43. The value and appropriateness of some of the orders has always been uncertain. Setting to one side the inherent difficulty in balancing the competing values and priorities involved, there is an ever-increasing challenge to the justifications proffered and the efficacy of the attempted quarantining of information and pre-trial comment in a period of mass communication.

44. Once charges have been laid against an alleged perpetrator, an additional dimension can be added to the possible problems created by the public dissemination of information or comment about the case. In one much publicised matter, which serves to illustrate a number of the issues that can arise, a Catholic priest, Michael Glennon, was charged with sex offences against children.[4] While he was on bail awaiting trial, a well-known Melbourne radio commentator, Derryn Hinch (now Senator Hinch of the Parliament of Australia), drew attention to his criminal history and asserted that he was a continuing threat to young people. The comments were made in three broadcasts which the judge, who subsequently heard the contempt charges laid against Mr Hinch in consequence, found 'would have influenced most listeners to conclude that [Glennon] was a despicable man, a dissembling priest, who corrupted young people after using his pseudo-clerical position to gain their trust' when the commentator had a very large audience.[5] The judge continued:

> A strong feeling of hostility towards [Glennon] must, in my opinion, have been created. Reference is made, as I said, to his prior conviction and gaoling, to his prior acquittals on similar charges, and to at least the possibility that many other offences had been committed but never seen the light of day.[6]

45. Mr Hinch maintained that he was concerned to protect children who were still at risk, not only by the predator, Glennon, but other members of religious orders whose activities were known and not prevented by church authorities.

46. The central question which the High Court of Australia ultimately had to address in that matter was whether, in spite of the notoriety of the accused that had developed, in part, as a consequence of the broadcasts and the subsequent imprisonment of the broadcaster himself on the very basis of the potential of his statements to

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4 The circumstances of this case are set out at length in *R v Glennon* (1992) 173 CLR 592 ('*Glennon*').

5 *Hinch v A-G (Vic)* (1987) 164 CLR 15, 77–80. The text of these broadcasts appears as an appendix to the judgment of Toohey J in this proceeding, in which the High Court dismissed an appeal by Hinch against his conviction for contempt of court.

6 Ibid.

compromise a fair trial, nevertheless one could be conducted on the specific charges made against Glennon.

47. What this translated to as a practical proposition was: Could a jury be relied upon to deal with the case in accordance with the law and the evidence and not on the basis of widely disseminated and highly prejudicial statements made prior to the trial? If the answer to that question was 'no', a very serious problem could be seen to arise for the entire system of trial by jury.

48. Commonly, when a problem of this kind arises, the hearing of the case is deferred, usually for a matter of months on the assumption that any possible prejudice generated by the disclosure or breach is likely to dissipate with the passage of a relatively short time. Whether or not this was ever likely to be the case, particularly in relation to notorious events or well-known individuals, was debatable. In our present time, where there is a continuing capacity for anyone interested to access internet records or reports and social media, it is more likely to represent wishful thinking than reality.[7]

49. The problem created by the almost uncontrollable dissemination of factual assertions or potentially prejudicial comment is becoming more acute as the avenues for such statements proliferate. It is unfortunate enough when the assertions are true but the community is now being deluged with material from unreliable sources.

50. The legitimacy of our current trial process as a fair and reliable fact-finding mechanism is dependent upon acceptance of the proposition that the tribunal of fact, whether judge or jury, will reach its decisions on the basis of the evidence admitted in the trial and not as the consequence of outside influences or pressures of this kind. If this could not be accepted in notorious or highly publicised cases, some could never be tried at all under our current system.

51. Similar problematic situations have arisen regularly over a very long time and the courts have struggled to deal with them. The issues were encountered in an acute form not long previously in relation to the trial of a group of men in New South Wales for the horrific rape and murder of a young woman named Anita Cobby[8] and, in Victoria, in the trial of the previously convicted, Peter Dupas.[9] Understandably, these cases attracted considerable public interest and the dissemination through the media of a great deal of potentially prejudicial information and expressions of public anger. Nevertheless, as in *Glennon*, the courts concluded that fair trials could be conducted.

52. These cases are highly significant in the present context. Confronted with the reality of very significant potential prejudice and its possible impact upon the fairness of the trial process, the courts have relied upon the integrity of the jurors empanelled to try the accused and their compliance with the instructions given to them by the trial judge.

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7 Jane Johnston, Patrick Keyzer, Geoffrey Holland, Mark Pearson, Sharon Rodrick and Anne Wallace, *Juries and Social Media* (Report, Victorian Department of Justice, 2013) <https://www.researchgate.net/profile/Anne_Wallace3/publication/275037791_Juries_and_Social_Media_A_report_prepared_for_the_Victorian_Department_of_Justice/links/5530bd970cf2f2a588ab2b35/Juries-and-Social-Media-A-report-prepared-for-the-Victorian-Department-of-Justice.pdf> 20 [4.19].

8 See *Murphy v The Queen* (1989) 167 CLR 94, in which unsuccessful applications for special leave to appeal were brought by three of the offenders involved. A ground of appeal common to all applications, which was rejected by the High Court, was the prejudice generated by pre-trial publicity of an exceptional nature.

9 *Dupas v The Queen* (2010) 241 CLR 237.

53. At the same time, suppression orders are regularly being made in far less troublesome circumstances to guard against the risk of a miscarriage of justice and, presumably, on the basis that the jury subsequently hearing the case could not be so trusted to set aside these external influences. Although the system of trial by jury has frequently been described as a 'bulwark of liberty',[10] it is clear that there has always been an underlying doubt in much judicial reasoning concerning the capacity of jurors to act dispassionately and solely on the evidence and the instructions of law given by the judges.[11]

54. Apart from the absurdity of the notion that jurors, or judges for that matter, could ever approach their tasks free of pre-existing knowledge, social perceptions or personal viewpoints and with blank minds on which only the admissible evidence and legal principles are imprinted, the entire system assumes that they do not. Juries are specifically instructed to rely upon their experience and understanding of human behaviour and the world in which they live in arriving at their determination of the facts.

55. In this context, it should also be noted that, for the most part, trials are conducted in the regional centre closest to the community most directly affected and with the understanding that at least some of those from whom the jury will be selected may have personal knowledge or perceptions derived from families or friends concerning the parties, witnesses or issues involved, including their prior criminal convictions or social propensities. In short, it is acknowledged that a country jury may well possess the very kind of information that, if the case was to be heard in a major city, could be the subject of a suppression order or otherwise excluded from the trial by order of the judge. Very rarely, however, is a change of venue ordered on this basis.

56. In other situations, the courts have had to accept the earlier disclosure of information concerning notorious individuals on trial or the widespread knowledge in the community of their antecedents including that they had been previously convicted of the commission of extremely serious crimes: again, the kind of information that would almost certainly have been regarded as requiring the making of a suppression order. The trial of the four men charged with the murder of two police members in Walsh Street, South Yarra, in 1988 provides an example of this. The prosecution case rested on the nature of the association and relationships that it was asserted existed between a number of individuals who engaged in armed robberies. It was claimed that the murder of the two police members was undertaken as an act of revenge and pursuant to prior agreement that, if one of their number was to die at police hands, they would kill two police.[12] Much evidence was, accordingly, of a kind that would almost certainly have been excluded in other circumstances as seriously prejudicial. However, it was clearly highly relevant and noteworthy that, despite its potential prejudicial impact, the jury was not satisfied beyond reasonable doubt on the evidence presented and the accused were acquitted.

57. Quarantining a jury from all outside influences and information has always been extremely difficult, but, in many cases, it is now virtually impossible due to ease of access through the internet and the rapidly expanding impact of social media.

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10 *Ford v Blurton* (1922) 38 TLR 801, 805 (Atkin LJ), quoting William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, Book 4, 1765–1769) 343–4.

11 See 13.5.1 below.

12 John Silvester, 'Lessons of History', *News, The Sydney Morning Herald* (online), 11 October 2008, <http://www.smh.com.au/national/lessons-of-history-20081010-4ydy.html>. See also *R v Peirce* (1992) 1 VR 273.

58. It is evident that there are serious questions to be answered with which the courts have been grappling for a long time with respect to both the justifications for and utility of suppression orders in the cases before them. The necessity for the careful evaluation of the particular circumstances before such an order is made at all and the importance of limiting any restriction on publication to the minimum seen to be required has been repeatedly emphasised.

59. However, there was, for some time in Victoria, a widely held perception that while the nature of the dilemmas presented was formally acknowledged, in practice, insufficient attention was often given by judges to ascertain whether an order of this kind was really required and, if so, what should be its scope or duration.

60. This concern prompted Parliamentary intervention through the passage of the *Open Courts Act 2013* (Vic). The objective sought to be achieved through this legislation was to establish a framework of principle and practice so that orders would be made only when and to the extent necessary.

61. The Act created presumptions and some limitations to which courts and tribunals are required to have regard when considering whether suppression orders should be made and an opportunity for media organisations or other relevant persons to contest or review them.

62. However, complaints concerning the operation of the system have continued. It has been contended that many of the orders made do not even comply with the formal provisions of the Act and that others are so broad in scope and duration that they unjustifiably prevent the dissemination of information that is of public importance.

63. Difficulties have been said to be encountered by those seeking to challenge or review orders and it has been claimed that, on many occasions, orders have been made with little, if any, opportunity, to present argument concerning their necessity, scope or duration.

64. Further sets of issues have arisen in the specific contexts of sex offenders, juvenile offenders who continue to engage in criminal conduct as adults and the ability of victims, in some circumstances to speak publicly about what has happened and its impact upon them.

65. In consequence, the present Review has been instituted, the Terms of Reference[13] of which have been directed to:

    a. the establishment of a proper basis in principle for the restriction of dissemination of information emerging or relied upon in proceedings in courts and tribunals generally, the entirety of which it would otherwise be expected in the public interest to be open to community scrutiny.

    b. identifying what, if any, problems can be seen to exist within the current provisions and operation of the Open Courts Act and the practices of courts and tribunals with respect to the making of orders suppressing such dissemination; and

    c. to make recommendations as to what, if any, changes are considered necessary to facilitate the achievement of an appropriate balance of the fundamentally important but sometimes competing values underpinning our system of justice in this area.

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13 See Chapter 3 above.

5 Methodology of Review

66. The broad objectives underpinning the provisions of the *Open Courts Act 2013* (Vic) and the orders for suppression of the dissemination of information made in our courts and tribunals under a range of powers seem to be, in their formal expression, relatively straightforward and consistent with the values inherent in the rule of law. However, reference has already been made to the conceptual and practical issues involved in their elaboration and implementation. These will be further addressed later in this report.[14]

67. The Review has been undertaken on the premise that the suppression of information in our legal processes should only be directed to ensuring that the objectives and values of the system itself are maintained and that any restrictions on dissemination of information concerning what is happening in our legal system are kept to the minimum seen to be required to achieve those objectives.

68. Although differently expressed, the Terms of Reference governing the Review raise the questions:

    a. Is there substance to complaints that have repeatedly been made since the enactment of the Open Courts Act that the objectives of the legislation have not been achieved and the central problems to which its provisions were directed still exist?

    b. Are the principles and practices adopted by our courts and tribunals in relation to applications for suppression orders both realistic and appropriate in a rapidly changing social and communications environment?

    c. Is there a need for any and, if so, what reform?

69. The starting point for that investigation was an examination of what was happening in practice. This required an analysis of any available data and files. However, much of the information necessary for an adequate evaluation to be made was, for one or another reason, not only sensitive but its disclosure had been restricted. Accordingly, the Chief Justice and the heads of each of the Victorian jurisdictions in which suppression orders are made was approached.[15] All of those approached were extremely cooperative and all agreed to provide to the Review, on a confidential basis, whatever data was available and to provide access to individual cases as requested.

70. The particular purposes for which this material was sought were to ascertain the extent to which:

    a. there has been formal compliance with the provisions of the Open Courts Act;

    b. judges have tended to approach applications for suppression orders in compliance with the spirit and objectives of the Act as identified by Parliament;

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14 See Chapter 13 below.

15 The Review consulted with, and obtained access to material from, the Supreme Court of Victoria, the County Court of Victoria, the Magistrates' Court of Victoria, the Children's Court of Victoria and the Victorian Civil and Administrative Tribunal ('VCAT'). The making of suppression orders by the Coroners Court of Victoria was not examined because at no stage of the Review was it suggested by any contributor nor was there any anecdotal evidence or court decision to indicate that problems had emerged in that jurisdiction.

c. there is substance to a number of the specific complaints being made;

d. any structural issues, trends or patterns can be identified.

71. The analysis also assisted in the consideration of broader questions concerning the general approach being adopted by the courts and the efficacy and consistency of application of the currently adopted principles in this area.

72. The Review obtained from each Victorian court and tribunal all suppression orders made under any source of power in the period commencing 1 December 2013, on which date the Open Courts Act was introduced, to 31 December 2016. A dataset of orders made in three complete calendar years (2014–2016) was then constructed,[16] forming the basis for the data analysis undertaken by the Review. The information from each order was entered into a spreadsheet and double-checked by another person. The results drawn from the spreadsheet data were also reviewed by an independent statistician from the Sentencing Advisory Council. This data analysis is set out in Chapter 11.

73. The Review also randomly selected approximately 10% of the orders made by each court in 2016 under the Open Courts Act and examined the transcripts or audio recordings of the applications for the orders.[17] The intent behind this random sampling process was to provide a type of spot check on how applications appeared to be dealt with in practice, rather than to construct and analyse a representative sample of the orders made by each court. The objective of the examination of these individual matters was not to 'second guess' the exercise of judicial discretion in the cases considered but to identify issues and any patterns or trends that may be seen to have emerged.

74. A consultation process was undertaken with a range of stakeholders, and a public invitation extended for the presentation of written submissions by any interested organisations and individuals.[18] A list of those who contributed to the Review in one or other of these ways is set out in Appendix 1. The themes emerging from the submissions to the Review are discussed in Chapter 10.

75. The issues to be considered in the Review related not only to the legislative structure and principles of law applicable to decisions to suppress dissemination of information but the culture and approaches that influence their application and, therefore, the practical outcomes. It was important to secure the uncensored views on these aspects of a range of contributors. Accordingly, the consultation process has been conducted on the basis of strict confidentiality. In the absence of securing each contributor's consent to publication, the individual experiences and perspectives discussed in this report are to be treated as confidential.

76. Whilst it was important to have regard to any anecdotal evidence or assertions concerning the operation of the system, care had to be taken to ensure that any conclusions or recommendations were properly evidenced based. The specific concerns expressed by contributors to the Review constituted a significant part of the framework for the Review and directed attention to possible areas of difficulty that were then further pursued.

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16 See 11.2.1 below.

17 This amounted to 12 of 120 orders made by the County Court, 6 of 56 orders made by the Supreme Court, 18 of 174 orders made by the Magistrates' Court and 9 of 92 orders made by VCAT.

18 The public call for written submissions was made through the Engage Victoria website: see <https://engage.vic.gov.au/open-courts-act-review>. Written submissions were accepted between 10 April 2017 and 10 May 2017.

77. Contact was made with other Australian jurisdictions in order to secure a satisfactory understanding of the processes adopted across the country.[19] Direct comparisons were not possible as there were substantial variations between them in the data collected, the source of power relied upon and some differences in the operating principles and cultures. Nevertheless, these discussions enabled some insight to be obtained into the manner in which applications for orders were handled in the various jurisdictions and emphasised the different cultures that have developed.

78. A literature search and a review of relevant legislation, court decisions and secondary sources was also conducted.[20] This was particularly, although not solely, directed to the identification of the principles involved in the determination of the circumstances in which orders should be made, the content of any such orders, their duration and rights of challenge or review. As there were almost no decisions of substance concerning the interpretation of the Open Courts Act, as opposed to cases applying its provisions, the case law was only discussed to the extent that it illustrated a broader issue with the Victorian approach to open justice or set out the common law background.

19 See Chapter 9 below.

20 See Chapters 5, 7 and 8 below.

6 Importance of Open Justice

6.1 Introduction

79. The fundamental aim of the common law, and our legal system more broadly, is to ensure that justice is done and that the values of the community are vindicated.[21] The proper administration of a system directed to these objectives must incorporate attention being given not only to ensuring as far as possible their achievement in an individual case but in upholding the efficacy and integrity of the system generally. Carrying out justice in the open is regarded as vital to the proper administration of justice.

80. The principle of open justice is reflected in the well-known adage that 'justice must not simply be done, but be seen to be done'.[22] It incorporates three main procedural measures that have been adopted to promote judicial transparency.[23] First, the conduct of a proceeding must be in 'open court'.[24] A court is 'open' when members of the public have a right to be admitted to, and observe, hearings.[25] Second, the evidence and information presented in hearings must be fully disclosed to those in attendance and judgments should be given in public.[26] Third, the law should not discourage the publication of fair and truthful reports of judicial proceedings, either in whole or part.[27]

81. The significance of the principle of open justice is widely recognised. It has been described as 'one of the most fundamental aspects of the system of justice in Australia.'[28] The importance of the principle is reflected by its status as a constitutional hallmark of judicial power, as opposed to executive or administrative power.[29] Court proceedings are, with limited exceptions, open to the public, unlike the decision-making processes of administrative officials, which are often conducted in secret. As such, open justice is described as a 'defining' or 'essential' characteristic of courts under ch III of the Constitution.[30] It is also regarded as a key

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21 *Scott v Scott* [1913] AC 417, 437; *R v Macfarlane; Ex parte O'Flanagan and O'Kelly* (1923) 32 CLR 518, 549.

22 See generally *R v Sussex Justices; Ex parte McCarthy* [1924] KB 256, 259 (Lord Hewart CJ); Chief Justice J J Spigelman, 'Seen to Be Done: The Principle of Open Justice' (Pt I) (2000) 74 *Australian Law Journal* 290, 292.

23 Jason Bosland and Ashleigh Bagnall, 'An Empirical Analysis of Suppression Orders in the Victorian Courts: 2008–12' (2013) 35 *Sydney Law Review* 670, 674.

24 *Scott v Scott* [1913] AC 417, 429; *Dickason v Dickason* (1913) 17 CLR 50, 51.

25 *Kenyon v Eastwood* (1888) 57 LJQB 455; *R v Governor of Lewes Prison; Ex parte Doyle* [1916-17] All ER Rep Ext 1218 at 1227; *R v Hamilton* (1930) 30 SR (NSW) 277, 277; *Dando v Anastassiou* [1951] VLR 235, 237; *R v Denbigh Justices; Ex parte Williams* [1974] 2 All ER 1052, 1056. Cf *Lang v Warner* (1975) 10 SASR 289.

26 *Daubney v Cooper* (1829) 109 ER 438; *Scott v Scott* [1913] AC 417, 438 (Lord Haldane LC).

27 *A-G v Leveller Magazine Ltd* [1979] AC 440, 450; *Hogan v Hinch* (2011) 243 CLR 506, 532 [22]; *Rogers v Nationwide News Pty Ltd* (2003) 216 CLR 327, 335 [15]; *Waterhouse v Broadcasting Station 2GB Pty Ltd* (1985) 1 NSWLR 58 at 62E–F; *Eisa Ltd v Brady* [2000] NSWSC 929, [16]–[17] (Santow J).

28 *John Fairfax Publications Pty Ltd v District Court of New South Wales* (2004) 61 NSWLR 344, [18] (Spigelman CJ).

29 *McPherson v McPherson* [1936] AC 177, 200 (Lord Blanesburgh); *Russell v Russell* (1976) 134 CLR 495, 520 (Gibbs J). See also Greg Taylor, *The Constitution of Victoria* (Federation Press, 2006) 452.

30 *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 295 ALR 638, 659 [67] (French CJ); *Wainohu v New South Wales* (2011) 243 CLR 181, 208 [44] (French CJ and Kiefel J); *Hogan v Hinch* (2011) 243 CLR 506, 530 [20] (French CJ).

aspect of the right to a fair trial in human rights instruments such as the Victorian Charter of Human Rights and Responsibilities[31] and international conventions.[32]

6.2 The broad rationale for open justice

82. The traditional rationale for the principle of open justice was accountability to the public. The judiciary is one of three arms of democratic government. Unlike the legislature and the executive, the members of the judiciary are not publicly elected or removed from office. In the absence of direct accountability to the public, legal theorists such as 19th century English philosopher Jeremy Bentham contended that publicity would serve as a check on the arbitrary exercise of power by judges, who could be expected to act in a competent, fair and impartial manner if their decisions were subject to public scrutiny and criticism.[33] He said: 'Publicity is the very soul of justice, it is the keenest spur to exertion, and the surest of all guards against probity. It keeps the judge himself, while trying, under trial.'[34]

83. By ensuring the integrity of judges, open justice was thought to produce public confidence in the processes and outcomes of judicial proceedings.[35] Public attendance at court proceedings was said to have an educative effect, encouraging public discussion of judicial matters so that the public 'becomes accustomed to take a deeper interest in their result.'[36] In *Wigmore on Evidence*, the leading American text on evidence law, it was said that by virtue of open justice '[n]ot only is respect for the law increased and intelligent acquaintance acquired with the methods of government, but a strong confidence in judicial remedies is secured which could never be inspired by a system of secrecy.'[37]

84. Historically, open justice also had an evidentiary justification: to ensure the giving of honest testimony and to impress on a witness the seriousness of the judicial process.[38] For example, in *Wigmore on Evidence*, open justice was said to act as a check on the dishonest witness 'first, by stimulating the instinctive responsibility to public opinion, symbolised in the audience, and ready to scorn a demonstrated liar; and next, by inducing the fear of exposure of subsequent falsities through

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31 *Charter of Human Rights and Responsibilities Act 2006* (Vic).

32 See, eg, Art 14(1) of the *International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953); Art 6, as amended by *Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 13 May 2004, CETS No 194 (entered into force 1 June 2010) ('*European Convention on Human Rights*').

33 Jeremy Bentham, 'Bentham's Draught for the Organisation of Judicial Establishments, Compared with that of the National Assembly, with a Commentary on the Same' in John Bowring (ed), *The Works of Jeremy Bentham* (William Tait, vol 4, 1843) 305, 317; *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47, 52 (Kirby P); Chief Justice Marilyn Warren, 'Open Justice in the Technological Age' (2014) 40(1) *Monash University Law Review* 45, 46.

34 Jeremy Bentham, *A Treatise on Judicial Evidence* (J W Paget, 1825) 67.

35 Ibid 67–9.

36 Ibid.

37 John Henry Wigmore, *Evidence in Trials at Common Law* (Little Brown, Chadbourn Revision, vol 6, 1976) 335 ('*Wigmore on Evidence*').

38 William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, vol 3, 1768) 373; Sir Matthew Hale, *The History of the Common Law of England* (University of Chicago Press, 6th ed, 1820) 343–4; Jeremy Bentham, 'Rationale of Judicial Evidence,' in John Bowring (ed), *The Works of Jeremy Bentham* (William Tait, vol 6, 1843) 355.

disclosure by informed persons who may chance to be present or to hear of the testimony from others present.'[39]

85. Modern English and Australian jurisprudence has long accepted that the conduct of the courts should be open to the public. There are two contemporary justifications for open justice. First, public access to the courts is seen as a basic democratic right and a feature of the rule of law.[40] Second, open justice enables the public and participants in the judicial process to have confidence in the law and ensures the integrity of judicial institutions.[41]

86. Open justice supports the integrity of the courts in individual cases in both a prospective and retrospective way. It acts as a safeguard against judges acting improperly by threatening to expose poor performance. When the decision-making of judges has been unsatisfactory, it exposes judges to public criticism and helps to indicate that the outcome of a particular case should be appealed to a higher court.

87. An equally important function of open justice is ensuring that the law reflects the balance of values of the community. These change with the passage of time and as new problems and challenges arise. By holding proceedings and publishing judgments in public, the community is able to assess the efficacy of the law. Open justice acts as a corrective exposing deficiencies in statutory provisions and legal processes that no longer meet the needs of the community or are consistent with community values.

88. A number of common law cases set out the rationale for open justice.[42] In *Scott v Scott* ('*Scott*'),[43] the leading modern case on open justice, the House of Lords agreed that, as a general rule, the conduct of the courts should be administered in public. Earl Loreburn noted that open justice was necessary because of 'a danger that a court may not be so jealous to do right when its proceedings are not subject to full public criticism'.[44]

89. Lord Atkinson acknowledged the difficulties presented by open justice but concluded that transparency was vital:

> The hearing of a case in public may be, and often is, no doubt, painful, humiliating, or deterrent both to parties and witnesses, and in many cases, especially those of a criminal nature, the details may be so indecent as to tend to injure public morals, but all this is tolerated and endured, because it is felt that in public trial is to found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect.[45]

90. *Scott* was followed by the High Court of Australia in *Dickason v Dickason*.[46] Barton ACJ said that there was 'no inherent power in a Court of justice to exclude

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39 Wigmore, *Wigmore on Evidence*, above n 37, 436 [1834]. See also *DPP (on behalf of Smith) v Theophanous* (2009) 27 VR 295, 304 [40].

40 *Commissioner of Police v Nationwide News* [2007] 70 NSWLR 643, [86].

41 See, eg, *Russell v Russell* (1976) 134 CLR 495, 520; *John Fairfax Publications Pty Ltd v District Court of NSW* (2004) 61 NSWLR 344, [99]; *Re Applications by Chief Commissioner of Police* (2004) 9 VR 275, 286 [25].

42 The historical and theoretical basis for open justice is comprehensively set out in the judgment of Kirby P in *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47, 50-60.

43 [1913] AC 417.

44 Ibid 449.

45 Ibid 463.

46 (1913) 17 CLR 50. This case involved similar circumstances to those in *Scott*.

the public, inasmuch as one of the normal attributes of a Court is publicity, that is, the admission of the public to attend the proceedings.'[47]

91. In *Russell v Russell*,[48] the leading Australian authority on open justice, the High Court said that sitting in the open was an essential aspect of the character of the courts. Gibbs J set out the rationale for the principle as follows:

> It is the ordinary rule of the Supreme Court, as of the other courts of the nation, that their proceedings shall be conducted 'publicly and in open view'. This rule has the virtue that the proceedings of every court are fully exposed to public and professional scrutiny and criticism, without which abuses may flourish undetected. Further, the public administration of justice tends to maintain confidence in the integrity and independence of the court. The fact that courts of law are held openly and not in secret is an essential aspect of their character. It distinguishes their activities from those of administrative officials, for 'publicity is the authentic hallmark of judicial as distinct from administrative procedure'. To require a court invariably to sit in closed court is to alter the nature of the court.[49]

92. In *Hogan v Hinch*,[50] French CJ explained the rationale for the principle, emphasising that open justice was not an end in itself:

> An essential characteristic of courts is that they sit in public. That principle is a means to an end, and not an end in itself. Its rationale is the benefit that flows from subjecting court proceedings to public and professional scrutiny. It is also critical to the maintenance of public confidence in the courts. Under the Constitution courts capable of exercising the judicial power of the Commonwealth must at all times be and appear to be independent and impartial tribunals. The open-court principle serves to maintain that standard.[51]

93. In *R v Davis*,[52] the Full Federal Court of Australia underlined the importance of unfettered media access in realising the aim of open justice:

> [T]he media habitually report pre-trial proceedings, including evidence given in committal proceedings. Whatever their motives in reporting, their opportunity to do so arises out of a principle that is fundamental to our society and method of government: except in extraordinary circumstances, the courts of the land are open to the public. This principle arises out of the belief that exposure to public scrutiny is the surest safeguard against any risk of the courts abusing their considerable powers. As few members of the public have the time, or even the inclination, to attend courts in person, in a practical sense this principle demands that the media be free to report what goes on in them.[53]

94. Victorian courts rely on the principles above in cases concerning open justice.[54] For example, in a summary of the principles applicable to orders which pseudonymise the names of persons in a proceeding, J Forrest J said in *ABC v D1*:[55] 'the principal

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47 Ibid 51 (Isaacs, Gavan Duffy, Powers and Rich JJ agreeing).

48 (1976) 134 CLR 495 ('*Russell*').

49 Ibid 520 (citations omitted).

50 (2011) 243 CLR 506. French CJ delivered a separate judgment from that of the majority of the High Court. The majority did not disagree with French CJ's statement of general principles.

51 Ibid [20] (citations omitted).

52 (1995) 57 FCR 512.

53 Ibid 514.

54 See, eg, *Re Applications by Chief Commissioner of Police (Vic) For Leave to Appeal* (2004) 9 VR 275, 286–7 [25]–[27]; *ABC v D1* [2007] VSC 480 [26]–[39]; *Anon 2 v XYZ* [2008] VSC 466 [10]–[17]; *DPP (on behalf of Smith) v Theophanous* (2009) 27 VR 295, 304–5 [38]–[42].

55 [2007] VSC 480.

rule is that judicial hearings should take place in open court: publicly and in open view, with no restriction on reporting. This is a fundamental precept underpinning the administration of justice.'[56]

6.3 Open justice and the criminal law

95. Open justice is especially emphasised in criminal proceedings.[57] There are four main reasons. First, that the proceedings were open to scrutiny conveys to the accused, the victim and the general public that the trial was conducted fairly and in accordance with the law.

96. Second, a crime is defined as a wrong not simply against a particular victim but against the community as a whole.[58] Understood in that sense, the public has an important interest in observing that criminal conduct is dealt with appropriately, whether the outcome of a criminal proceeding is a conviction or an acquittal. Observing the proper prosecution of a person in a judicial forum can act to restore peace within the community.[59]

97. Third, the hearing of a criminal trial in public and the provision of publicly available reasons for judgment enhances the community's understanding of the success or shortcomings of the judicial system. As the Sentencing Advisory Council ('SAC') noted in its June 2016 Sentencing Guidance in Victoria Report, reasons for sentences are a 'fundamental resource for community education about sentencing; and a prerequisite to informed community debate and discussion on sentencing issues.'[60] Sentencing remarks, the SAC commented, mark 'one of the few avenues for countering public misunderstanding and, sometimes, deliberate misinformation regarding a judge's decision in a particular case'.[61]

98. Research exploring public attitudes to sentencing shows that, when put in the position of a judge, and informed of the facts of a case and the background of the offender, members of the public are less likely to believe that sentences imposed by judges are too lenient.[62] A majority of people who have served as jurors, when given the details of particular cases and asked to set a sentence, impose sentences more lenient than the judge in each case and find the sentence in fact imposed by the judge to be appropriate.[63]

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56 Ibid [65].

57 *R v Tait* (1979) 24 ALR 473, 487; *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47, 58; *Re Applications by Chief Commissioner of Police (Vic) For Leave to Appeal* (2004) 9 VR 275, 287 [28].

58 LexisNexis, *Halsbury's Laws of Australia*, (at 28 September 2016) 130 Criminal Law, '(I)(1)(A) General Principles of Criminal Liability' [130-1].

59 John McKechnie, 'Directors of Public Prosecutions: Independent and Accountable' (1996) 15 *Australian Bar Review* 122, 129.

60 Sentencing Advisory Council, *Sentencing Guidance in Victoria* (Report, Sentencing Advisory Council, June 2016) 247 [10.10].

61 Ibid 248 [10.17].

62 Findings of the Australian Research Council Victorian Jury Sentencing Study, the published paper of which is forthcoming, are discussed at: Law Institute Journal, *Sentencing Study Backs Judges* (2016) <https://www.liv.asn.au/staying-informed/lij/lij/july-2016/sentencing-study-backs-judges>; Kate Warner, Julia Davis, Maggie Walter, Rebecca Bradfield and Rachel Vermey (2011) 'Public Judgement on Sentencing: Final Results of the Tasmanian Jury Study', *Trends & Issues in Crime and Criminal Justice*, No 407, Australian Institute of Criminology, viewed 25 November 2016, <http://www.aic.gov.au/documents/A/B/7/%7bAB703D46-E913-4384-B3DB-646DC27EF2D3%7dtandi407.pdf>.

63 Ibid.

99. Conversely, open justice serves to identify when sentences in particular cases or sentencing for particular kinds of offences has fallen out of line with community expectations. It exposes the need for intervention by an appellate court or the legislature. As the High Court said in *Markarian v The Queen*:[64]

> the role of open justice is … important. A judge's sentence and reasons are usually exposed to public scrutiny through publication or media reporting. Public responses to sentencing, although not entitled to influence any particular case, have a legitimate impact on the democratic legislative process. Judges are aware that, if they consistently impose sentences that are too lenient or too severe, they risk undermining public confidence in the administration of justice and invite legislative interference in the exercise of judicial discretion. For the sake of criminal justice generally, judges attempt to impose sentences that accord with legitimate community expectations.

100. Fourth, open justice helps regulate community behaviour. One of the purposes of sentencing an offender is general deterrence,[65] that is, to deter others tempted to commit an offence of that kind from doing so. General deterrence relies to a large degree on holding a trial and plea hearing in public and communicating broadly the fact of an offender's conviction and the sentence imposed.[66]

6.4 Open justice as a democratic ideal

101. The responsibility for preserving open justice is usually assumed to rest upon the courts. This is because judicial institutions have the power to make orders which limit transparency. An example of such an order is a suppression order or an order pseudonymising the identity of a witness or a police informer. However, because openness to the public is a fundamental feature of a democracy, open justice should be seen not merely as a legal principle, but as a broader democratic ideal. If open justice is understood in this way, then the responsibility for ensuring that it is achieved is shared among a broad range of societal institutions.

102. The legislature is responsible for enacting legislation that sets appropriate limits on statutory provisions which prohibit or restrict access to information and on courts' powers to make orders that qualify open justice. In Australia, each jurisdiction has statutory schemes or common law sources of power authorising the making of suppression orders in certain circumstances. Legislation specifically concerning suppression orders has been enacted in New South Wales, the Commonwealth and Victoria.[67]

103. Unfettered and accurate media reporting also plays an important part in facilitating open justice. In practice, few members of the public have the time, willingness or familiarity with legal concepts to attend courts and make sense of legal proceedings. Little of the evidence relied upon in litigation is made available to persons who attend public hearings. It has fallen upon media reporters to obtain evidence and legal submissions from the courts and explain legal proceedings in an

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64 (2005) 215 ALR 213, 236 [82].

65 *Sentencing Act 1991* (Vic) s 5(1)(b).

66 See also *Director of Consumer Affairs Victoria v Xu* [2015] VCAT 127 [289].

67 *Court Suppression and Non-Publications Orders Act 2010* (NSW); *Access to Justice (Federal Jurisdiction) Amendment Act 2012* (Cth); *Open Courts Act 2013* (Vic).

accessible manner to the public. As Malcolm CJ of the Supreme Court of Western Australia explained in *Re Bromfield; Ex parte WA Newspapers Ltd*:[68]

> The administration of justice is a matter of public interest. … The public nature of judicial proceedings is facilitated by the publication of fair and accurate reports of proceedings in our courts. … It is in the interests of the administration of justice and in the public interest that the public be fairly and accurately informed of what takes place in our courts.[69]

104. It follows from the need for accurate media reporting that the spreading of misinformation or partial information by the media undermines open justice. It can create misconceptions of the activities of the courts and promote unjustified public dissatisfaction with the functioning of the legal system.

105. Today, the rise of new digital technologies, and the decline of traditional media, has meant that methods of achieving transparency are changing.[70] The principle of open justice increasingly means promoting public access to court information through the internet and social media, with courts being expected to play a more active and direct role in community engagement. Ultimately, if open justice is a democratic ideal, it requires a broad effort to improve the accessibility of the law and simplify the workings of the courts.

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68 (1991) 6 WAR 153.

69 Ibid 164.

70 As Chief Justice Marilyn Warren noted in a recent lecture, the distribution and revenues of traditional print and television media, particularly newspapers, have been significantly affected by new media. She said: 'Newspapers in particular have a declining and ageing readership as younger viewers seek online content through Twitter and online news sites. In 2011, The Age had over 197,000 weekday newspaper subscriptions. Today The Age weekday newspaper circulation stands at just over 142,000. The Age Twitter account has over 150,000 followers. The weekday Herald Sun has circulation figures of just over 416,000 and the Herald Sun Twitter account has just over 62,000 followers. Reduced circulation figures have led to redundancies and restructures at newspaper outlets:' Chief Justice Marilyn Warren, 'Open Justice in the Technological Age', above n 33, 48.

7 Balancing Open Justice against Other Considerations

7.1 Introduction

106. The principle of open justice is not absolute. A court may depart from the ordinary requirements of open justice in one or more of a number of ways.[71] These include:

   a. Conducting 'closed court' proceedings, or hearings in camera;

   b. Ordering the concealment of particular evidence or information from those in court;

   c. Ordering the concealment of the identity of a person through a pseudonym;

   d. Ordering that reports of proceedings or certain information not be published.

107. The circumstances in which a court can depart from the principle of open justice in one of these ways are identified in both common law and statute. These exceptions are all situations where the courts or Parliament has determined that the dissemination of particular information must be restricted if the proper functioning of our system of justice is not to be compromised, or in cases where matters of national security are involved.

7.2 The rationale for exceptions to open justice at common law

108. It is clear at common law that deviation from open justice should only be contemplated when it is otherwise impossible to deal justly with a matter or there is some other overwhelming public interest consideration like national security. This is because, as Viscount Haldane LC explained in *Scott*,[72] upholding the integrity of the system of administration of justice is of fundamental importance:

> While the broad principle is that the Courts of this country must, as between parties, administer justice in public, this principle is subject to apparent exceptions, … themselves the outcome of a yet more fundamental principle that the chief object of Courts of justice must be to secure that justice is done.[73]

109. Similarly, in *Attorney-General v Leveller Magazine*,[74] Lord Diplock observed that the principle of openness should only be departed from where it is necessary:

> [S]ince the purpose of the general rule is to serve the ends of justice it may be necessary to depart from it where the nature or circumstances of the particular proceeding are such that the application of the general rule in its entirety would frustrate or render impracticable the administration of justice or would damage some other public interest for whose protection Parliament has made some statutory derogation from the rule. Apart from statutory exceptions, however, were a court in the exercise of its inherent power to control the conduct of

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71 Bosland and Bagnall, 'Empirical Analysis of Suppression Orders in the Victorian Courts: 2008–12', above n 23, 674.

72 [1913] AC 417.

73 Ibid 437–8.

74 [1979] AC 440.

> proceedings before it departs in any way from the general rule, the departure is justified to the extent and no more than the extent that the court reasonably believes it to be necessary in order to serve the ends of justice.[75]

110. The same point has been made by Australian courts. In *R v Macfarlane; Ex parte O'Flanagan and O'Kelly*,[76] Isaacs J reinforced the paramount need to do justice:

> The final and paramount consideration in all cases is that emphasised in *Scott v Scott*, namely, 'to do justice' (Viscount Haldane LC). All other considerations are means to that end. They are ancillary principles and rules. Some of them are so deeply embedded in our law as to be elementary and axiomatic, others closely approach that position. Of the latter class is publicity, which can only be disregarded where necessity compels departure, for otherwise justice would be denied to those whom Earl Loreburn termed 'the parties entitled to justice'.[77]

111. In *John Fairfax Group Ltd v Local Court of New South Wales*,[78] Kirby P observed that the 'common justification for these special exceptions is a reminder that the open administration of justice serves the interests of society and is not an absolute end in itself. If the very openness of court proceedings would destroy the attainment of justice in the particular case … the rule of openness must be modified to meet the exigencies of the particular case.'[79]

112. The requirement of necessity is a high threshold. In *John Fairfax Group Ltd v Local Court of New South Wales*,[80] Mahoney JA explained that the requirement of being 'necessary to secure the proper administration of justice'

> does not mean that if the relevant order is not made, the proceedings will not be able to continue. ... The basis of the implication is that if the kind of order proposed is not made, the result will be–or at least will be assumed to be–that particular consequences will flow, that those consequences are unacceptable, and that therefore the power to make orders which will prevent them is to be implied as necessary to the proper function of the court.[81]

113. The requirement of necessity can be contrasted with a test of expediency,[82] or convenience; the court can only be closed where 'justice cannot otherwise be administered in the case.'[83] The Full Court of the ACT Supreme Court explained in *Eastman v Director of Public Prosecutions [No 2]*[84] that:

> The only exception to the principle of open justice allowed at common law is where justice cannot be done if the court remains open. Unless a statute provides otherwise, a court may only limit the right of the public to be present or to make a fair report of the proceedings in public either by making non-publication or suppression orders or by closing the court, if, and only to the extent that, such an order is necessary in the interests of justice. Mere convenience, or concern for sensitivities of parties or witnesses, can never justify

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75 Ibid 450.
76 (1923) 32 CLR 518.
77 Ibid 549 (citations omitted).
78 (1991) 26 NSWLR 131.
79 Ibid 141. Kirby P dissented in the outcome of the case, but agreed with the majority of the NSW Court of Appeal on the general principles relating to open justice.
80 Ibid.
81 Ibid 161.
82 *John Fairfax & Sons Pty Ltd v Ryde Local Court* (2005) 62 NSWLR 512, 523.
83 Des Butler and Sharon Rodrick, *Australian Media Law* (Thomson Reuters, 4th ed, 2012) [5.60].
84 [2014] ACTSCFC 2.

> a departure from the rule that justice must be administered in public.[85]

114. In *John Fairfax & Sons Pty Ltd v Police Tribunal (NSW)*,[86] McHugh JA, after acknowledging the importance of the principle of open justice and of permitting the making of fair and accurate reports of proceedings, addressed the threshold that had to be met to make a non-publication order and the terms on which it should be made:

> Accordingly, an order of a court prohibiting the publication of evidence is only valid if it is really necessary to secure the proper administration of justice in proceedings before it. Moreover, an order prohibiting publication of evidence must be clear in its terms and do no more than is necessary to achieve the due administration of justice. The making of the order must also be reasonably necessary; and there must be some material before the court upon which it can reasonably reach the conclusion that it is necessary to make an order prohibiting publication. Mere belief that the order is necessary is insufficient.[87]

115. As noted above, the requirement of necessity will not be satisfied on the basis of expediency.[88] In addition, potential damage to the reputation or embarrassment of those involved in the proceeding is insufficient,[89] as is the potential for the disclosure of private, dangerous or damaging facts.[90] The law recognises that restricting access to a courtroom, or limiting publication about a proceeding, should only be considered in exceptional circumstances.

7.3 Main exceptions to open justice

116. The common law exceptions to the principle of open justice in Australia fall into a number of established categories, each showing that limiting public access to proceedings or information derived from proceedings is only contemplated in exceptional cases. This common law power is part of superior courts' inherent jurisdiction, and inferior courts' implied jurisdiction.[91] Chief Justice French in *Hogan v Hinch*[92] summarised the main circumstances in which courts have accepted that a deviation from the principle of open justice is justified:[93]

    a. In a proceeding involving a secret technical process where the public hearing could result in 'an entire destruction of the whole matter in dispute'.[94] Restrictions are justified along the same lines in proceedings involving injunctive relief against an anticipated breach of confidence;[95]

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85 Ibid [152], citing *Hogan v Australian Crime Commission* (2010) 240 CLR 651, 664 [30]–[31], 667 [42] (French CJ, Gummow, Hayne, Heydon and Kiefel JJ); *Rinehart v Welker* (2012) 83 NSWLR 347, 359 [53] (Bathurst CJ, Beazley and McColl JJA).

86 (1986) 5 NSWLR 465.

87 Ibid 477.

88 *John Fairfax & Sons Pty Ltd v Ryde Local Court* (2005) 62 NSWLR 512, 523.

89 *Scott* [1913] AC 417, 435; *Herald & Weekly Times Ltd v Medical Practitioners Board of Victoria* [1999] 1 VR 267, 294–5.

90 *John Fairfax Group Pty Ltd v Local Court (NSW)* (1991) 26 NSWLR 131, 142–3 (Kirby P).

91 Ibid 160; *Hogan v Hinch* (2011) 243 CLR 506, 531 [21].

92 *Hogan v Hinch* (2011) 243 CLR 506, 531 [21] (French CJ).

93 Ibid.

94 *Andrew v Raeburn* (1874) LR 9 Ch 522, 523. See also *Nagle-Gillman v Christopher* (1876) 4 Ch D 173, 174 (Jessel MR); *Mellor v Thompson* (1885) 31 Ch D 55; *Scott v Scott* [1913] AC 417, 436–7 (Viscount Haldane LC), 443 (Earl of Halsbury), 445 (Earl Loreburn), 450–1 (Lord Atkinson), 482–3 (Lord Shaw of Dunfermline).

95 *Hogan v Hinch* (2011) 243 CLR 506, 531 [21].

b. In some circumstances where the name of a police informant or identity of an undercover police office would be at risk of being revealed;[96]

c. In blackmailing cases, so that victims of blackmailers are not discouraged from coming forward;[97]

d. If there are 'exceptional and compelling considerations going to national security';[98]

e. Where it is necessary given the 'character of the proceedings and the nature of the function conferred upon the court', for example the jurisdiction of the court in relation to wards of the State and mentally ill people due to its 'parental and administrative' nature.[99]

117. The first category identified by French CJ recognises that, in cases involving trade secrets or confidential information, allowing the hearing to occur in public would be adverse to the subject matter of the proceeding. In *Australian Broadcasting Commission v Parish*,[100] Bowen CJ explained the rationale for this category as follows:

> [W]here the proceedings concern a secret process and publication of the process would destroy the subject-matter of the proceedings and render them nugatory, an order is necessary to prevent prejudice to the administration of justice. Where proceedings are brought to restrain publication of confidential material, similar considerations apply. Disclosure would prejudice the court's proper exercise of the function it was appointed to discharge, to do justice between the parties.[101]

118. It is not enough to claim that information is 'inherently confidential', it must also be shown that there will be some special prejudice to the administration of justice if the information is disclosed.[102] Examples of when this threshold will be met include situations where the information has value as an asset that would be compromised by disclosure, such as a trade secret or confidential information protected by equity.[103]

119. The second category identified by French CJ shows that holding proceedings *in camera* or restricting what can be published about a proceeding may be necessary to protect parties or witnesses in proceedings to ensure they will be willing to

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96 *Cain v Glass [No 2]* (1985) 3 NSWLR 230, 246 (McHugh JA); *John Fairfax & Sons Ltd v Police Tribunal (NSW)* (1986) 5 NSWLR 465, 472 (Mahoney JA), 480 (McHugh JA), 467 (Glass JA); *John Fairfax Group Pty Ltd v Local Court (NSW)* (1991) 26 NSWLR 131, 141 (Kirby P), 159 (Mahoney JA), 169 (Hope AJA); *Herald & Weekly Times Ltd v Medical Practitioners Board (Vic)* [1999] 1 VR 267, 293 [85]; *R v Lodhi* [2006] NSWCCA 101, [25]–[26] (McClellan CJ at Cl).

97 *R v Socialist Worker Printers and Publishers Ltd; Ex parte Attorney-General* [1975] QB 637, 644 (Lord Widgery CJ), 653 (Milmo and Ackner J) referred to with apparent approval in *A-G v Leveller Magazine Ltd* [1979] AC 440, 452 (Lord Diplock), 458 (Viscount Dilhorne), 471 (Lord Scarman). See also *John Fairfax Group Pty Ltd v Local Court (NSW)* (1991) 26 NSWLR 131, 141 (Kirby P).

98 *A v Hayden* (1984) 156 CLR 532; *John Fairfax Group Pty Ltd v Local Court (NSW)* (1991) 26 NSWLR 131, 141 (Kirby P); *R v Lodhi* [2006] NSWCCA 101, [26] (McClellan CJ at Cl); *R v Governor of Lewes Prison; Ex parte Doyle* [1917] 2 KB 254, 271–2 (Viscount Reading CJ); *Taylor v Attorney-General* [1975] 2 NZLR 675.

99 *Scott* [1913] AC 417, 437 (Viscount Haldane LC). See also J*ohn Fairfax Publications Pty Ltd v Attorney-General (NSW)* [2000] NSWCA 198, [165] (Meagher JA).

100 (1980) 40 FLR 311.

101 Ibid 132. See *Versace v Monte* [2001] FCA 1565 as an example of a case where secrecy was necessary to protect the subject matter of the dispute.

102 *Hogan v Australian Crime Commission* (2010) 240 CLR 651, 667 [43].

103 *Hogan v Hinch* (2011) 243 CLR 506, 532.

participate. The case of a police informant is the most obvious example. In *Cain v Glass [No 2]*,[104] McHugh JA articulated the rationale for this exception:

> [U]nless the anonymity of informers is protected 'the flow of intelligence about planned crime or its perpetrators' will stop: *D v National Society for the Prevention of Cruelty to Children* per Lord Simon of Glaisdale. Although the need to protect the safety of informers may have played a part in creating the principle, the existence of a threat to the informer is not a condition precedent to its operation.[105]

120. Similarly, the protection of victims of blackmail is justified on the basis that if the information were not protected, they would be unlikely to come forward as witnesses and allow for prosecution of the offence. In *R v Socialist Worker Printers and Publishers Ltd; Ex parte Attorney-General*,[106] Lord Widgery CJ explained:

> The reason why the courts in the past have so often used this device in this type of blackmail case where the complainant has something to hide, is because there is a keen public interest in getting blackmailers convicted and sentenced, and experience shows that grave difficulty may be suffered in getting complainants to come forward unless they are given this kind of protection.[107]

121. This exception could have broader application than just situations of blackmail. In *John Fairfax & Sons Pty Ltd v Police Tribunal (NSW)*[108] Mahoney JA explained that deviating from the principle of open justice may be necessary to 'secure that justice is done according to the law' in respect to those who come before the court. His Honour said:

> In so far as it may be necessary for this purpose, [the court] may make orders for the protection of those relevantly involved in proceedings before it. The protection of such persons has been recognised as something which, in a judicial system, must be undertaken.[109]

122. In *John Fairfax Group Ltd v Local Court of New South Wales*,[110] Mahoney JA further noted that 'the open conduct of the courts can cause great pain and loss to those touched by what is done and what is publicised', and that courts have an obligation to 'avoid such pain and loss to the extent that it is possible to do so.'[111] His Honour explained that:

> the principle that the courts are to be open and that the media may publish what is done in them is not an end in itself. The principle is adopted because it is judged to be the means by which other and more fundamental goods will be achieved. The power which the community gives to any person, whether he be in Parliament, an official in government, or a judge is to be exercised properly and accountably. And, it is believed, that will be achieved if the power is exercised, as in the present case, in open court and subject to full publicity.
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> But this is not an unalloyed panacea. Experience has shown that open courts and unrestricted media publicity produce bad as well as good consequences: the

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104 (1985) 3 NSWLR 230.
105 Ibid 247 (citations omitted).
106 [1975] QB 637.
107 Ibid 652.
108 (1986) 5 NSWLR 465.
109 Ibid 471.
110 (1991) 26 NSWLR 131.
111 Ibid 163.

> principle is adopted, not because it is an unalloyed panacea, but because it is the least worst method of securing the proper exercise of judicial power and accountability for it.[112]

123. As such, courts must find a 'proper accommodation of control of judicial power and accountability for it on the one hand, and the avoidance of personal and public harm on the other.' [113]

124. The national security exception is available where there are 'exceptional and compelling' considerations going to national security.[114] This is somewhat distinct from the other exceptions as it is not justified on the basis that the restriction is necessary for the administration of justice. Nevertheless, the public interest in having such an exception is clear. One example of its use is to protect information regarding intelligence and military organisations and operations. In *R v Lodhi*,[115] Whealy J remarked on the impact that disclosure could have on the operation of the Australian Security and Intelligence Organisation (ASIO):

> [I]t is fundamental to the effective operation of an organisation such as ASIO that its areas of interest; the identity of subjects of security interest; the degree of its ability to obtain intelligence in relation to those subjects; its sources, investigative techniques and work methods and the like, are all matters specific details of which must be kept in the strictest possible secrecy. Disclosure of matters of that kind in the public domain would adversely affect ASIO's ability to effectively perform its statutory functions. Without this advice, the Commonwealth would not be able to receive timely forewarning or threats to Australia's security and would be less able to take appropriate action to deal with such threats.[116]

125. The final category of exception identified by French CJ in *Hogan v Hinch* that permits deviation from the open courts principle is where justified by the 'character of the proceedings and the nature of the function' being exercised by a court.[117] As noted earlier, for example, in cases involving wards of the court and mentally ill people, the role of the court is 'parental and administrative'.[118] In such cases the primary function of the Court is to protect the interests of the ward or mentally ill person, which may necessitate excluding members of the public from the hearing.[119]

126. Limiting access to court hearings has also been viewed as necessary to manage public attendance and order in the court, where, for example, there is a crowd of people who might disrupt proceedings by preventing others from entering or by causing a disturbance in the courtroom.[120]

127. While the categories of exceptions to the principle of open justice are not closed, 'they will not lightly be extended.'[121] Courts have been willing to expand the categories in situations of close analogy to existing exceptions.[122]

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112 Ibid 164.
113 Ibid.
114 *A v Hayden* (1984) 156 CLR 532, 599.
115 (2006) 199 FLR 270.
116 Ibid [19].
117 *Hogan v Hinch* (2011) 243 CLR 506, 531 [21].
118 *Scott* [1913] AC 417.
119 Ibid.
120 *Ex Parte Tubman; Re Lucas* (1970) 92 WN (NSW) 520, 544.
121 *Hogan v Hinch* (2011) 243 CLR 506, 531 [21], citing *R v Kwok* [2005] NSWCCA 245, [12]–[14] (Hodgson JA), [29]–[31] (Howie J), [38]–[39] (Rothman J); *Commissioner of Police (NSW) v Nationwide*

128. This reticence to expand the available categories and the emphasis placed upon the maintenance of a strict approach to the notion of 'necessity' could be seen as even more important in light of modern communication technology. The dissemination of information is increasingly harder to control as more and more people have the capacity to publish material online, this information being capable of being rapidly shared across social networks. If it was determined that an order would have no effect because the information is already in the public sphere, to make it would arguably achieve no result other than to undermine the authority of the Court. The common law test, when properly applied, ensures that it is only when departure from the principle of open justice is clearly necessary that it will be contemplated.

129. The difficulties in integrating the principles and approaches adopted in these areas in part rest upon the essentially conservative character of the common law. Traditionally, the development of principle and practice to accommodate and adjust to changing circumstances has tended to be quite gradual due to a system of precedent. In earlier times, when the rate of change in society was relatively slow, this did not ordinarily present as significant a problem as it does currently when our society is experiencing rapid transition with as yet unknown outcomes. All elements of the legal system will need to respond to new challenges, among which are changes in the forms and environment of communication. As is discussed further below, there is little point in adhering to practices of the past when not only can they be seen to be rapidly reducing in their capacity to achieve the stated objective but which may rest on assumptions of dubious validity in the first place.

News Pty Ltd (2008) 70 NSWLR 643, 648 [32]–[38] (Mason P, Ipp JA agreeing), 658 [90]–[91] (Basten J); *P v D1 [No 3]* [2010] NSWSC 644, [11]–[20].

122 *R v Kwok* (2005) 64 NSWLR 335, 341.

8 Victorian Law

8.1 Open Courts Act 2013

8.1.1 Law prior to the Act

130. Prior to the *Open Courts Act 2013* (Vic), the power of Victorian courts to order the restriction of access to, or prevent the publication of, proceedings was found both under statute and at common law. The common law background has been set out in detail in the previous section. In addition, Victorian courts had the power under their respective Acts to depart from open justice in a wide range of circumstances. Sections 18 and 19 of the *Supreme Court Act 1986* (Vic)[123] provided that the Supreme Court could make an order 'prohibiting the publication of a report of the whole or any party of a proceeding or of any information derived from a proceeding' where such an order was necessary so as not to:

    a. Endanger national or international security;

    b. Prejudice the administration of justice;

    c. Endanger the physical safety of any person;

    d. Offend public decency or morality;

    e. Cause undue distress or embarrassment to a victim of certain sexual offences;

    f. Cause undue distress or embarrassment to a witness under examination in proceedings to a sexual offence.

131. Sections 80 and 80AA of the *County Court Act 1958* (Vic) and section 126(2)(c) of the *Magistrates' Court Act 1989* (Vic) conferred the same power in equivalent terms upon County Court judges and magistrates respectively,[124] with the exception that magistrates did not have the power to suppress information on the basis of public decency or morality.

132. Although these provisions permitted the making of suppression orders on a broader range of grounds than at common law, they required the order to be necessary to prevent publication. The test of whether an order ought to be made under one of the statutory grounds was therefore no more accommodating than the common law position in relation to the high threshold for the making of an order.[125]

133. In addition to the court-specific statutory powers to make suppression orders, various subject-specific legislation contained provisions that empowered courts and tribunals to make suppression orders and provisions that automatically restricted the use of certain information.

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123 *Supreme Court Act 1986* (Vic) ss 18 and 19 were repealed by *Open Courts Act 2013* (Vic) s 54.

124 *County Court Act 1958* (Vic) ss 80 and 80AA were repealed by *Open Courts Act 2013* (Vic) s 45 and s 126 of the *Magistrates' Court Act 1989* (Vic) was repealed by *Open Courts Act 2013* (Vic) s 51.

125 See Andrew Kenyan, 'Not Seeing Justice Done: Suppression Orders in Australian Law and Practice' (2006) 27 *Adelaide Law Review* 279, 289.

8.1.2 Background to the Act's passage

134. In 2008, the Standing Committee of Attorneys-General ('SCAG'), consisting of the Attorneys-General of the Commonwealth, States and Territories, set out to draft model legislation in relation to suppression orders. The working group established by SCAG intended to create a clearer legislative framework for suppression orders and the harmonising of law across Australian jurisdictions. The working group also attempted to address criticism of the volume and breadth of suppression orders made by some State courts.[126]

135. In 2010, the draft legislation produced by the working group was adopted by SCAG. It was passed in NSW as the *Court Suppression and Non-Publication Orders Act 2010* (NSW) and federally, with some variations, as the *Access to Justice (Federal Jurisdiction) Amendment Act 2012* (Cth). The model legislation was not implemented in Victoria.

136. In 2013, the Victorian Attorney-General introduced into Victorian Parliament the Open Courts Bill 2013, the provisions of which relied to some extent on those of the SCAG model legislation.

8.1.3 The legislative framework of the Open Courts Act

8.1.3.1The objectives of the Act

135. The structure of the Open Courts Act reflects two distinct policy objectives. The primary purpose of the Act was to impose greater rigour on the powers of VCAT and the Supreme, County, Magistrates' and Coroners Courts to make suppression orders and closed-court orders: section 1 states that the main purposes of the Act are to 'reform and consolidate' provisions relating to suppression orders and closed court orders[127] and 'make general provisions applicable to all suppression orders' under the Act or in the exercise of the Supreme Court's inherent jurisdiction.[128] This purpose is realised by the repeal of provisions establishing powers to make suppression and closed court orders under court- and tribunal-specific legislation and the replacement of those provisions with powers consolidated under the Act. In parallel with the aim of consolidating the powers of courts and tribunals under statute, section 5 abrogates all powers to make orders prohibiting or restricting publication of information under common law and in the exercise of any implied jurisdiction, without restricting the inherent jurisdiction of the Supreme Court.

136. The Open Courts Act preserves certain aspects of the pre-existing system. Section 6 states that the law relating to contempt remains unaffected; likewise section 7 provides that the Act does not interfere with admission of evidence and disclosure of information to a court, tribunal or party to a proceeding. Section 8 ensures that provisions under other legislation which prohibit or restrict disclosure of information or which relate to the closing of proceedings to the public, for example under the *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) or the *Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997* (Vic), are not limited by the Open Courts Act. More fundamentally, the duty of a court or tribunal to give reasons for judgment or decisions remains intact, subject to the need to edit

126 Commonwealth, *Parliamentary Debates*, House of Representatives, 23 November 2011, 13553–4 (Brendan O'Connor).
127 *Open Courts Act 2013* (Vic) s 1(a), (b) and (d).
128 *Open Courts Act 2013* (Vic) s 1(c).

those reasons to protect restricted information, pursuant to section 16. In respect of closed court orders, section 29 preserves the power or jurisdiction of a court or tribunal to regulate its proceedings apart from the requirements under the Act.

137. The second policy aim of the Open Courts Act was the reinforcement of 'the primacy of open justice and the free communication of information in relation to proceedings in Victorian courts and tribunals'.[129] This aim is given effect through two statutory mechanisms: the presumptions under sections 4 and 28 and the test of necessity in making a suppression order or closed court order. Section 4 creates a presumption in favour of disclosure of information, to which a court or tribunal must have regard in determining whether to make a suppression order. Section 28 creates a similar presumption in favour of hearing a proceeding in open court in any application for a closed court order. The test of necessity is considered further below, in the context of making a proceeding suppression order.[130]

8.1.3.2Suppression orders

8.1.3.2.1 What is a suppression order?

138. A suppression order is an order prohibiting or restricting the publication or other disclosure of certain information. At a general level, the Open Courts Act draws a distinction between two types of suppression orders: proceeding suppression orders and broad suppression orders. This division is based on the *source* of suppressed information: proceeding orders concern information derived from a proceeding, for example the name of the complainant or the charges laid against the accused, while broad suppression orders concern information derived from a source other than a proceeding, for example newspaper articles pre-dating a proceeding which reveal the image of an accused.

139. The division emerges from the structure of the Open Courts Act and the statutory definition of a suppression order. Proceeding suppression orders are dealt with under Part 3 of the Act (ss 17–23). A 'proceeding suppression order' is defined in section 3 as an order made under section 17. Part 4 of the Act (ss 24–27) sets out the provisions governing broad suppression orders. Section 24 reinforces the proceeding/broad division: it provides that a broad suppression order 'must not be made in respect of any information which could be the subject of a proceeding suppression order'.

140. Bearing this distinction in mind, a 'suppression order' is defined in section 3 as:

a. a proceeding suppression order;

b. an interim order;

c. an order made under section 25 or 26;

d. an order made by the Supreme Court in the exercise of its inherent jurisdiction that prohibits or restricts the publication or other disclosure of information in connection with any proceeding, whether or not the information was derived from the proceeding.

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129 Victoria, *Parliamentary Debates*, Legislative Assembly, 27 June 2013, 2417 (Robert Clark, Attorney-General).

130 See 8.1.3.2.2 below.

8.1.3.2.2 Proceeding suppression orders

141. The power of any court or tribunal to make a proceeding suppression order is set out under section 17. It states:

> A court or tribunal on one or more of the grounds specified in section 18 may make a proceeding suppression order to prohibit or restrict the disclosure by publication or otherwise of—
>
> (a) a report of the whole or any part of a proceeding;
>
> (b) any information derived from a proceeding.

142. Section 18 sets out a number of grounds for making a proceeding suppression order. Common to all grounds is the test of necessity; the relevant court or tribunal must be satisfied that a proceeding suppression order is necessary on the applicable ground.

143. There are five general grounds available to a court or tribunal, apart from the Coroners Court, to make a proceeding suppression order. Pursuant to section 18(1), a court or tribunal may make an order on one or more grounds if it is satisfied that the order is necessary to:

> (a) … prevent a real and substantial risk of prejudice to the proper administration of justice that cannot be prevented by other reasonably available means;
>
> (b) … prevent prejudice to the interests of the Commonwealth or a State or Territory in relation to national or international security;
>
> (c) … protect the safety of any person;
>
> (d) … avoid causing undue distress or embarrassment to a complainant or witness in any criminal proceeding involving a sexual offence or a family violence offence;
>
> (e) … avoid causing undue distress or embarrassment to a child who is a witness in any criminal proceeding;

144. There are two grounds available solely to VCAT, in addition to the five general grounds. Under section 18(1)(f), VCAT may make an order where necessary:

> (i) to avoid the publication of confidential information or information the subject of a certificate under section 53 or 54 of the *Victorian Civil and Administrative Tribunal Act 1998*;
>
> (ii) for any other reason in the interests of justice.

145. Under section 18(2), the Coroners Court may make a proceeding suppression order in the case of an investigation or inquest into a death or fire provided disclosure would (a) be likely to prejudice the fair trial of a person; or (b) be contrary to the public interest.

146. Section 19 sets out the process by which a proceeding suppression order is made and who may be heard in an application for an order. A court or tribunal may make a proceeding suppression order on its own motion or by application made by either a party to the proceeding or any other person considered to have a sufficient

interest in the making of the order. Section 19(2) lists a range of persons who may be heard on an application, including media organisations. An order may be made either during a proceeding or on its conclusion (section 19(4)) and can be made subject to any exceptions and conditions that the court or tribunal thinks fit (section 19(5)).

147. An order under Part 3 may have effect outside Victoria provided it is necessary for achieving the purpose for which the order is made: section 21(3).

148. Orders made under Part 3 are supported by an offence for their contravention pursuant to section 23. Section 23 provides:

> (1) A person must not engage in conduct that constitutes a contravention of a proceeding suppression order or an interim order that is in force if that person—
>
> (a) knows that the proceeding suppression order or interim order, as the case requires, is in force; or
>
> (b) is reckless as to whether a proceeding suppression order or an interim order, as the case requires, is in force.
>
> …
>
> (2) For the purposes of subsection (1), in the absence of evidence to the contrary, a person is taken to be aware that a proceeding suppression order or an interim order is in force if a court or tribunal has electronically transmitted notice of the order to the person.

8.1.3.2.3 Broad suppression orders

149. Only the County Court and the Magistrates' Court are authorised to make broad suppression orders by the Act. Under section 25, the County Court has the power to grant an injunction, solely in relation to criminal proceedings, in equivalent terms to the inherent jurisdiction of the Supreme Court.[131] Section 25 states:

> (1) The County Court has the same jurisdiction, and may exercise the same powers and authority, to grant an injunction in a criminal proceeding restraining a person from publishing any material or doing any other thing to ensure the fair and proper conduct of the proceeding as the Supreme Court has and may exercise in respect of a criminal proceeding in the Supreme Court.
>
> (2) The power of the County Court referred to in subsection (1) is exercisable by making an order, whether interlocutory or final, either unconditionally or on such terms and conditions as the Court thinks just.

150. The power committed in the County Court extends beyond the making of an order restraining publication; it enables 'doing any other thing' required to ensure the fair and proper conduct of a criminal proceeding. As the definition of 'publish' includes the 'provision of access' to information, pursuant to section 3, section 25 enables the County Court to make mandatory injunctions ordering the take down of published material (internet 'take down' orders).

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131 Section 25(1) is framed identically to the former *County Court Act 1958* (Vic) s 36A(3). The latter provision was repealed by *Open Courts Act 2013* (Vic) s 43.

151. Section 26 confers upon the Magistrates' Court the power to make a broad suppression order. It is expressed in different terms to the statutory power of the County Court. Section 26(1) permits the making of an order in both criminal and non-criminal proceedings, on two grounds.[132] The power is expressed as follows:

> (1) The Magistrates' Court may make an order prohibiting the publication of any specified material, or any material of a specified kind, relevant to a proceeding that is pending in the Court if in its opinion it is necessary to do so in order not to—
>
> (a) prejudice the administration of justice; or
>
> (b) endanger the safety of any person.

152. An order under section 26 may have effect outside Victoria provided it is necessary for achieving the purpose for which the order is made: sub-ss 26(3)–(4). The power under section 26 also allows the making of take down orders.

153. Orders made under Part 4 are supported by an offence for their contravention under section 27, which is framed in identical terms to section 23.

8.1.3.2.4 Interim or interlocutory orders

154. The Open Courts Act enables a court or tribunal to make provisional orders in advance of the substantive determination of an application for a suppression order. The mechanisms for making such an order are expressed differently in relation to proceeding orders and broad orders.

155. Part 3 of the Act, which concerns proceeding suppression orders, contains a power under section 20 to make an 'interim order' without determining the merits of the substantive application. Section 20(3) provides that an interim order has effect until the substantive application is determined or the order is revoked by a court or tribunal. Section 20(4) requires a court or tribunal which has made an interim order to determine the substantive application 'as a matter of urgency'.

156. Under Part 4, the County Court's power to make broad suppression orders pursuant to section 25 extends to making interlocutory orders unconditionally or on terms and conditions regarded as the Court to be just.[133] There is no reference in section 26 to the power of the Magistrates' Court to make an interlocutory or interim order.

8.1.3.2.5 Pseudonym orders

157. Pseudonym or anonymity orders are orders which conceal the identity of a person by giving that person a pseudonym or otherwise limiting the way the person is referred to in a proceeding. It is unclear whether pseudonym orders are to be regarded as suppression orders under the Open Courts Act. Given that section 7(d)(i) of the Act preserves the power of a court or tribunal to make an order

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132 This power is more confined than the repealed power in s 126(2)(d) of the *Magistrates' Court Act 1989* (Vic).

133 *Open Courts Act 2013* (Vic) s 25(2).

concealing the identity of persons by restricting the way the person is referred to in open court, it is likely that pseudonym orders fall outside the scheme of the Act.[134]

8.1.3.2.6 General provisions

8.1.3.2.6.1 Notice of application and notification to the media

158. Where an application for a suppression order is made, the applicant must give three days' notice to the court or tribunal in question and the parties to the proceeding, pursuant to section 10(1). There are two possible exceptions to the requirement to give notice, set out under section 10(3):

    (a) there was a good reason for the notice not being given or not being given within the required time period; or

    (b) it is in the interests of justice that the court or tribunal hear the application without notice being given.

159. The requirement to give notice does not apply to a proceeding suppression order made by a court or tribunal on its own motion: section 10(4).

160. Under section 11(1), courts and VCAT bear the responsibility of taking all reasonable steps to notify media organisations of an application for a suppression order once notice is received under section 10(1).

8.1.3.2.6.2 Duration

161. Pursuant to section 12, suppression orders must operate for a specified duration, no longer than reasonably necessary to achieve the purpose for which the order is made.[135] Under sub-sections (2) and (3), the duration of the order may be specified in one of three ways:

    (a) for a fixed or ascertainable period;

    (b) until a future event which will occur; or

    (c) until a future event which may not occur, in which case the order must also specify a period not exceeding 5 years at the end of which the order expires.

162. The provision includes an example of the last category of order: an order expressed to be in effect until further order of the court or tribunal and which also specifies a period of up to five years.

8.1.3.2.6.3 Scope and purpose

163. Section 13 imposes two general requirements on suppression orders: adequate specification and limitation of subject matter and purpose.

164. Section 13(1) states that a suppression order 'must specify the information to which the order applies with sufficient particularity to ensure that':

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[134] Further reasons for regarding suppression and pseudonym orders as different are advanced in *ABC-1 and ABC-2 v Ring and Ring* [2014] VSC 5, [15] and *Hunter v Australian Football League* [2015] VSC 112, [2]–[6].

[135] Section 12 does not apply to interim orders. The duration of interim orders is provided under s 20(5).

(a) the order is limited to achieving the purpose for which the order is made; and

(b) the order does not apply to any more information than is necessary to achieve the purpose for which the order is made; and

(c) it is readily apparent from the terms of the order what information is subject to the order.

165. Section 13(2) provides that a suppression order:

(a) must specify the purpose of the order; and

(b) in the case of a proceeding suppression order or an order under section 26(1), must specify the applicable ground or grounds on which it is made.

166. It would appear, from the distinction drawn between 'purpose' and 'ground', that the specification of an order's purpose and the ground on which it was made are separate requirements.

8.1.3.2.6.4Basis for making an order

167. In making a suppression order other than an interim order, a court or tribunal must rely on 'evidence or sufficient credible information' that the grounds for the order are established, pursuant to section 14. There is no explicit requirement to give reasons for making an order; the Act goes no further than the statement in section 16 that it does not interfere with the duty to give reasons.

168. Section 15 enables suppression orders to be reviewed, either on the court's own motion or by application. The list of persons who can make an application for review under section 15(1)(b) is substantially similar to those who can make an application for the making of a proceeding suppression order under section 19. The underlying requirement is that the relevant person must have a sufficient interest in the order.

8.1.3.3Closed court orders

169. Section 30(1) establishes the power of a court or tribunal to order the closure of a proceeding, either for the whole or part of a proceeding, or order that only specified persons or classes of persons be present for the whole or part of a proceeding.[136]

170. The grounds available under section 30(2) for making a closed court order are nearly identical to those for making a proceeding suppression order. The requirement of necessity for making an order also applies to closed court orders.

171. When a closed court order is made, notice of the order must be posted on the door of the court or tribunal, pursuant to section 31. It is an offence to contravene a closed court order: section 32.

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[136] Section 30 replaces court- and tribunal-specific provisions repealed by the Open Courts Act. These provisions are the *Supreme Court Act 1986* (Vic) s 18(1)(a)-(b), *County Court Act 1958* (Vic) s 80(1)(a)-(b), *Magistrates' Court Act 1989* (Vic) s 126(2)(a)-(b), *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 101(2), and *Coroners Act 2008* (Vic) s 55(2)(d).

8.2 Serious Sex Offenders (Detention and Supervision) Act 2009

172. Part 13 of the *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) ('SSODSA') sets up a scheme restricting publication of certain evidentiary information and the identity and whereabouts of offenders.

173. The default position is that certain evidentiary information used in proceedings under the Act is protected from publication, subject to authorisation by the court. Section 182(1) makes it an offence for a person to publish, or cause to be published, the following kinds of information:

> (a) any evidence given in a proceeding before a court under this Act; or
>
> (b) the content of any report or other document put before the court in the proceeding; or
>
> (c) any information that is submitted to the court that might enable a person (other than the offender) who has attended or given evidence in the proceeding to be identified; or
>
> (d) any information that might enable a victim of a relevant offence committed by the offender to be identified.

174. Sections 182(2)–(3) set out limitations on the publication of the identity and location of an offender within the context of section 182. Sub-section (2) provides that a police officer may publish the identity and location of an offender:

> (a) to the Australian Crime Commission (by whatever name described) established by the *Australian Crime Commission Act 2002* of the Commonwealth, for entry on the Australian National Child Offender Register; and
>
> (b) in the course of law enforcement functions; and
>
> (c) in the execution of a warrant referred to in section 172 or the arrest or apprehension of an offender under section 171 or 172.

175. Sub-section (3) of the same provision states that, despite section 182(1), a media organisation may publish the identity and location of an offender if publication is:

> (a) at the request of a police officer that disclosed that information; and
>
> (b) for the purposes of subsection (2)(b) or (2)(c).

176. Section 183 permits publication of information falling within the categories in section 182(1) if the court, being satisfied that exceptional circumstances exist, makes an order authorising that publication.

177. Section 184 generally permits the identification of an offender unless the court orders otherwise, contravention of which order is an offence under section 186. Section 184 states:

> (1) In any proceedings before a court under this Act, the court, if satisfied that it is in the public interest to do so, may order that any information that might enable

an offender or his or her whereabouts to be identified must not be published except in the manner and to the extent (if any) specified in the order.

(2) An order under this section may be made on the application of the offender or on the court's own initiative.

178. In ordering publication under section 183 or non-publication under section 184, a court must have regard to the considerations under section 185:

(a) whether the publication would endanger the safety of any person;

(b) the interests of any victims of the offender;

(c) the protection of children, families and the community;

(d) the offender's compliance with any order made under this Act;

(e) the location of the residential address of the offender.

8.3 Children, Youth and Families Act 2005

179. Section 534 of the *Children, Youth and Families Act 2005* (Vic) places restrictions on the publication of proceedings relating to juvenile offenders. Subject to the permission of the President of the Children's Court or an applicable magistrate, section 534(1) of the Act provides that a person must not publish or cause to be published:

a. a report of a proceeding in the Court or arising out of the Court that contains any particulars likely to lead to the identification of:

i. the particular venue of the Court;

ii. a child or other party to the proceeding, or

iii. a witness in the proceeding;

b. a picture of a child or other party to, or a witness in, a proceeding in the Court referred to in (a), or

c. any matter that contains any particulars likely to lead to the identification of a child as being the subject of an order made by the Court.

180. The President has a broad power to approve the publication of accounts of proceedings of the Children's Court under section 534(5).

9 Open Justice in Other Jurisdictions

9.1 Introduction

181. The regulation of the exceptions to open justice is broadly similar across Australia and in Canada and the United Kingdom. All jurisdictions set a high standard to be met for a court to order the restriction of public access to proceedings or to information about proceedings. However, some jurisdictions have a more comprehensive statutory scheme that governs the procedure for making such orders, including specifying the considerations that must be taken into account. In Australia, as noted in the previous section, New South Wales and the Commonwealth have a similar statutory scheme. The South Australian regime is notable for its notice and reporting requirements. In Canada and the United Kingdom, the making of such orders is comprehensively regulated by the relevant court rules, and is significantly influenced by human rights law. The other jurisdictions rely on the common law, with some powers granted by statute in similar terms to the law in Victoria prior to the *Open Courts Act 2013* (Vic). While the terms of these statutory provisions do differ between jurisdictions, they effectively apply the common law position set out in detail above.

182. In addition to the more general powers to limit open justice, each jurisdiction has a number of subject matter-specific statutory exceptions. These include protections for victims and witnesses of sexual assault, limits on access to information about child perpetrators and victims, and limits to public access in terrorism cases. A table comparing the subject matter-related statutory exceptions across jurisdictions is set out in Appendix 2.

183. With the exception of South Australia, there is no publicly available information that tracks the number of suppression, non-publication and closed-court orders in the jurisdictions considered by this report.

9.2 New South Wales

9.2.1 General overview

184. The making of suppression and non-publication orders in New South Wales is regulated by the *Court Suppression and Non-Publication Orders Act 2010* (NSW) ('CSNO Act (NSW)'). A 'suppression order' is defined as an order that prohibits or restricts the disclosure of information, and a 'non-publication order' is defined as an order that prohibits or restrict the publication of information, but does not otherwise restrict the disclosure of information.[137] The power to make such orders is available to the Supreme Court, Land and Environment Court, District Court, Local Court and Children's Court.[138] Orders may be made at any time during the proceeding, or after it has been concluded,[139] and can be subject to 'such exceptions and conditions as the court thinks fit.'[140] Importantly, the order must 'specify the information to which

137 *Court Suppression and Non-Publication Orders Act 2010* (NSW) s 3.
138 Ibid.
139 Ibid s 9(3).
140 Ibid s 9(4).

the order applies with sufficient particularity to ensure that the order is limited to achieving the purpose for which the order is made.'[141] It is an offence to contravene a suppression or non-publication order,[142] and this conduct may also be punished as a contempt of court.[143]

185. The CSNO Act (NSW) is more confined in the possible ambit of an order's subject matter than that allowed by the Open Courts Act. It provides that a court may make an order that prohibits or restricts the publication of two forms of information. The first form of information is that 'tending to reveal the identity' of a party or witness in a proceeding, or a person related to a party or witness in the proceeding.[144] The second form is 'information that comprises evidence, or information about evidence, given in proceedings.'[145] Although the NSW Act does not explicitly establish the distinction between broad and proceeding suppression orders that is made in the Open Courts Act, a similar division has been read into section 7 of the CSNO Act (NSW).[146]

9.2.1.1Grounds for making an order

186. The CSNO Act (NSW) provides that a suppression or non-publication order can be made 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.[147]

187. The order must specify the ground or grounds on which it is made,[148] any exceptions or conditions to which it is subject,[149] the information to which it applies,[150] its duration,[151] and the places where it applies.[152] The requirement for

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141 Ibid s 9(5).
142 Ibid s 16.
143 Ibid s 16(2), (3).
144 Ibid s 7(a).
145 Ibid s 7(b).
146 *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* (2012) 83 NSWLR 52, 62. The Court distinguished between orders that constrained 'publication of material disclosed in court proceedings' and orders that addressed the 'publication of material having no connection with court proceedings except its capacity to affect current or future proceedings.'
147 *Court Suppression and Non-Publication Orders Act 2010* (NSW) s 8(1).
148 Ibid s 8(2).
149 Ibid s 9(4).
150 Ibid s 9(5).
151 Ibid s 12(1).
152 Ibid s 11(1).

necessity in each of the grounds is in line with the test applied for the exercise of inherent jurisdiction to make non-publication orders, and emphasises that such an order should only be made in exceptional circumstances.[153]

9.2.1.2Procedure

188. A court may make an order on its own initiative or on the application of a party to the proceeding, or any other person 'considered by the court to have sufficient interest in the making of the order.'[154] This section establishes that along with the applicant and other parties in the proceeding, the Government, a news media organisation, and any other person who has 'sufficient interest in the question' are entitled to appear on an application for an order.[155] However, there is no requirement to give notice to news organisations of the existence of a suppression order. These persons are also entitled to apply to the original court for a review of the order,[156] or to apply for leave to appeal the decision to make the order, or a decision not to review an order.[157]

9.2.1.3Geographical scope and duration

189. Orders made under the Act only apply to the publication of the relevant information in the place specified in the order.[158] However, this is not limited to applying in NSW, and can be made to apply anywhere in Australia if the court is satisfied that to do so would be necessary for achieving the purpose for which the order was made.[159] The order operates for the period decided by the court and specified in the order, but the court must ensure that this is also for no longer than is reasonably necessary to achieve the purpose for which the order was made.[160]

9.2.2 Interim orders

190. A court may make an interim suppression order, without determining the merits of an application, to protect the relevant information until the application is determined or the order is revoked by the court.[161] If a court makes an interim order, it is required to determine the substantive application 'as a matter of urgency.'[162]

9.2.3 Preservation of inherent jurisdiction

191. The CSNO Act (NSW) preserves the pre-existing common law rules relating to the suppression of information, provided that the inherent jurisdiction and powers of courts are not affected by the Act.[163] The limits of this inherent power are not prescribed, but it is directed to preserving the court's ability to properly administer justice.[164]

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153 *Rinehart v Welker* (2011) 93 NSWLR 311, [27]–[28].
154 *Court Suppression and Non-Publication Orders Act 2010* (NSW) s 9(1).
155 Ibid s 9(2).
156 Ibid s 13.
157 Ibid s 14.
158 Ibid s 11(1).
159 Ibid s 11(2), (3).
160 Ibid s 12(2).
161 Ibid s 10(1).
162 Ibid s 10(2).
163 Ibid s 4.
164 *BUSB v The Queen* (2011) 80 NSWLR 170, [28] (Spigelman CJ).

9.2.4 Other statutory provisions relating to suppression of information

192. There are other provisions which empower NSW courts to make non-publication or suppression orders, or otherwise prohibit the publication of information.[165] These are listed in Appendix 2.

9.2.5 Number of orders made

193. The total number of non-publication orders and suppression orders made by the Supreme Court of NSW has not been made available for the purposes of this review.[166] However, the number of non-publication orders issued to media has risen over the past few years from 44 in 2014, to 66 in 2015 to 114 in 2016. These figures include variations and revocations of existing orders.

194. As of 5 May 2017 there were 165 current non-publication and suppression orders in relation to NSW Supreme Court proceedings.[167] The Supreme Court keeps a central database of its orders that was set up in August 2016, but this is not used by other courts.[168]

9.3 Queensland

9.3.1 General overview

195. Queensland courts retain a common law power to restrict access to court proceedings[169] or to limit the information that may be published where necessary in the interests of the administration of justice.[170] In *R v McGrath*,[171] the Queensland Court of Appeal described closing the court as an 'exceptional procedure'.[172] The types of cases where it would be merited include where 'the interests of privacy or delicacy render it desirable', if the evidence would be likely to identify police informers, if it is necessary to protect a victim of blackmail, or if it is necessary in the public interest for national security reasons.[173]

196. In Queensland, the main sources of restriction of public access to proceedings and information about proceedings are subject-specific statutes. Courts have statutory powers to protect the address of victims of indictable offences involving personal violence,[174] the identity of offenders who undertake to cooperate with law

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165 These are unaffected by the *Court Suppression and Non-Publication Orders Act 2010* (NSW): s 5.

166 The figures provided are not exhaustive as they only cover the non-publication orders that the Media Manager at the Supreme Court of NSW has been made aware of and that have been circulated to media organisations. The actual number of non-publication orders would be higher: Supreme Court of NSW, Email, *Open Courts Act Review*, 18 August 2017.

167 Supreme Court of NSW, Consultation, *Open Courts Act Review*, 5 May 2017.

168 Ibid.

169 This power is also provided by the *Supreme Court of Queensland Act 1991* (Qld) s 8(2).

170 *Hogan v Hinch* (2011) 243 CLR 506, 534 [26] (French CJ); *R v McGrath* [2002] 1 Qd R 520, [8]; *Ex parte Queensland Law Society Inc* [1984] 1 Qd R 166, 170.

171 [2002] 1 Qd R 520.

172 Ibid [9].

173 Ibid.

174 *Criminal Code 1899* (Qld) s 695A.

enforcement agencies,[175] and the identity of certain kinds of witnesses, including by closing the court while such witnesses are giving evidence.[176]

197. The Supreme Court of Queensland maintains a database of all non-publication orders made by the court.[177]

9.3.2 Statutory restrictions

198. There are a number of statutory restrictions on the publication of certain kinds of information. These are dealt with in Appendix 2.

9.3.3 Number of orders made

199. The number of suppression and non-publication orders made in Queensland appears to be negligible.[178] As an indication of the frequency with which orders are made, there were five orders made from August 2016 to March 2017 that required notifying the media.[179]

200. In consultation, Justice Byrne of the Queensland Supreme Court said the main reason for the low rate of non-publication orders is because the statutory restrictions that apply to Queensland proceedings cover many of the bases on which orders are commonly made in other jurisdictions, such as the protection of witnesses and victims in sexual offence proceedings.[180] In addition, there is a high level of media awareness of applicable statutory prohibitions.[181]

201. Justice Byrne also said that the low number of non-publication orders was due to a general culture of openness in Queensland, reflected in other contexts such as the public accessibility of court files in criminal matters.[182]

9.4 Western Australia

9.4.1 General overview

202. Western Australian courts have an inherent power to supress information when necessary for the proper administration of justice.[183] This power extends to suppressing information in respect of the proceeding in which the suppression order is sought, or in respect of other proceedings that might be affected by the publication of the proceedings in which the order is sought.[184] Orders can also be made on an interim basis.[185] As in other jurisdictions, determining whether to make

175 *Penalties and Sentencing Act 1992* (Qld), s 13A.
176 *Evidence Act 1977* (Qld), s 21A.
177 Supreme Court of Queensland, Consultation, *Open Courts Act Review*, 17 March 2017.
178 Des Butler and Sharon Rodrick, *Australian Media Law* (Thomson Reuters, 4th ed, 2012) [5.380].
179 Supreme Court of Queensland, Consultation, *Open Courts Act Review*, 17 March 2017.
180 Ibid.
181 Ibid.
182 Ibid.
183 *A v Maughan* (2016) 50 WAR 263, [145]; *AW v Rayney* [2012] WASCA 117, [32]; *Rayney v Western Australia [No 8]* [2017] WASC 66, [19].
184 *A v Maughan* (2016) 50 WAR 263, [145].
185 Ibid.

an order involves balancing the benefit of supressing the information against the public interest underlying the principle of open justice and freedom of the press.[186]

203. All Western Australian courts have the statutory power in criminal proceedings to prohibit or restrict the publication of the proceedings, or to prohibit or restrict publication of any matter that might identify a victim of an offence, if the court is satisfied it is in the interests of justice to do so.[187] Such an order can be made on application by a party to the case, or on the court's own motion,[188] and can be made at any time after an accused is charged with an offence.[189] A similar power exists in relation to civil proceedings in the Magistrates Court.[190]

204. The practice in Western Australia is that orders are generally made to expire after a fixed period or be subject to review.[191] The media has standing to contest the making of an order, and to challenge an order in the Court of Appeal.[192] In consultation, Chief Justice Martin said that the orders made generally fall into two broad categories. The first kind are identification orders protecting victims, witnesses and undercover operatives which usually persist until some further order. The second kind are orders for a fixed term where there are separate trials of co-accused and judgments in relation to one or more of the co-accused require suppression until the conclusion of the trial of another person due to the prejudicial effect they may have.[193]

205. A central register of orders is maintained by the Sheriff. Associates send any non-publication or suppression orders that are made in proceedings to the Sheriff. The Media Liaison Officer of the Supreme Court has access to the register in order to provide the media with any relevant information.[194]

9.4.2 Other statutory provisions

206. There are a number of statutory provisions that restrict the publication of certain forms of information and the people that may attend the hearing. These are listed in detail in Appendix 2. Chief Justice Martin said, in the course of consultation, that Western Australian courts rely heavily on these statutory prohibitions to control information about, and access to, proceedings.[195]

9.4.3 Number of orders made

207. In consultation, the Supreme Court of Western Australia provided the Review with the number of orders made by the Supreme Court, the Magistrates Court, District Court, State Administrative Tribunal and the Children's' Court.

186 *Rayney v Western Australia [No 8]* [2017] WASC 66, [19].
187 *Criminal Procedure Act 2004* (WA) s 171(4).
188 Ibid s 171(3).
189 Ibid s 171(5).
190 *Magistrates Court (Civil Proceedings) Act 2004* (WA) s 45.
191 Supreme Court of Western Australia, Consultation, *Open Courts Act Review*, 3 May 2017.
192 Ibid.
193 Ibid.
194 Ibid.
195 Ibid.

Year	Number of orders made
2016	275
2015	206
2014	169
2013	205

208. Chief Justice Martin said that the increase in orders from 2015 to 2016 was largely due to a single case in which orders related to one witness and were of limited duration.[196]

9.5 South Australia

9.5.1 General overview

209. In South Australia, suppression orders are governed by Part 8 of the *Evidence Act 1929* (SA). The power to make suppression orders and closed court orders is available to 'any person acting judicially'.[197] A suppression order is defined as an order prohibiting the publication of specified evidence, or a report of specified evidence, or an order forbidding the publication of the name or other material 'tending to identify' a party, witness, or person 'alluded to in the course of proceedings'.[198] An order can be made subject to any exceptions and conditions as the court thinks fit.[199] It is unclear whether this part of the *Evidence Act 1929* (SA) replaces the inherent powers of the court.[200]

210. Section 69A of the Act sets out a series of requirements for making a suppression order. The court must be satisfied that the order should be made 'to prevent prejudice to the proper administration of justice' or to 'prevent undue hardship' to the alleged victim of the crime, a witness who is not a party to the proceeding, or to a child.[201]

211. The *Evidence Act 1929* (SA) provides that when considering whether to make an order the court:

196 Ibid.
197 *Evidence Act 1929* (SA) s 68.
198 Ibid.
199 Ibid s 69(4).
200 *A-G v Kernahan & Hunter* (1981) 28 SASR 313, 314 (King CJ) suggested that it is a code that abrogates any pre-existing inherent power, whereas in *Legal Practitioners Conduct Board v Viscariello [No 2]* [2013] SASFC 47, [15] the Full Court said that it 'complemented' the inherent jurisdiction of the Court.
201 *Evidence Act 1929* (SA) s 69A(1). The reference to a child was included in the Act to protect children who are not victims or witnesses, but may be harmed by the publication of their identity: Des Butler and Sharon Rodrick, *Australian Media Law* (Thomson Reuters, 4th ed, 2012) [5.470].

a) must recognise that a primary objective in the administration of justice is to safeguard the public interest in open justice and the consequential right of the news media to publish information relating to court proceedings; and

b) may only make a suppression order if satisfied that special circumstances exist giving rise to a sufficiently serious threat of prejudice to the proper administration of justice, or undue hardship, to justify the making of the order in the particular case.[202]

212. The *Evidence Act 1929* (SA) provides that, along with the parties to the proceeding, a representative of 'a newspaper or a radio or television station' or any other person who has 'a proper interest in the question', may make submissions and, with the permission of the court, call or give evidence.[203] They may also be heard on a review of a suppression order, and are entitled to bring an appeal.[204] A court can vary or revoke a suppression order.[205]

213. In relation to notice requirements, if a court makes a suppression order, it must send to the Registrar 'as soon as reasonably practicable' a copy of the order[206] to allow the Registrar to maintain a register of all suppression orders and 'immediately transmit' the terms of the order to each authorised news media representative.[207] The register must be freely available for inspection by the public.[208] The court must also forward to the Attorney-General a report setting out 'the terms of the order, the name of any person whose name is suppressed from publication, a transcript or other record of any evidence suppressed from publication', and finally 'full particulars of the reasons for which the order was made.'[209]

214. South Australia has a more rigorous mechanism for review of orders than Victoria. The *Evidence Act 1929* (SA) provides that suppression orders must be reviewed at different stages of a proceeding.[210] For criminal proceedings, an order must be reviewed on the completion or termination of a preliminary examination, on the withdrawal of a charge, the acquittal of the defendant, after an appeal has been determined or all rights have been exhausted, or if proceedings are otherwise concluded.[211]

9.5.2 Interim orders

215. A court may make an interim suppression order, effective until its revocation or the application is determined.[212] However, if an interim suppression order is made, the court must determine the application 'as a matter of urgency' and 'wherever practicable, within 72 hours of making the interim suppression order.'[213]

202 *Evidence Act 1929* (SA) s 69A(2).
203 Ibid s 69(5).
204 Ibid ss 69AB and 69AC.
205 Ibid s 69(6).
206 Ibid s 69(8)(a).
207 Ibid s 69(10).
208 Ibid s 69(11).
209 Ibid s 69(8)(b).
210 Ibid s 69AB(1).
211 Ibid s 69AB(1)(a).
212 Ibid s 69(3).
213 Ibid.

9.5.3 Other statutory provisions

216. There are a number of statutory provisions that restrict the information that may be published about proceedings, or empower the court to make orders limiting the publication of information. These are listed in Appendix 2.

9.5.4 Number of orders made

217. The Attorney-General of South Australia is required to provide an annual report on the number of suppression orders made by the courts, and a summary of reasons that were given for the making of those orders.[214] The table below sets out the total number of suppression orders made by South Australian courts between 2010–11 and 2016–17.

Year	Supreme Court	District Court	Magistrates Court	Youth Court	Total
2016-7	49	39	103	3	194
2015-6	51	32	116	1	200
2013-4	27	45	66	n/a	138
2012-3	22	48	84	1	155
2011-2	31	54	73	3	161
2010-11	31	76	69	n/a	176

9.6 Tasmania

9.6.1 General overview

218. Section 194J(1) of the *Evidence Act 2001* (Tas) provides that if a court is of the opinion that the publication of any evidence or argument in a case 'may prejudice, or is likely to prejudice, the fair trial of the case', the court may prohibit its publication. In *Tasmania v G and T*,[215] the Supreme Court of Tasmania held that this provision only applies to the publication of evidence or argument in the trial of a case before the court, not more broadly to information about *other* proceedings.

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214 Ibid s 71. These reports are available on the database of Tabled Papers and Petitions on the House of Assembly of South Australia website at <http://www.parliament.sa.gov.au/HouseofAssembly/BusinessoftheAssembly/RecordsandPapers/TabledPapersandPetitions/Pages/TabledPapersandPetitions.aspx>.

215 [2014] TASSC 71, [6].

219. The court also retains the inherent power to restrict the publication of proceedings conducted in open court when necessary for the 'administration of justice',[216] in line with the High Court decision in *Hogan v Hinch*.[217]

9.6.2 Other statutory provisions

220. As in other jurisdictions, there are a number of statutory provisions that restrict the publication of certain kinds of information, or allow judges to exclude people from proceedings. These are covered in detail in Appendix 2.

9.6.3 Number of orders made

221. There are very few suppression orders made by Tasmanian courts. As at September 2017, the online register maintained by the Supreme Court of Tasmania lists four made since September 2014, only two of which are still operative.[218]

9.7 Northern Territory

9.7.1 General overview

222. All courts in the Northern Territory have the statutory power to make orders:

    a. Directing persons to leave the court while evidence is being given;[219]

    b. Prohibiting the publication of evidence either absolutely or subject to conditions;[220]

    c. Prohibiting the publication of the name of any party or witness.[221]

223. A court may make an order if it is satisfied that the publication of evidence is 'likely to offend against public decency'[222] or it is 'desirable' to prohibit the publication of a name of a witness 'for the furtherance of, or otherwise in the interests of, the administration of justice.'[223] Courts can also make an order temporarily prohibiting the publication of evidence from a proceeding if to do so is in the interests of the administration of justice.[224]

224. The NT Court of Appeal addressed the operation of this section in *Australian Broadcasting Corporation v L*[225]. The Court held that the power to make an order prohibiting the publication of a name is not limited to protecting the interest of the administration of justice only in respect to the proceedings before the relevant court, but extends to the administration of justice in any proceeding.[226] The threshold for

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216 Ibid [7].
217 (2011) 243 CLR 506 (French CJ).
218 Supreme Court of Tasmania, *Suppression Orders* (24 July 2017) <http://www.supremecourt.tas.gov.au/for_the_media/suppression_orders>.
219 *Evidence Act* (NT) s 57(1)(b)(i).
220 Ibid s 57(1)(b)(ii).
221 Ibid s 57(1)(b)(iii).
222 Ibid s 57(1)(a).
223 Ibid s 57(1)(b).
224 Ibid s 58.
225 (2005) 16 NTLR 186.
226 Ibid [3], [23].

making such an order is lower than in other jurisdictions: in obiter Riley J said that while the principle of open justice remains a 'significant matter to be considered', the 'fundamental principle is the requirement that the accused receive a fair trial'.[227] As such, once a court is satisfied there is a 'realistic possibility' of a risk to the fair trial of the accused, the court should suppress relevant material.[228]

225. The Supreme Court retains an inherent jurisdiction to make suppression orders.[229] However, the test applied is stricter, with the Court having to be satisfied that the order is 'reasonably necessary to secure the proper administration of justice'.[230]

226. In a written submission to the Review, the Supreme Court of the Northern Territory said that suppression orders are most commonly made in relation to:

    a. The identity of informants;

    b. Material which might identify police surveillance and information gathering techniques;

    c. Children subject to criminal proceedings; and

    d. Information which might tend to prejudice the fair trial of an accused.[231]

227. This is consistent with the experience in other jurisdictions. The submission also said that, while most suppression orders were not opposed, sometimes in high-profile criminal trials media organisations tended to intervene and act as contradictor.

9.7.2 Other statutory provisions

228. There are also some statutory restrictions on publishing certain kinds of information, set out in Appendix 2.

9.7.3 Number of orders made

229. No statistics about the number of orders made have been made available.

9.8 Australian Capital Territory

9.8.1 General overview

230. ACT courts have the power to prohibit the publication of evidence or a report of evidence where publication would be likely to prejudice the administration of justice.[232] Courts may also prohibit the publication of the name of any person involved in the proceeding if it is in the interests of the administration of justice.[233] Such orders may be subject to whatever conditions the court sees fit,[234] and tend

227 Ibid [32].
228 Ibid [32].
229 Ibid [72].
230 Ibid [73] (Southwell J).
231 Supreme Court of Northern Territory, Written Submission, *Open Courts Act Review*, 22 August 2017.
232 *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 111(1)(a), (2).
233 Ibid s 111(1)(b), (2).
234 Ibid s 111(3).

not to be made for a fixed duration.[235] The Supreme Court also retains its inherent power to make suppression and non-publication orders where necessary for the administration of justice.[236]

9.8.2 Other statutory provisions

231. There are a number of statutory provisions that restrict the publication of certain kinds of information regarding proceedings. These are covered in detail in Appendix 2.

9.8.3 Number of orders made

232. The Supreme Court of ACT was unable to provide precise figures as to the number of orders made, reflecting the primary reliance on statutory prohibitions rather than orders to restrict access to information in that jurisdiction.

9.9 The Commonwealth

9.9.1 General overview

233. The High Court, Federal Court and Federal Circuit Court have the power to make suppression and non-publication orders under their governing Acts.[237] The Commonwealth statutory scheme is the same as that adopted by New South Wales with four main exceptions:[238]

    a. Commonwealth courts can suppress a wider range of information than courts in New South Wales, including information obtained by discovery, produced under subpoena, or filed in court.[239]

    b. The Commonwealth Acts do not allow suppression orders to be made on the ground that 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.'[240]

    c. They do not allow for review of a suppression order by the same court that made the order.

    d. The contravention of the order is an offence, but no *mens rea* is specified.[241]

234. As in New South Wales, each of the relevant Commonwealth Acts provides that the inherent powers of the Federal courts are not affected by the Acts.[242] This enables

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235 Supreme Court of Australian Capital Territory, Consultation, *Open Courts Act Review*, 15 June 2017.
236 *Eastman v Direct of Public Prosecution [No 2]* (2014) 9 ACTLR 178 [151]–[154].
237 *Judiciary Act 1903* (Cth) Pt XAA; *Federal Court of Australia Act 1976* (Cth) Pt VAA; *Federal Circuit Court of Australia Act 1999* (Cth) Pt 6A.
238 Des Butler and Sharon Rodrick, *Australian Media Law* (Thomson Reuters, 4th ed, 2012) [5.400].
239 *Judiciary Act 1903* (Cth) s 77RE(1)(b); *Federal Court of Australia Act 1976* (Cth) s 37AB; *Federal Circuit Court of Australia Act 1999* (Cth) s 88F(1)(b).
240 See *Court Suppression and Non-Publication Orders Act 2010* (NSW) s 8(1)(e).
241 Des Butler and Sharon Rodrick, *Australian Media Law* (Thomson Reuters, 4th ed, 2012) [5.400].
242 *Judiciary Act 1903* (Cth) s 77RB; *Federal Court of Australia Act 1976* (Cth) s 37AF(1)(b); *Federal Circuit Court of Australia Act 1999* (Cth) s 88B.

courts to use their inherent power to make suppression or non-publication orders where necessary for the administration of justice.

9.9.2 Other statutory provisions

235. There are a number of statutory provisions that provide for the restriction of publication of certain forms of information, or for the court to be closed in some situations. In addition to the categories of exceptions set out in Appendix 2, under the *Crimes Act 1914* (Cth), courts can exclude members of the public and make orders about the non-publication of evidence in certain proceedings, such as those involving official secrets, when such a course is 'expedient in the interest of the defence of the Commonwealth.'[243] Similarly, the *Criminal Code* (Cth) provides for the exclusion of the public or prohibition of the publication of evidence if it is in 'the interest of the security of the Commonwealth.'[244]

9.10 Overseas jurisdictions

9.10.1 United Kingdom

9.10.1.1 General overview

236. UK courts have a statutory power under the *Contempt of Court Act 1981* (UK) to restrain the publication of proceedings where 'it appears to be necessary for avoiding a substantial risk of prejudice to the administration of justice in those proceedings, or in any other proceedings pending or imminent' and may make an order to postpone publication for as long as the court considers necessary.[245] It is unclear whether the courts have any inherent powers outside the *Contempt of Court Act 1981* (UK) as the Act has been found to fully encompass the previous common law rights.[246] Nevertheless, the *Criminal Procedure Rules 2015* (UK) provide that the court has an inherent power to withhold certain information from the public in 'exceptional circumstances.'[247]

237. There are several other statutory provisions that provide for restrictions on reporting in particular situations. A comprehensive list of these provisions can be found in Part 6 of the *Criminal Procedure Rules 2015*, and is listed below in in Appendix 2. The *Criminal Practice Directions 2015* (UK)[248] sets out certain general principles for the court to apply when considering whether to exercise their statutory discretion to postpone publication. It provides that, amongst other things:

    a. The court 'must keep in mind the fact that every order is a departure from the general principle that proceedings shall be open and freely reported.'[249]

    b. 'Before making any order the court must be satisfied that the purpose of the proposed order cannot be achieved by some lesser measure e.g. the grant

243 *Crimes Act 1914* (Cth) s 85B.
244 *Criminal Code* (Cth) s 93.2.
245 *Contempt of Court Act 1981* (UK) s 4.
246 *Re Belfast Telegraph Newspapers Ltd's Application* [1997] NI 309, 315.
247 *Criminal Procedure Rules 2015* (UK) r 6.1.
248 [2015] EWCA Crim 1567.
249 *Criminal Practice Directions* [2015] EWCA Crim 1567, 6B.4(b).

of special measures, screens or the clearing of the public gallery (usually subject to a representative/s of the media remaining).'[250]

c. The order must be proportionate given the interference with the freedom of expression, as found in article 10 of the European Convention on Human Rights.[251]

d. No order should be made without giving any interested party, including the media, an opportunity to make representations.[252]

e. The wording of the order should be 'in precise terms'[253] and state the power under which it is made, its precise scope and purpose, and the time at which it shall cease to have effect, if appropriate.[254]

f. It must specify whether or not the making or terms of the order may be reported, or whether this in itself is prohibited.[255]

238. It should be noted that the European Convention on Human Rights has been incorporated into domestic UK law, and thus applies to the courts of the UK. It alters the way the courts treat the balance between the rights of the accused to a fair and public trial, the right of freedom of expression, and the necessity in some circumstances to protect certain kinds of information.

9.10.2 Canada

9.10.2.1 General overview

239. Canadian courts have a common law power to order a ban on the publication of information, but the test applied is quite strict. The Supreme Court of Canada held in *R v Mentuck*[256] that bans should only be ordered when:

> (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.[257]

240. The Court made some additional comments that illustrate the test applied has a similar effect to the Australian common law test. The decision emphasised the concept of 'necessity', and explaining that the 'risk in question must be a serious risk' that is 'well-grounded in the evidence.'[258] Furthermore, the order must be necessary for the 'proper administration of justice', a concept that gives the court a

250 Ibid 6B.4(c).
251 Ibid 6B.4(d).
252 Ibid 6B.4(e).
253 Ibid 6B.4(g).
254 Ibid 6B.4(h).
255 Ibid 6B.4(i).
256 [2001] 3 SCR 442.
257 Ibid [32].
258 Ibid [34].

degree of discretion about determining when a ban will be necessary.[259] Third, the court should consider whether any reasonable alternatives are available that would prevent the risk.[260]

241. The Canadian *Criminal Code*[261] also has a number of provisions that allow courts to ban publication to protect the identity of witnesses and complainants in certain circumstances:

a. A court must make an order restricting publication of any information that could identify a victim or witness in certain sexual offences on application by the victim, prosecutor or any other witness.[262]

b. In any other proceeding, if the victim is under 18 years old, courts must make the order on the application of the victim or the prosecution.[263]

242. A court may also make an order restricting publication of information that could identify the victim or witnesses if the judge is of the opinion that the order 'is in the interest of the proper administration of justice.'[264] The Code sets out a number of factors that must be considered when determining whether to make an order:

(a) the right to a fair and public hearing;

(b) whether there is a real and substantial risk that the victim, witness or justice system participant would suffer harm if their identity were disclosed;

(c) whether the victim, witness or justice system participant needs the order for their security or to protect them from intimidation or retaliation;

(d) society's interest in encouraging the reporting of offences and the participation of victims, witnesses and justice system participants in the criminal justice process;

(e) whether effective alternatives are available to protect the identity of the victim, witness or justice system participant;

(f) the salutary and deleterious effects of the proposed order;

(g) the impact of the proposed order on the freedom of expression of those affected by it; and

(h) any other factor that the judge or justice considers relevant.[265]

9.11 Statutory exceptions

243. Each jurisdiction considered in this chapter has a variety of subject matter-specific statutory exceptions to open justice that co-exist with the general powers to restrict

259 Ibid [35].
260 Ibid [36].
261 *Criminal Code*, RSC 1985, c C-46.
262 Ibid s 486.4(1), (2).
263 Ibid s 486.4(2,2).
264 Ibid s 486.5(1).
265 Ibid s 486.5(7).

access to proceedings or publication of proceedings under statute or common law. These are set out in detail in Appendix 2.

10 Submissions to the Review

244. In developing its recommendations, the Review took note of concerns raised by stakeholders, whether in consultations or in written submissions. The submissions canvassed a number of issues in relation to open justice, identified practical problems with the operation of the Open Courts Act and related Acts, and proposed a range of solutions. The main themes that emerged in this process are outlined below.

10.1 Continuing relevance of the principle of open justice

245. The centrality of the principle of open justice to Australia's system of justice was repeatedly affirmed by stakeholders.[266] In a joint submission made by 14 media organisations ('Joint Media Organisation submission'),[267] open justice was described as 'a fundamental and abiding principle of the Australian legal system'.[268] The Herald and Weekly Times observed that the victim, if open justice was not observed, was ultimately the Victorian public. Liberty Victoria cautioned that, while the principle of open justice was fundamental to the proper administration of justice, it was also important to acknowledge the limits of that principle: the need to make exceptions to open justice in certain cases, for example in cases involving persons with mental impairments, children and youthful offenders so as to prioritise their rehabilitation by protecting their identities.

246. There was widespread recognition of the unique institutional role played by the media. The function of preserving open justice, Liberty Victoria emphasised, did not simply rest with the courts; it also lay with the media, by engaging in accurate and fair reporting of proceedings, as sensationalistic press coverage undermined open justice. The Joint Media Organisations and the Media, Entertainment and Arts Alliance ('MEAA') criticised the expectation that media organisations play the sole role of overseeing open justice as an unreasonable one given the exacerbating challenges faced by the media.[269] These challenges included the competitive digital environment, financial pressures and staff redundancies, including of experienced court reporters.

247. In written submissions made in a personal capacity, Victorian barrister Richard Wilson said that the Open Courts Act failed to accord the principle of open justice due significance.[270] He argued that the Act effectively treated the need to maintain

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266 Joint Media Organisations, Submission, *Open Courts Act Review*, 12 May 2017; Justin Quill and John-Paul Cashen, Consultation, *Open Courts Act Review*, 29 March 2017; Patrick O'Neil, Fairfax Media, Submission, *Open Courts Act Review*, 17 April 2017; Elissa Hunt, The Herald and Weekly Times, Submission, *Open Courts Act Review*, received on 9 May 2017; Liberty Victoria, Submission, *Open Courts Act Review*, 30 May 2017; Senator Derryn Hinch, Consultation, *Open Courts Act Review*, 19 April 2017; Victorian Bar, Consultation, *Open Courts Act Review*, 3 May 2017; Richard Wilson, Submission, *Open Courts Act Review*, 31 May 2017.

267 The media organisations in question are AAP, ABC, Australian Subscription Television and Radio Association, Bauer Media Group, Commercial Radio Australia, Community Broadcasting Association of Australia, Fairfax Media, Free TV, HT&E – Here, There and Everywhere, MEAA, News Corp Australia, NewsMediaWorks, SBS and The West Australian.

268 Joint Media Organisations, Submission, *Open Courts Act Review*, 12 May 2017, 3.

269 Ibid. See also Media, Entertainment and Arts Alliance, Submission, *Open Courts Act Review*, 1 March 2017.

270 *Contra* Director of Public Prosecutions, Submission, *Open Courts Act Review*, 30 June 2017.

open justice as a rebuttable presumption rather a matter of legal principle requiring exceptions to it to be grounded in necessity. Amongst various suggestions for structural amendments highlighting the significance of open justice in the Act, he suggested that the Review recommend the insertion of a new preamble to the Act expressing the fundamental nature of the legal principle of open justice in the Victorian legal system and the repeal of the existing section 4 of the Open Courts Act, to be replaced with a section of general application to all Parts of the Act.

10.2 Victorian 'culture of suppression'

10.2.1 Cultural approach to open justice in Victoria

248. There was no consensus as to whether the Victorian regime for suppression required reform. Some stakeholders, notably Victorian courts and tribunals and public agencies, made comments to the effect that there was no clear evidence establishing that the suppression order regime, from the perspective of their own roles or experiences within the system, was not operating as intended.[271] In consultation with the Supreme Court of Victoria, it was noted that the assumption that Victoria had a more endemic culture of suppression relative to other jurisdictions was difficult to establish when other jurisdictions did not maintain as comprehensive a record of orders made in those states. This was said to engender a false comparison with other jurisdictions.

249. In comments echoed by other judges in consultations with the Victorian courts and tribunals, judges of the Supreme Court said that, if the proposition that suppression orders were more commonly made in Victoria was borne out, there were two reasons why Victorian judges might turn to suppression: first, judges in this jurisdiction often faced inaccurate or one-sided media reporting of the workings of the courts and relied upon suppression to mitigate the prejudicial impact of such reporting. In support of the contention that media organisations frequently mischaracterised the workings of the courts and failed to object to orders despite being given timely notice of applications or seek reviews of orders despite having opportunities to do so, reference was made to the Supreme Court judgment in *Director of Public Prosecutions (Cth) v Brady*.[272] Secondly, there had been a loss of judicial confidence, particularly within the Magistrates' Court and the County Court, in the efficacy of alternatives to suppression such as the law of contempt and statutory prohibitions against publication.

250. Of those stakeholders critical of the Victorian culture of suppression, there were differing views as to the scale of the problem and the nature of reform required. Legal practitioners held more moderate views of the deficiencies of the Open Courts Act, preferring reform of the mechanism used to effect non-publication rather than challenging the balance to be struck between open justice and other interests.

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271 Supreme Court of Victoria (members of the Supreme Court), Consultation, *Open Courts Act Review*, 21 November 2016; County Court of Victoria (Chief Judge Kidd, Toby Hemming, Tim Bourbon), Consultation, *Open Courts Act Review*, 7 December 2016; Magistrates' Court of Victoria (Chief Magistrate Lauritsen), Consultation, *Open Courts Act Review*, 8 December 2016; Victorian Civil and Administrative Tribunal (President Garde), Consultation, *Open Courts Act Review*, 12 December 2016; Corrections Victoria, Victorian Department of Justice and Regulation, Consultation, *Open Courts Act Review*, 28 April 2017; Alister McKeich, Victorian Aboriginal Legal Service, Submission, *Open Courts Act Review*, received on 8 May 2017; Commercial Bar Association (Luke Merrick), Consultation, *Open Courts Act Review*, 1 May 2017.

272 (2015) 252 A Crim R 50 ('*Brady*').

In consultation with a panel of criminal defence lawyers organised by the Law Institute of Victoria ('LIV'),[273] it was accepted that the number of orders being made in Victoria should be reduced. However, emphasis was also placed upon the need for appropriate limitations to the public's right to know in order to ensure that proceedings remained fair to the accused in criminal cases. The Director of Public Prosecutions ('DPP') agreed that there was scope to improve Victoria's approach to open justice.[274] Both the criminal lawyers consulted through the LIV and the DPP supported broader use of statutory restrictions on publication of certain categories of information rather than primary reliance on a regime of suppression orders made by courts and tribunals, although the DPP warned that the efficacy of a statutory scheme depended upon the media and members of the public being made aware of the subject of the statutory prohibitions. The DPP said that attention would have to be directed to how an expanded statutory scheme might practically operate in communicating the scope of sensitive information.

251. Victoria Police observed that the requirement to take seized evidence before the court reduces the ability to publicise information and fostered the tendency of Victorian police authorities not to comment on arrests or show visual evidence of the seizure of illicit material like drugs or guns upon arrest of accused persons, in contrast to the approach of federal police authorities.[275] It suggested that one of the consequences of the operation of section 465 of the *Crimes Act 1958* (Vic) was that the Victorian community was sometimes denied access to material necessary to give it confidence in the workings of the police and the endeavours being made to ensure that it was being kept safe.

252. Media organisations were the most critical of the operation of the suppression order regime. The Joint Media Organisations submission said that the media had 'observed a culture develop in Victoria which favours the making of suppression orders and the issuing of those orders without proper consideration for whether the criteria under the [Open Courts] Act has been met'.[276] Similar comments were made by the Herald and Weekly Times in a separate submission. Virtually all stakeholders representing the media in some capacity noted that the Open Courts Act did not appear to have reduced the number of suppression orders made in Victoria.[277] Both the Joint Media Organisations and the MEAA relied on the findings of academic Jason Bosland in a 2017 study to argue that the overall number of regular suppression orders made by the courts per year had remained relatively stable,[278] while Patrick O'Neil, The Age's Justice Editor making a submission on behalf of Fairfax, said that, anecdotally, the number of suppression orders had increased in recent years.

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273 Law Institute of Victoria (Melinda Walker, Rob Stary), Consultation, *Open Courts Act Review*, 20 March 2017.

274 Director of Public Prosecutions, Submission, *Open Courts Act Review*, 30 June 2017.

275 Victoria Police (Findlay McRae), Consultation, *Open Courts Act Review*, 28 April 2017.

276 Joint Media Organisations, Submission, *Open Courts Act Review*, 12 May 2017, 3.

277 Joint Media Organisations, Submission, *Open Courts Act Review*, 12 May 2017; Patrick O'Neil, Fairfax Media, Submission, *Open Courts Act Review*, 17 April 2017; Elissa Hunt, The Herald and Weekly Times, Submission, *Open Courts Act Review*, received on 9 May 2017; Media, Entertainment and Arts Alliance, Submission, *Open Courts Act Review*, 1 March 2017.

278 See Jason Bosland, 'Two Years of Suppression under the Open Courts Act 2013 (Vic)' (2017) 39 *Sydney Law Review* 1 ('2017 Bosland study').

10.2.2 Judicial norms

253. One of the most criticised aspects of the present legal environment in relation to suppression orders was the nature of judicial attitudes. The previous section makes note of the distrust felt by the judiciary towards media organisations as a result of media reporting perceived to be unfair or inaccurate. The submissions made by media organisations further evince the existence of a somewhat antagonistic relationship between the judiciary and the media in Victoria. Three principal complaints were made by the media: judges misunderstood the position of the media; ignored or misapplied the legal framework; and lacked institutional disincentives against making orders improperly.[279] Illustrative comments on these three themes are provided below.

254. The Joint Media Organisations submission stated that judicial officers had a hostile and distrustful attitude towards some media organisations. The MEAA argued that judges had an inappropriate notion of the public interest and the media's role in promoting that interest, making references to remarks by senior judicial officers characterising media organisations as profit-driven entities that did not represent the public interest. Speaking in his personal capacity, media lawyer Justin Quill noted that the presence of a commercial motive on the part of the media did not invalidate the public's right to know.[280] The Joint Media Organisations said in their submission that judicial officers had an outdated conception of the resources of media organisations, as they continued to interpret the presence or absence of the media in court rooms as a reflection of the media's interest. The Herald and Weekly Times said that when media organisations did attend open court hearings, their presence was often seen as an annoyance.

255. The Herald and Weekly Times stated that the 'biggest barrier to the [Open Courts] Act achieving its stated purpose is that the majority of judicial officers fail to apply it correctly, whether it be by choice or ignorance'.[281] Especial criticism was levelled at the Magistrates' Court as the court most non-compliant with the legal framework in relation to suppression. Patrick O'Neil of The Age said that magistrates often did not appear to be familiar with the requirements under the Open Courts Act, and were guided by the legal practitioners for parties as to whether it was common practice to grant media access to certain material at different stages in court proceedings, without offering the media an opportunity to argue for the public interest in accessing such material. Media organisations said that judicial officers routinely failed to apply the test of necessity in order to justify the making and scope of an order and frequently issued 'blanket' prohibitions against publication.

256. In the Joint Media Organisations submission, the media contended that there were institutional incentives favouring, rather than inhibiting, the making of suppression orders. It said that judicial officers routinely made suppression orders 'on the basis of a perceived sympathy for victims, witnesses or other parties to a proceeding who may be adversely affected by publication' supported by uncritical acceptance of the evidence of medical professionals as to the distress and embarrassment to a

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279 Joint Media Organisations, Submission, *Open Courts Act Review*, 12 May 2017; Patrick O'Neil, Fairfax Media, Submission, *Open Courts Act Review*, 17 April 2017; Elissa Hunt, The Herald and Weekly Times, Submission, *Open Courts Act Review*, received on 9 May 2017; Media, Entertainment and Arts Alliance, Submission, *Open Courts Act Review*, 1 March 2017.

280 Justin Quill and John-Paul Cashen, Consultation, *Open Courts Act Review*, 29 March 2017.

281 Elissa Hunt, The Herald and Weekly Times, Submission, *Open Courts Act Review*, received on 9 May 2017, 1.

person whose interests would be protected by suppression.[282] It also said that the making of a suppression order was thought to be preferable because the media was seen to be the only party adversely affected; in this light, the decision to make a suppression order was less likely to be the subject of appeal or cause harm if the decision was overturned on appeal.

257. The solution uniformly proposed by media organisations was robust judicial training. The MEAA suggested that the courts and media organisations collaborate to devise a training program that would be of use to both the courts and the media. The Joint Media Organisations submission suggested that the training program for judicial officers cover more than simply the requirements of the Open Courts Act as to the grounds, scope and duration for making a suppression order. Additional subjects for training that were proposed included helping judges to cultivate the mindset of a contradictor by critically assessing evidence and arguments in the absence of a public contradictor and encouraging the practice of deferral of hearings of applications for suppression orders if the media was not given adequate notice. The Herald and Weekly Times noted that, in addition to judicial training, the pro forma templates for suppression orders used by judicial officers, particularly in the Magistrates' Court, did not encourage adequate specification of the purpose, grounds, scope and duration of orders.

258. Individual members of the Victorian Bar also supported the need for greater judicial training.[283] Barristers Georgina Schoff QC and Haroon Hassan said that the Open Courts Bench Book produced by the Judicial College of Victoria ('JCV') was an important educational tool for the judiciary. Haroon Hassan suggested that the Bench Book required updating in some respects, for example of the model suppression orders included in the Bench Book.

259. The Review also consulted with Crown Counsel advising the former Attorney-General during the drafting of the Open Courts Act, Mark Sneddon.[284] He noted that the intent of the Open Courts Act had been to encourage judicial officers to bring careful consideration and greater rigour to the decision whether to make an order and the scope of such an order. He suggested that, if that result was not being achieved, incentives could be built into the legislative framework to focus the attention of judicial officers on those aims of the legislative requirements. He raised a number of possible options, including automatic lapse of orders formally non-compliant with the requirements of the Act after two weeks, the institution of a panel of judicial officers from each court and tribunal to review suppression orders made in that jurisdiction on their formal compliance on an annual basis, and more stringent reporting requirements imposed on the heads of each jurisdiction as to the rate of judicial compliance.

10.2.2.1 Judicial attitudes towards juries: time for a change?

260. A number of stakeholders said that it was artificial and futile to attempt to contain the spread of information in a digital world, particularly in relation to notorious cases such as the criminal trials of Adrian Bayley or Peter Dupas or within small communities, or to assume that jurors did not undertake online investigations

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282 Joint Media Organisations, Submission, *Open Courts Act Review*, 12 May 2017, 6.

283 Victorian Bar (Haroon Hassan) (Georgina Schoff QC), Consultation, *Open Courts Act Review*, 3 May 2017.

284 Mark Sneddon, Consultation, *Open Courts Act Review*, 20 February 2017.

despite being instructed not to do so.[285] Consequently, the Review consulted stakeholders specialising in jury decision-making on whether judges were justified in suppressing information thought to contaminate the reasoning of the jury or whether alternative ways of curing potential prejudice, such as jury directions, were effective.[286] In summary, both experts broadly agreed that juries, provided that they were made active participants in the trial process by judges, were capable of effective decision-making. The implications of this are considered further in Chapter 13 below.

261. Professor James Ogloff, an expert in forensic behavioural science, said that it was not to be expected that jurors, as laypersons, would appreciate the evidentiary rules circumscribing how they should deal with the cases before them without adequate instruction. He said that, given insufficient information as to their task, jurors tended to approach their task as if they had been asked to uncover the truth rather than determine the question of whether the burden of proof had been satisfied, having regard to the relevant rules of evidence.[287] Juries failed to understand, unless informed otherwise, the rationale for exclusion of access to information which they regarded as probative. Professor Ogloff said that studies clearly demonstrated that jury decision-making was affected by evidence ruled to be inadmissible, indicating that juries were sensitive to the implications of material kept hidden from them.[288] He suggested that, instead of judges merely instructing the jury not to have access to certain information as part of an extensive suite of directions in charging a jury, it was beneficial for judges to set the parameters of how jurors should approach information clearly from the outset of a trial and explain why untested information should not be taken into account.[289]

262. Professor Jonathan Clough, a criminal law academic from Monash University specialising in jury research, concurred with the assessment that jurors were less likely to seek out information when they were more involved as participants in the trial process, but he expressed caution in moving entirely away from the use of suppression orders as a means of dealing with prejudicial material. He drew attention to the possible ineffectiveness of jury directions to address the potential for prejudice, for example the uncertainty as to whether juries absorbed or followed directions not to seek out information or perform their own investigations.[290]

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285 Joint Media Organisations, Submission, *Open Courts Act Review*, 12 May 2017; Director of Public Prosecutions, Submission, *Open Courts Act Review*, 30 June 2017; Victoria Police (Findlay McRae), Consultation, *Open Courts Act Review*, 28 April 2017; Law Institute of Victoria (Melinda Walker, Rob Stary), Consultation, *Open Courts Act Review*, 20 March 2017; Victorian Bar (P Justin Hannebery) (Haroon Hassan), Consultation, *Open Courts Act Review*, 3 May 2017; Professor Ogloff, Consultation, *Open Courts Act Review*, 20 June 2017; Professor Jonathan Clough, Consultation, *Open Courts Act Review*, 15 June 2017; Alister McKeich, Victorian Aboriginal Legal Service, Submission, *Open Courts Act Review*, received on 8 May 2017.

286 Professor Ogloff, Consultation, *Open Courts Act Review*, 20 June 2017; Professor Clough, Consultation, *Open Courts Act Review*, 15 June 2017.

287 Nancy Steblay, Harmon M Hosch, Scott E Culhane and Adam McWethy, 'The Impact on Juror Verdicts of Judicial Instruction to Disregard Inadmissible Evidence: A Meta-Analysis' (2006) 30 *Law and Human Behaviour* 469, 487.

288 Ibid.

289 Steblay, Hosch, Culhane and McWethy, above n 287, 486.

290 For discussion of the research on the limited effectiveness of judicial directions not to undertake online research and the notion of 'reactance' or the unwillingness or inability of jurors to set aside information viewed to be relevant, see Jane Johnston, Patrick Keyzer, Geoffrey Holland, Mark Pearson, Sharon Rodrick and Anne Wallace, *Juries and Social Media* (Report, Victorian Department of Justice, 2013) <https://www.researchgate.net/profile/Anne_Wallace3/publication/275037791_Juries_and_Social_Media_A_

263. The JCV agreed that there was a conceptual tension between judges distrusting the capacity of potential juries to encounter prejudicial information, thereby necessitating suppression, and the implicit trust placed in juries in relation to other kinds of judicial directions being obeyed faithfully.[291] It noted that, while materials explaining the mechanics of the legislation such as the Open Courts Bench Book published by the JCV were useful,[292] they were poor tools for challenging cultural assumptions made by judges that led to the preference for using suppression orders over other means of dealing with prejudicial information. Broader cultural change was difficult to engender, not just because of the difficulty in assisting judges to make a generational shift in relation to well-accepted propositions, but because of the concern felt by judicial officers in lower courts and tribunals that decisions based on different assumptions as to the efficacy of various means of dealing with prejudicial information would be overturned by the Victorian Court of Appeal.

264. The JCV said that there were two models for cultural change that had enjoyed success in challenging entrenched assumptions within the judiciary:

    a. The model used in relation to sexual offences: exposure of judicial officers to a vast body of research highlighting the lack of foundation for certain common judicial assumptions, for example assumptions in relation to the truthfulness of female or child complainants in sexual offending, in parallel with the framing of legislation in terms that counteracted against judicial officers acting upon those assumptions;

    b. Judicial symposia: programs enabling judicial officers to reflect on court processes and deliberate whether there were aspects of those processes which frustrated the administration of justice.

10.2.3 Norms of legal practitioners

265. Media organisations argued that legal practitioners, particularly criminal defence lawyers, routinely applied for suppression orders on behalf of clients on weak bases, with no disincentive.[293] They stated that legal practitioners often did not assist the media with inquiries about impending applications for suppression orders or the meaning of orders once made. The judges who addressed this aspect expressed the opinion that, if a broader cultural change was necessary to decrease the number of suppression orders, the responsibility for that shift did not fall on the courts alone; it should also be borne by legal practitioners in the making of applications only where necessary.[294]

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report_prepared_for_the_Victorian_Department_of_Justice/links/5530bd970cf2f2a588ab2b35/Juries-and-Social-Media-A-report-prepared-for-the-Victorian-Department-of-Justice.pdf> 15–16.

291 Judicial College of Victoria (Matthew Weatherson, Sophie MacKinnon), Consultation, *Open Courts Act Review*, 15 June 2017.

292 See Judicial College of Victoria, *Open Courts Bench Book*, 2 December 2013, <http://www.judicialcollege.vic.edu.au/publications/open-courts-resources>.

293 Joint Media Organisations, Submission, *Open Courts Act Review*, 12 May 2017; Patrick O'Neil, Fairfax Media, Submission, *Open Courts Act Review*, 17 April 2017; Justin Quill and John-Paul Cashen, Consultation, *Open Courts Act Review*, 29 March 2017.

294 Supreme Court of Victoria (members of the Supreme Court), Consultation, *Open Courts Act Review*, 21 November 2016; Magistrates' Court of Victoria (Chief Magistrate Lauritsen), Consultation, *Open Courts Act Review*, 8 December 2016.

266. The prosecution of breaches of applicable statutory prohibitions or suppression orders was another area of complaint. Chief Justice Warren was concerned by the seeming reluctance to prosecute breaches, even where they had been referred by the courts. The criminal defence lawyers consulted through the LIV agreed that there was a prosecutorial gap, complaining that media organisations were more likely to breach a suppression order than apply to lift the order, as, in practice, there were no sanctions imposed for ignoring it.

267. In his submission, the DPP asserted that there were complexities in proving a breach of the various forms of legal prohibitions against publication, particularly where the knowledge of the accused as to the existence of the prohibition or its scope was in question, which stifled the prosecution of contraventions of court orders. In relation to the offence provisions under the Open Courts Act, the DPP said that sections 23 and 27 established the requirement of knowledge and recklessness as to whether an order was in force as an element of breach.[295] He noted that they created a presumption of awareness where a court or tribunal had emailed notice of the order to the person, but were of little assistance in establishing the presence of the necessary awareness of a person who was not on the email distribution list by which suppression orders were circulated to the media.[296] The DPP also said that the standard of proof in contempt proceedings was difficult to meet and that contempt proceedings, particularly in a civil context, needed simplification.

10.3 Greater regard for victims' interests

268. Victims groups generally suggested that there was greater scope for victims' interests to be given regard. The victims representatives from the Victims of Crime Consultative Committee said that victims were given little information about suppression orders and their implications and they were rarely consulted as to whether they wished for their identities to be suppressed.[297] The victim representatives said that, as prosecutors saw themselves as representatives of the State of Victoria, victims were often made to feel peripheral to trials in which they were intimately involved. In order to redress the lack of adequate support received by victims, it was suggested that representatives of victims with knowledge of court processes should be involved in trials, both to assist with the making of suppression orders and to explain the implications of an order being made to the victim in question. The victims representatives were concerned to ensure victims' rights to speak about their experiences, particularly on social media, without breaching any suppression orders.

269. Lynell Crowther, a co-ordinator of the National Victims of Crime Awareness Week, submitted that suppression of certain offenders' identities made the community less safe by emboldening those offenders: 'people that are inclined to commit atrocities can gain a mindset that the Government will essentially give them anonymity without fear of vetting if they commit other crimes after an initial crime.'[298]

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295 See 8.1.3.2.2 and 8.1.3.2.3 above, in relation to sections 23 and 27 of the Open Courts Act.

296 See 10.4.4 below.

297 Victims of Crime Consultative Committee (victims representatives), Consultation, *Open Courts Act Review*, 20 March 2017.

298 Lynell Crowther, Submission, *Open Courts Act Review*, received on 8 May 2017.

270. The Victims of Crime Commissioner emphasised the importance of protecting the identities of victims, particularly in cases involving sexual assault or where the victims were children.[299] He noted that, in cases involving rape, many victims found the trial process re-traumatising because it caused them, of necessity, to relive what had happened and made them aware of being the subject of public scrutiny due to the concentrated media focus on such cases. He observed that, despite this, victims showed an increasing tendency to wish to disclose their identities in order to reclaim their experiences and prevent the accused from receiving the benefit of suppression of his or her identity.

271. The Review was greatly assisted by the submissions made by some victims of offending, outlining their personal experiences and making suggestions for improvement of the system.[300] Tracey May, a victim of sexual offending when she was a child, supported the call for offenders' names to be disclosed, particularly in cases of historical offending against children who were adults by the time that the proceeding against the offender was heard. She said, of the offender: 'His name was to be suppressed from the public to protect his victims/step children which happened to be me … I wanted the world to know him and his name …. I believe that his name being released would save many more people who are not aware of his arrest, conviction or crimes due to his name being withheld and not released. … To give multiple victims the opportunity to name the offender publicly would be a massive part of the healing process. I want my story to be heard, I am not ashamed of my past; to tell my story I need to be able to say his name.'[301]

272. Janine Greening, the daughter of a murder victim, said that in her case, the two young offenders in question, whose identities had been suppressed due to their youth, had continued to torment her family. She said that, 'youths that do minor crime should be protected but youths that do major crime, such as rape, vicious assaults, sexual abuse, [and] murder should be named.'[302]

273. Sandy and Tony,[303] the parents of a child complainant in a recent case relating to allegations of sexual assault, reported that no information on legislation or processes relevant to the desirability of a suppression order was provided to them to protect their child at the initial stages, including the bail hearing of the persons charged. The consequent publication of unnecessary and extremely distressing detail not only resulted in the identification of the child in the area but added substantially to the extreme trauma already being experienced by the young person. It was not until they made their own inquiries as to what could be done that any action was taken by the Office of Public Prosecutions.[304] By then, it was too late to be of any real assistance to the child. They suggested that judicial officers, in particular magistrates hearing bail proceedings, should show greater awareness of the needs of victims, and advocated for the mandatory making of suppression orders to prevent media organisations from publishing details of offending that are embarrassing or likely to cause undue embarrassment or distress to complainants in sexual assault cases. They said that they had been expected to assume the

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299 Victims of Crime Commissioner (Greg Davies), Consultation, *Open Courts Act Review*, 22 March 2017.

300 Tracey May, Submission, *Open Courts Act Review*, received on 8 May 2017; Name Withheld, Submission, *Open Courts Act Review*, received on 3 May 2017.

301 Tracey May, Submission, *Open Courts Act Review*, received on 8 May 2017.

302 Janine Greening, Submission, *Open Courts Act Review*, received on 10 May 2017.

303 These names have been pseudonymised by request.

304 Sandy and Tony, Submission, *Open Courts Act Review*, 30 April 2017.

burden of monitoring breaches of suppression orders, as the DPP did not take a proactive role in ensuring that suppression orders were obeyed. This added to their suffering. They were highly critical of the inclusion of gratuitous and re-traumatising detail in the media reporting of their child's case, describing the media's attitude towards publication as 'if the courts allow it, we will print it.' They requested that media organisations be made to engage in training and be penalised for breaching suppression orders.

274. The DPP acknowledged that most victims lacked prior knowledge about statutory prohibitions on publication and suppression orders, and that information was provided to victims by the Office of Public Prosecutions ('OPP') only on a case by case basis. He said that consideration was being given to providing general information about this issue on the OPP website. However, he contended that prosecutors did take victims' views into account when seeking suppression orders. He noted a range of concerns expressed by victims favouring the protection of their identities, including concerns about their personal safety, employers knowing that they were victims of offending, and the fear of media harassment. He asserted that victims also pointed to reasons in favour of disclosure of their identities, such as the desire felt by some victims to have the community know the offender's identity for the purposes of the community's safety and public condemnation of the offender. He noted that the making of orders suppressing the identity of the accused fostered the perception of some victims that the criminal justice process was all about the offender. He commented that individual victims were sometimes reluctant to come forward in cases in which the offender was a person in authority but were more inclined to do so in the knowledge that there were other victims.

10.4 Issues with the Open Courts Act

10.4.1 Subject matter of orders

275. In consultation with members of the Victorian Bar, Georgina Schoff QC, specialising in media law, said that the most important issue of application was the appropriate delimitation of the scope of orders. Media organisations also submitted that suppression orders were regularly unclear or unnecessarily broad in scope, contravening the requirement of adequate specificity under section 13 of the Open Courts Act.[305] The prevalence of 'blanket' suppression orders drew especial criticism; the MEAA referred to an editorial in The Age which reported that 37% of orders provided to The Age in 2016 prevented reporting of any aspect of a case.[306]

10.4.2 Basis for making orders

276. Discussions with stakeholders revealed clear dissatisfaction with the adequacy of the basis for suppression orders, although that dissatisfaction was cast in different forms. Four main themes emerged in submissions and consultations: the need to give reasons, clarification of the statutory approach to justifying orders, improper judicial application of the relevant provisions, and the need to view the necessity of

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305 Joint Media Organisations, Submission, *Open Courts Act Review*, 12 May 2017; Elissa Hunt, The Herald and Weekly Times, Submission, *Open Courts Act Review*, received on 9 May 2017; Media, Entertainment and Arts Alliance, Submission, *Open Courts Act Review*, 1 March 2017.

306 Editorial, 'Suppression Orders Restricting the Public's Right to Know', *The Age* (online), 11 November 2016, <http://www.theage.com.au/comment/the-age-editorial/suppression-orders-restricting-the-publics-right-to-know-20161111-gsnac0.html>.

the grounds for making suppression orders in the context of open justice mechanisms as a whole.

10.4.2.1 Need for courts to give reasons

277. Jason Bosland, a University of Melbourne academic who has published studies on the law and practice relating to suppression orders in Victoria, said that the imposition of a requirement that courts give reasons for the making of suppression orders was one of the most significant recommendations that could be made by the Review.[307] He argued that the failure to provide adequate explanation for the making of orders or the justifications for their terms was an error of law, and pointed to the frequency with which reasons were given to support the making of orders in analogous contexts such as granting the public access to documents or exhibits. He submitted that introducing a statutory obligation to this effect would also provide a buffer against suppression orders being made too easily, as it would reduce the number of applications made on tenuous bases and compel judges to assess rigorously the basis upon which an order was necessary, particularly where applications were not contested.

278. A significant number of other stakeholders agreed that courts be required to give reasons for the making of suppression orders,[308] although they diverged on how that proposal should practically be given effect. The Joint Media Organisations submission suggested that each decision be accompanied by short reasons articulating the specific rationale for suppression. The Herald and Weekly Times proposed that, where the general ground was relied upon to make an order, courts should be required to state reasons for making an order if the duration of the order went beyond the duration of the proceeding.

10.4.2.2 Amendment of the statutory approach

279. Stakeholders disagreed on the efficacy of the requirement under section 14 of the Open Courts Act to rely upon evidence or sufficient credible information for making a suppression order. The JCV suggested that section 14 be amended or repealed, as it offered no practical assistance to judicial officers. In contrast, the Herald and Weekly Times suggested that all orders be required to state briefly how the requirement to rely upon adequate evidence under section 14 of the Open Courts Act had been satisfied, in order to preclude assertions from counsel being readily accepted by judges and magistrates.

280. The distinction drawn between the 'grounds' and 'purpose' for making an order under section 13 also appeared not to be widely understood by judicial officers. The JCV suggested that, as the distinction was unhelpful and not applied in the majority of cases, it ought to be confined to the requirement to specify the purpose for the order where the general ground was used. Conversely, some media organisations supported the requirement to specify both the purpose and the ground for orders.[309]

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307 Jason Bosland, Consultation, *Open Courts Act Review*, 29 March 2017.

308 Victims of Crime Consultative Committee (victims representatives), Consultation, *Open Courts Act Review*, 20 March 2017; Joint Media Organisations, Submission, *Open Courts Act Review*, 12 May 2017; Elissa Hunt, The Herald and Weekly Times, Submission, *Open Courts Act Review*, received on 9 May 2017; Mark Sneddon, Consultation, Open Courts Act Review, 20 February 2017; Victorian Bar (Haroon Hassan), Consultation, *Open Courts Act Review*, 3 May 2017.

309 Elissa Hunt, The Herald and Weekly Times, Submission, *Open Courts Act Review*, received on 9 May 2017; Media, Entertainment and Arts Alliance, Submission, *Open Courts Act Review*, 1 March 2017.

The MEAA, referring to the 2017 Bosland study, criticised the fact that 73% of orders repeated the statutory grounds when both the purpose of an order and the grounds upon which it was made should have been specified in the order.

281. There were a few calls to consider expansion of the grounds for making a suppression order. Jason Bosland said that, while the current statutory bases for making a suppression order were working well, thought might be given to an individual's right to privacy as an emerging interest for protection. The Victorian Aboriginal Legal Service suggested that the Review consider expanding the bases for protection in two respects. First, it suggested the inclusion of the potential for racial discrimination as a ground, in order to ensure the safety of the defendant or appellant in matters in which race may be an issue, and to ensure that individuals involved in the trial were not subject to racial hatred or psychological harm if race was made a focus of any media reporting. Secondly, it suggested that the protection for matters concerning child sexual abuse be further strengthened. Sandy and Tony, the parents of a child complainant in a case of alleged sexual assault, said that it should be made clear that protection of information on the ground of ensuring the safety of a person included harm to psychological safety.

10.4.2.3 Improper application of statute

282. Media organisations argued that orders rarely specified the purpose and grounds for making them.[310] The Herald and Weekly Times argued that the general ground under section 18(1)(a) was often used to justify the making of blanket orders. It also complained that section 18(1)(d) was too broadly available to any witness, not simply complainants and victims, and was misused as a generic distress/embarrassment ground in matters that were not of a sexual nature or involved family violence. It recommended that the Act be amended to state that the only basis for protection of the identity of a witness was to protect a complainant from undue distress.

10.4.2.4 Suppression orders in context

283. Some stakeholders observed that the necessity for making suppression orders had to be considered alongside the other mechanisms available for protecting sensitive information, for example statutory prohibitions against publication of the relevant information, the law of contempt and judicial directions to the jury.[311] This was of particular concern with respect to the use of the general ground for making suppression orders; the Herald and Weekly Times, for example, argued that section 18(1)(a) of the Open Courts Act was routinely applied in cases where the jury could be instructed to disregard certain information, even though the ground required consideration of whether the risk 'cannot be prevented by other reasonably available means'.

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310 Elissa Hunt, The Herald and Weekly Times, Submission, *Open Courts Act Review*, received on 9 May 2017.

311 Elissa Hunt, The Herald and Weekly Times, Submission, *Open Courts Act Review*, received on 9 May 2017; Judicial College of Victoria (Matthew Weatherson, Sophie MacKinnon), Consultation, *Open Courts Act Review*, 15 June 2017; Mark Sneddon, Consultation, Open Courts Act Review, 20 February 2017.

10.4.3 Duration of suppression orders

284. Media organisations contended that there were a number of issues with the duration of suppression orders made under the Open Courts Act.[312] These included the continuing tendency in some orders not to specify duration, particularly through the practice of stating that the order would remain effective 'until further order'; the imposition of periods of duration unnecessarily longer than the length of the proceeding; over-reliance on the default period of five years provided for under section 12 without justification for its selection; and the failure to replace interim orders with proceeding suppression orders quickly. The Herald and Weekly Times said that the duration of orders was the most common defect encountered in orders, particularly those made by the Magistrates' Court. It submitted that interim orders were routinely made in place of proceeding suppression orders and tended not to be listed for a future determination at the time of their making. Many interim orders were said not to be determined for long periods, despite the statutory requirement to determine the substantive application as a 'matter of urgency' under section 20(4) of the Open Courts Act.

285. A number of suggestions were advanced as to how greater rigour might be introduced. The Joint Media Organisations submission recommended that, if duration could be determined by reference to a future event, the legislation require that such an option be given preference over a fixed period. The Herald and Weekly Times suggested that interim orders be set to operate for no longer than five business days before being determined properly or expiring. Mark Sneddon, Crown Counsel during the drafting of the Open Courts Bill, argued for confining the default duration for a proceeding suppression order to a shorter period than five years.

286. Victims groups had different perspectives on the operation of the duration provisions. The Victims of Crime Commissioner said that suppression orders should generally expire upon the conclusion of the trial, with the requirement to make a further application if protection was still needed at that stage. Tracey May and Janine Greening argued that orders should expire when there was no continuing basis for protection, for example upon the coming of age of a child victim whose identity has been suppressed. Sandy and Tony, parents of a child victim, said that, in some cases, it was difficult to determine the length of time required and that it was necessary for some orders to remain in place for an indeterminate amount of time.

287. Luke Merrick, the Vice President of the Commercial Bar Association, said that, while the Open Courts Act had limited application to commercial proceedings and therefore did not adversely affect such proceedings in a systemic way, one area in which improvement could be made was the duration of orders.[313] He said that suppression orders were frequently made to last 'until further order', with practitioners not having sufficient regard to the appropriate temporal limitation on the confidentiality of certain information.

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312 Joint Media Organisations, Submission, *Open Courts Act Review*, 12 May 2017; Elissa Hunt, The Herald and Weekly Times, Submission, *Open Courts Act Review*, received on 9 May 2017; Media, Entertainment and Arts Alliance, Submission, *Open Courts Act Review*, 1 March 2017.

313 Commercial Bar Association (Luke Merrick), Consultation, *Open Courts Act Review*, 1 May 2017.

10.4.4 Notice of applications and notification of orders

288. Media organisations raised two related issues in relation to notice. They said that the timeliness and content of both notice of applications for suppression orders and the notification of suppression orders once made were poor.[314] The Joint Media Organisations submission stated that, although 137 suppression orders were made in Victoria between 1 January 2017 and 28 April 2017, the media organisations which had written the submission had received notice of the application to make the suppression order on only 24 occasions. Notices were said often to contain little information of the nature and basis of the application in question, making it difficult for media organisations to assess whether the matter was worth contesting. The Herald and Weekly Times observed that judges rarely questioned why no notice was given and did not adjourn applications when it became clear that no notice had been given. It said that practitioners often sought orders at the start of hearings, particularly in the Magistrates' Court, regularly flouting the requirement to give notice. This assessment was supported by Patrick O'Neil, representing the Fairfax organisation. He argued that '[l]awyers often cite last-moment factors as the basis for seeking suppression orders, but it quickly emerges they are well placed to make these points.'[315]

289. In order to address the problems raised with the giving of notice, the Joint Media Organisations proposed greater judicial intervention. They suggested that judges and magistrates should ask applicants for suppression orders whether adequate notice was given at the start of a hearing; if the requirement had not been complied with, judicial officers should adjourn the hearing. The submission also recommended that notice be given in all circumstances, including on the court's own motion, or upon extension or variation of a suppression order. The Herald and Weekly Times proposed the adoption of a different notice mechanism. Its submission suggested that a suppression order made where notice had not been given, including orders made on the court's own motion, should be an interim order, set to expire three or five days from its making. The Herald and Weekly Times added that interim orders must state the purpose for, and grounds on, which they were made so that media organisations could understand the basis for the order and evaluate whether they wished to contest the order.

290. A related issue raised in the Herald and Weekly Times submission was the practice of public listings of proceedings in the courts. The Herald and Weekly Times said that, in 2016, it discovered that the Magistrates' Court automatically removed from public court listings any matter in which a suppression order was made regardless of the scope of the order, with the Court providing an unsatisfactory explanation as to technical issues for that practice. It proposed that the Open Courts Act should make reference to the need for public listings in all matters. It also suggested that section 136 of the Magistrates' Court Act should be amended to prevent it being used for an inappropriate purpose. That section deals with the practice of 'silent' listings; where a case is deemed sensitive, it is not entered into court listings and staff are told not to respond to enquiries from the media about when the case is next listed. The Herald and Weekly Times contended that the Magistrates' Court

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314 Joint Media Organisations, Submission, *Open Courts Act Review*, 12 May 2017; Elissa Hunt, The Herald and Weekly Times, Submission, *Open Courts Act Review*, received on 9 May 2017; Media, Entertainment and Arts Alliance, Submission, *Open Courts Act Review*, 1 March 2017; Patrick O'Neil, Fairfax Media, Submission, *Open Courts Act Review*, 17 April 2017; Michael Bachelard, Submission, *Open Courts Act Review*, 5 May 2017.

315 Patrick O'Neil, Fairfax Media, Submission, *Open Courts Act Review*, 17 April 2017, 1.

tended to rely on section 136 to subvert open court hearings without the need for a suppression order or closed court order.

291. With respect to the issue of public notification of orders once made, Michael Bachelard, the Investigations Editor of The Age, noted that the method of notification currently used by the courts was an email service distributing orders to a list of media organisations. He said that this approach was problematic because the text of suppression orders were not easily searchable, particularly where the content of the email attaching a suppression order misspelt critical details. He submitted that it was difficult for media organisations or journalists to keep track of the limits of publication in individual cases because a number of suppression orders were received each day from the courts, with multiple communications being issued where orders were varied. He suggested that the Review recommend the institution of a central and publicly accessible database of current suppression orders.

292. Calls for a searchable notification system were also made by the MEAA, barrister Haroon Hassan and academic Jason Bosland. The MEAA requested that consideration also be given to improving the speed of notifications of orders once made. Haroon Hassan said that, if transparency was an important value, courts needed to move to a more public system of notification of applications and orders instead of the use of email lists to undisclosed media groups.

293. By contrast, judicial stakeholders, when consulted, said that when notice of an application was given they frequently observed a lack of media attendance at hearings. The Supreme Court referred to *Brady* as a high-profile example of such a case. In consultation with the County Court, Chief Judge Kidd said that media organisations did not appear to acknowledge that it was open to them to make an application to lift a suppression order once made. He said that the failure to make such applications was at odds with the media's insistence that the lack of notice deprived them of the opportunity to be heard, and supported the conclusion that they did not avail themselves of opportunities to object to the making of suppression orders.

294. As to the notification of orders once made, the Review contacted each court and tribunal to clarify the method used. The Supreme Court directed the Review to its General Practice Note 9 on the Open Courts Act, which sets out the process of notification at length.[316] Briefly, each court either directly notified media organisations that had already expressed an interest in the proceeding in question or communicated the terms of orders through an email system to the email addresses of news media organisations that had registered with the court that they would like to receive such notices. No statistical record was kept of the notifications themselves; the means of tracking whether notification of an order was sent out was a rudimentary search of the media email inbox maintained by each court.

316 Supreme Court of Victoria, Practice Note SC Gen 9 <http://www.supremecourt.vic.gov.au/home/law+and+practice/practice+notes/practicenotescgen9notificationsundetheopencourtsact2013>.

10.4.5 Consolidating heads of power

10.4.5.1 Proceedings and broad split

295. Stakeholders broadly agreed that the distinction drawn in the Open Courts Act between proceedings and broad suppression orders was not well understood. The JCV, for example, said that the distinction was confusing and impractical as it drew on a distinction based on the source rather than the content of the information. Stakeholders disagreed, however, on whether maintaining the distinction was of much utility.

296. Jason Bosland suggested that there was little justification for a distinction, and that, as the distinction was not practically observed by judges, it should be abolished. He noted that other jurisdictions, such as New South Wales, had a single head of power to make suppression orders rather than creating a distinction between proceeding and broad suppression orders. He supported the repeal of section 24 of the Open Courts Act.

297. Other stakeholders adopted the position that, while the distinction was not well understood, the preferred solution was supporting better judicial understanding of the respective uses of proceeding and broad suppression orders.[317] Victorian barrister Georgina Schoff QC argued for retention of the distinction on the basis that it provided greater clarity to media organisations expected to obey the order as to what could not be published. She said that clarity as to the scope of an order was important because the single largest issue affecting the operation of suppression orders was the lack of judicial rigour in narrowing the subject matter suppressed to that strictly necessary to achieve the ground on which the order was made.

298. The DPP suggested that clarification was necessary as to whether the power to make proceeding suppression orders extended to suppressing reports of a proceeding or information derived from a proceeding not being the proceeding actually before the court or tribunal, or whether a broad suppression order was necessary in such circumstances.

10.4.5.2 Consistency between protection across different stages of proceedings

299. Some stakeholders raised the necessity for wider protection of sensitive information at an earlier stage of proceedings than was currently available. Defence lawyers reported frustration that information which was the potential subject of a suppression order was often disclosed by the media before an application for suppression could be made.[318] They recommended greater use of statutory categories of non-publication because reliance on statute, as opposed to orders, would prevent situations where an application for suppression was made redundant by media disclosure of the information sought to be protected prior to any operative prohibition. Victoria Police also argued for more effective suppression at earlier stages of hearings, especially bail hearings. As bail hearings constituted

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317 Victorian Bar (Georgina Schoff QC) (Haroon Hassan), Consultation, *Open Courts Act Review*, 3 May 2017; Justin Quill and John Paul Cashen, Consultation, *Open Courts Act Review*, 29 Match 2017; Elissa Hunt, The Herald and Weekly Times, Submission, *Open Courts Act Review*, received on 9 May 2017; Director of Public Prosecutions, Submission, *Open Courts Act Review*, 30 June 2017.

318 Law Institute of Victoria (Melinda Walker, Rob Stary), Consultation, *Open Courts Act Review*, 20 March 2017.

administrative hearings rather than legal proceedings, Victoria Police said, protection of sensitive information was compromised in the absence of rigorous protection. The difficulty of adequate protection of sensitive information at the stage of the bail hearing was reinforced by Sandy and Tony, the parents of the child complainant. They urged more expansive protection of details of offending to avoid re-traumatising complainants in sexual offending cases.

300. Victoria Legal Aid raised the issue that the scope of the power to make a suppression order at first instance was broader than that on appeal in reviews of regulatory or administrative decisions, creating a disincentive to appeal in such cases. It pointed to examples of this issue in the context of applications to the Court of Appeal to review refusal of a Working with Children Check under the *Working with Children Act 2005* (Vic) by VCAT, where refused at first instance by the Secretary to the Department of Justice and Regulation. It said that the need for making pseudonym orders in these kinds of cases was justified by the highly sensitive nature of the material which tended to be considered by the decision-maker, often relating to previous sexual, family violence or drug offending. It said: 'The limited availability of suppression orders in civil law matters in the higher courts, and the threat of media coverage, means that clients with otherwise meritorious appeals are deterred from making an application for leave to appeal and exercising their legal rights to challenge the lawfulness of a decision. It would be beneficial to consider procedures to facilitate the transferring of a suppression order when an appeal is filed, and to give the appeal court the power to make the suppression order on the same basis as that made in the original jurisdiction'.[319] It proposed that the Open Courts Act be amended to enable the Supreme Court to make pseudonym-based suppression orders on the same basis as VCAT when considering an appeal of a VCAT decision.[320] Liberty Victoria supported Victoria Legal Aid's submission.

10.5 Need for a public contradictor

301. There was broad consensus amongst stakeholders that applications for suppression orders were typically made without significant opposition from the other party.[321] Both the heads of the Supreme Court and the County Court noted that judges frequently received little assistance by way of opposition, as Victoria Police and Victorian prosecutors rarely opposed the making of orders in criminal proceedings and the media decreasingly played a contradictor role. President Garde, of VCAT, said that media organisations generally expressed diminishing interest in engaging with court proceedings, based on the appearance of media representatives in court. He said that they rarely availed themselves of the opportunity to challenge an order once made.

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319 Victoria Legal Aid, Submission, *Open Courts Act Review*, 30 May 2017.

320 Under s 18(1)(f)(ii) of the Open Courts Act, VCAT has a broad power to make a proceeding suppression order if it is satisfied that it is 'for any other reason in the interests of justice'. By contrast, the power of the Supreme Court to make an order on the general ground under s 18(1)(a) is more confined: an order may be made where it is necessary to 'prevent a real and substantial risk of prejudice to the proper administration of justice that cannot be prevented by other reasonably available means'.

321 Supreme Court of Victoria (members of the Supreme Court), Consultation, *Open Courts Act Review*, 21 November 2016; County Court of Victoria (Chief Judge Kidd, Toby Hemming, Tim Bourbon), Consultation, *Open Courts Act Review*, 7 December 2016; Law Institute of Victoria (Melinda Walker, Rob Stary), Consultation, *Open Courts Act Review*, 20 March 2017; Victorian Bar (Georgina Schoff QC), Consultation, *Open Courts Act Review*, 3 May 2017.

302. Chief Justice Warren drew attention to the arrangement that had been entered into between the Supreme Court and the Victorian Bar Council under the existing Pro Bono scheme to enable judges to receive assistance from independent counsel in applications for suppression orders. However, she reported that little use was being made of it. Two members of the Pro Bono Committee agreed with this assessment, indicating that while a number of barristers had expressed willingness to participate in the scheme, there were few judicial referrals to it.[322] They queried the appropriateness, in any event, of using a pro bono service intended to improve access to justice for those unable otherwise to exercise their rights to satisfy this need. Other stakeholders consulted by the Review, such as Mark Sneddon, said that the ad hoc use of the Pro Bono scheme was inadequate to ensure that the provisions of the Open Courts Act were being rigorously applied.

303. Media organisations pointed to a number of problems with the expectation that they continue to bear the sole burden of playing a contradictor role, arguing that, while they played an important role in securing transparency of the system, they were not the sole custodians of its integrity. The MEAA observed that the explanatory materials for the Open Courts Bill, for example in relation to the notice provisions, reflected the assumption that the media ought to act as a contradictor. Patrick O'Neil summed up the practical constraints faced in the satisfaction of this expectation in his submission on behalf of Fairfax: 'The legal budgets of news rooms means media cannot fight every suppression application, which often makes the constant application for orders feel like a war of attrition. The onus to contest frivolous suppression applications, and the significant expense involved, should not fall on the media.'[323]

304. There was widespread, though not unanimous, support for the need for a public contradictor. Jason Bosland stated that a new approach was necessary to remedy the existing lack of a contest in making suppression orders. He noted that, on a broader level, if open justice was regarded as a principle of fundamental importance in our legal system, a public body with oversight of its operation was vital. Barristers Haroon Hassan and Richard Wilson, members of the Victorian Bar's Pro Bono Committee, supported the proposal to institute an open justice advocate. Stakeholders observed that public contradictors had proven useful in other contexts; Victoria Police referred to the use of public contradictors in applications for exclusion orders, while the criminal lawyers consulted through the LIV noted the use of the Public Interest Monitor ('PIM') in cases involving preventative detention of persons. The MEAA recommended the creation of an Office of the Open Courts Advocate to argue on behalf of the public interest in applications for suppression orders and in any subsequent review. It said that, while the media should continue to be afforded the opportunity to be heard on any such application, the Public Advocate should assume the function formerly occupied by media lawyers representing media organisations in arguing for the public interest.

305. By contrast, the DPP argued that the assistance of a contradictor was not required. He said that judges were capable of making appropriate decisions, taking into account public interest factors. He said that there were practical difficulties in the introduction of an independent contradictor, such as delay in hearing the application for an order so that the contradictor could be briefed about the matter. He queried

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322 Victorian Bar (Richard Wilson) (Haroon Hassan), Consultation, *Open Courts Act Review*, 3 May 2017.

323 Patrick O'Neil, Fairfax Media, Submission, *Open Courts Act Review*, 17 April 2017, 1.

how briefing arrangements would be made, for example who would be responsible for briefing the contradictor. Similarly, barrister P Justin Hannebery, representing the Criminal Bar Association, was critical of the ability of an independent contradictor to appreciate the forensic basis for an order in the context of the proceeding and argued that the prosecutor in criminal proceedings, or the media in civil and criminal proceedings, was the appropriate party to fulfil the function of opposing an order.[324] He said that the absence of opposition in the majority of cases was not of inherent concern provided orders were being made on a sound basis.

306. In consultations with the PIM, Brendan Murphy advised that the Office of the PIM had the potential to perform the functions of a public contradictor in applications for a suppression order by helping determine whether orders should be made, on what grounds and the framing of their scope.[325] He said that the PIM also had the capacity to issue reports on open justice on an annual basis in the same manner as is presently done for the *Surveillance Devices Act 1999* (Vic) and the *Telecommunications (Interception and Access) Act 1979* (Cth). He said, however, that the PIM ought not to assume the function of reviewing orders in the public interest or prosecuting appeals of an order once made, as the PIM was not to act on behalf of the parties contemplated by section 15 of the Open Courts Act. He cautioned that careful attention would have to be given to the funding and design of any such scheme.

10.6 Encouraging alternatives to suppression orders

307. As discussed above,[326] stakeholders raised the possibility of greater reliance upon alternative means of protecting sensitive information. These included the giving of judicial directions to the jury and reliance upon the court's powers in relation to contempt of court and statutory prohibitions or restrictions against publication.

308. A number of stakeholders raised the issue of pseudonym orders. Some noted that there was lack of clarity as to whether pseudonym orders were properly to be regarded as proceeding suppression orders.[327] Those contributors who did consider pseudonym orders to fall outside the Open Courts Act regime proposed that greater reliance should be placed on them rather than suppression orders; pseudonym orders represented a more limited derogation from the principle of open justice, as they did not prohibit publication of reports.[328] Victoria Legal Aid suggested the introduction of a presumption in favour of granting pseudonym orders to protect individuals seeking to preserve or assert their rights in jurisdictions where review is sought of administrative or regulatory decisions.

309. Anne Stanford, the former media officer at the Supreme Court of Victoria, noted that the introduction of the Open Courts Act had caused a shift in professional norms in

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324 Victorian Bar (P Justin Hannebery), Consultation, *Open Courts Act Review*, 3 May 2017.

325 Public Interest Monitor (Brendan Murphy), Consultation, *Open Courts Act Review*, 21 June 2017; Submission, *Open Courts Act Review*, 30 August 2017.

326 See 10.4.2.4 and 10.4.5.2 above.

327 Supreme Court of Victoria (members of the Supreme Court), Consultation, *Open Courts Act Review*, 21 November 2016; Victorian Civil and Administrative Tribunal (President Garde), Consultation, *Open Courts Act Review*, 12 December 2016; Victorian Bar (Richard Wilson), Consultation, *Open Courts Act Review*, 3 May 2017.

328 Liberty Victoria, Submission, *Open Courts Act Review*, 30 May 2017.

civil proceedings; lawyers were increasingly seen to bring applications for suppression orders under the Act when less serious alternatives such as pseudonym orders or orders preserving the confidentiality of the court file for a proceeding were available and would previously have been used.[329]

10.7 National harmonisation

310. Given the challenge posed by the digital environment to the enforcement of geographical limits on suppressed information, some stakeholders suggested that jurisdictional quarantining of information may no longer be viable.[330] Justice Blue, of the Supreme Court of South Australia, noted that the Chief Justices of each Supreme Court in the States and Territories had set up a Harmonisation of Rules Committee with representatives from each jurisdiction. As part of the national harmonisation effort, Justice Blue had proposed to that Committee the creation of a central register of all suppression orders made in Australia. No action has been undertaken on this proposal to the present time.

311. The MEAA noted that there were differences in the propensity to make suppression orders between each Australian jurisdiction. It contrasted Victoria and South Australia, where it was asserted a large number of orders relative to the caseload of each court and tribunal were made, with Western Australia and Queensland, where the numbers were relatively low. It suggested that the Law, Crime and Community Safety Council of the Council of Australian Governments be urged to consider a uniform national approach to suppression orders.

312. Haroon Hassan, of the Victorian Bar, suggested that the legal terms for protecting sensitive information be harmonised across Australian jurisdictions, as it would help to create a unified body of law.

10.8 Exposing entrenched patterns of offending from childhood into adulthood

313. Victims groups such as the victims representatives of the Victims of Crime Consultative Committee and the Forget-Me-Not Foundation submitted that, while protection of an offender's identity served to protect the identity of victims in some cases, it was not unknown for there to be cases in which offenders were emboldened to continue offending by the knowledge that their identities were protected. A victim member of the Committee said, in a few cases, individuals convicted of serious crimes such as murder continued to torment victims or their families, and these victims faced difficulty in protecting their safety when the identity of the perpetrator was unknown to them.

314. Both the Children's Court of Victoria and the Victorian Commission for Children and Young People accepted that the rationale for protecting the identities of juvenile

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329 Supreme Court of Queensland (Anne Stanford, current Principal Information Officer at the Queensland Courts – Supreme & District, former Strategic Communications Manager at the Supreme Court of Victoria), Consultation, *Open Courts Act Review*, 17 March 2017.

330 Supreme Court of Australian Capital Territory (Justice Refshauge and Registrar Glover), Consultation, *Open Courts Act Review*, 15 June 2017; Supreme Court of South Australia (Justice Blue and Sylvia Kriven), Consultation, *Open Courts Act Review*, 28 March 2017; Media, Entertainment and Arts Alliance, Submission, *Open Courts Act Review*, 1 March 2017.

offenders, namely to avoid stigmatising children or inhibiting their rehabilitation, was not as forceful when an individual's offending extended into adulthood.[331] They said, however, that the disclosure of convictions for offending committed as a child should remain at the discretion of the court sentencing an offender. President Chambers argued for two further provisos on disclosure: first, prior offending as a child should only be disclosed provided there was sufficient connection between the juvenile and adult offending in question. Second, exposure of prior offending should not be automatically available for offenders once they had turned 18 given the frequent incidence of offending committed by young adults into their early twenties. President Chambers warned that mere disclosure of child offending would reveal only a partial picture of continued criminality in the absence of information about the circumstances of the offending. Similarly, Principal Commissioner Buchanan said that disclosure of the prior offending of a person as a child upon conviction of crimes as an adult should only occur when there was sufficient similarity between the child and adult offences and the adult offending was of a serious character.

315. The discretionary disclosure of offending committed as a child where offending continued into adulthood received support from Victoria Police, criminal defence lawyers consulted through the LIV, and the DPP. Justice Refshauge, from the Supreme Court of the ACT, also supported disclosing entrenched patterns of offending because it added transparency to the sentencing process.[332] He said that by precluding sentencing judges, in their judgments, from explaining that a particular individual's behaviour had been aggravated by a repeated pattern of offending extending into childhood, it created the inaccurate perception that a particularly severe sentence had been imposed.

10.9 Other legislation affecting open justice

10.9.1 Serious Sex Offenders (Detention and Supervision) Act 2009

316. Stakeholders sharply diverged as to whether the publication provisions under the *Serious Sex Offenders (Detention and Supervision) Act 2009* ('SSODSA') appropriately served the ends of open justice.

317. Some stakeholders submitted that the SSODSA provisions struck an appropriate balance between the preservation of the privacy of individuals in proceedings under the Act, being the person subject to post-sentence supervision, and the need for open justice.[333] Three key reasons were offered in support of avoiding publication of identifying details of sex offenders: exposure of sex offenders impeded their rehabilitation; placed them, or others misidentified as them, at the risk of harassment; and potentially increased the anxiety of victims and inhibited their recovery. Corrections Victoria asserted that, while most offenders succeeded in having their identifying details suppressed, the applications for non-publication

331 Children's Court of Victoria (President Chambers), Consultation, *Open Courts Act Review*, 26 June 2017; Commission for Children and Young People (Principal Commissioner Buchanan), Consultation, *Open Courts Act Review*, 1 June 2017.

332 Supreme Court of Australian Capital Territory (Justice Refshauge), Consultation, *Open Courts Act Review*, 15 June 2017.

333 Corrections Victoria, Victorian Department of Justice and Regulation, Consultation, *Open Courts Act Review*, 28 April 2017; Director of Public Prosecutions, Submission, *Open Courts Act Review*, 30 June 2017; Victoria Legal Aid, Submission, *Open Courts Act Review*, 30 May 2017.

orders were frequently rigorously contested. There was nothing to suggest that judges failed to apply themselves in this decision-making process; courts made non-publication orders in the context of a finely-weighted scheme that took into account constitutional and rights-related issues, such as ensuring a minimum of interference with a person's liberty and privacy. Corrections Victoria argued that an offender's risk of re-offending should be conceptualised as a continuum; supervised offenders being released into the community had reduced their risk of re-offending through behavioural intervention programs. However, if offenders had their identities and whereabouts disclosed, research supported the view that it heightened the psychological stress they experienced and could have a detrimental effect on their rehabilitation.[334] Further, only one victim had raised a complaint in relation to the operation of the scheme.

318. Victoria Legal Aid argued for maintenance of the current level of suppression afforded to proceedings under the SSODSA on the basis that the scheme of post-sentence supervision and detention was intended to be a civil, not criminal scheme, seeking to effect prevention of further offending, protection of the community and rehabilitation, rather than punishment, of the offender.

319. As to the protection of evidentiary information under sections 182 and 183, the Director of Public Prosecutions stated that information contained in clinical assessment reports enabled the court to properly assess the risk and the level of supervision required. As these reports contained detailed personal information about victims and other persons, prohibiting publication protected victims and encouraged full and frank disclosure to medical professionals.

320. Conversely, other stakeholders, particularly media groups, perceived a number of problems with the operation of the SSODSA provisions.[335] Both the submissions of the Joint Media Organisations and the Herald and Weekly Times complained that non-publication orders in relation to an offender's identity and whereabouts were being made as a matter of course. This was clearly contrary to the intention of Parliament, as the scheme under the SSODSA contemplated that such information would be available to the public, unless it was in the public interest to make an order to the contrary. This was particularly the case as section 184 of the SSODSA had been amended in order to require courts to consider the protection of the community, in addition to other factors, when deciding whether to make an order prohibiting publication of an offender's identity.

321. The Joint Media Organisations submission suggested that the Review recommend that judicial training in relation to open justice cover the SSODSA. In particular, judges should be reminded to give effect to Parliament's intention that community protection be prioritised over protection of offenders' identities and to avoid ready acceptance of the argument that reporting an individual's identity would increase their stress, which in turn would increase the risk of re-offending. The submission also proposed that section 184 of the SSODSA be amended in order to reflect that prohibition of publication should only be ordered in exceptional circumstances necessitated by community protection.

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334 W Edwards and C Hensley, 'Contextualizing Sex Offender Management Legislation and Policy: Evaluating the Problem of Latent Consequences in Community Notification Laws' (2001) 45 *International Journal of Offender Therapy and Comparative Criminology* 83.

335 Joint Media Organisations, Submission, *Open Courts Act Review*, 12 May 2017; Elissa Hunt, The Herald and Weekly Times, Submission, *Open Courts Act Review*, received on 9 May 2017; Senator Derryn Hinch (Senator for Victoria, Parliament of Australia), Consultation, *Open Courts Act Review*, 19 April 2017.

322. In its submission, the Herald and Weekly Times criticised the provisions precluding publication of the identity and whereabouts of an offender because the public interest lay in the community being able to inform itself of the management of the community's most dangerous individuals for its safety and to scrutinise the reasons for depriving a person of their liberty beyond the period of their sentence. The absence of a requirement to notify the media of hearings to make non-publication orders under the SSODSA, unlike the Open Courts Act, was also criticised. The Herald and Weekly Times submission also criticised section 182 of the SSODSA on three main bases: first, it was difficult for media organisations to provide clarifying details in such cases because it was unclear whether the source of material presented in the hearing was prohibited; second, the protection under section 182(1)(c) of the identity of any person attending the hearing was overly broad in expression; and third, victims were unable to consent to identification if they chose to do so.

323. The Herald and Weekly Times suggested that the Review recommend that there be no non-publication available under the SSODSA, and that the precise information subject to protection be made in proceeding suppression orders under the Open Courts Act.

324. Senator for Victoria, Derryn Hinch, submitted that there was a clear public safety basis upon which the identities and whereabouts of sex offenders should be disclosed.[336] He pointed to the National Sex Offender Public Website, run by the United States Department of Justice, as a model for appropriately identifying individuals and providing details of their crimes without being specific enough to disclose the identities of victims.

325. Although Victoria Police did not express an opinion on the adequacy of the SSODSA provisions, it noted that vigilantism did not appear to be a practical problem in Victoria.

10.9.2 Other Acts

326. Both the submissions of the Joint Media Organisations and the Herald and Weekly Times suggested that section 464JA of the Crimes Act be repealed or amended to permit publication of records of interview in certain circumstances, unless the court ordered otherwise. They argued that the rationale for protection of such information was lost after the proceedings had come to an end.

327. The Herald and Weekly Times submitted that it was desirable to promote greater consistency across different sources of power affecting open justice, for example by introducing the same requirements in relation to duration of an order, the necessity for making an order and notification of applications to media organisations as under the Open Courts Act. It suggested that the *Victims of Crime Assistance Act 1996* (Vic) be amended to permit reporting of proceedings with the consent of the victim.

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336 Senator Derryn Hinch (Senator for Victoria, Parliament of Australia), Consultation, *Open Courts Act Review*, 19 April 2017.

11 Results of Data Analysis

11.1 Context for analysis

328. The number of suppression orders, as an index of the state of open justice in a jurisdiction, should be considered in context, by reference to the overall caseload of Victorian courts and tribunals.[337]

329. Considering the latest figures available, for the period 2014–5, Victorian courts and tribunals finalised more than 400,000 cases in total. The Victorian Court of Appeal finalised 503 appeals and applications for leave to appeal. The Trial Division of the Supreme Court finalised approximately 6,712 cases. The County Court finalised 12,264 cases. The Magistrates' Court finalised 305,272 civil and criminal cases. The Victorian Civil and Administrative Tribunal finalised 85,887 cases.

330. Importantly, when the number of suppression orders is considered as a proportion of the caseload borne overall by Victorian courts and tribunals,[338] the conduct of proceedings in Victoria is overwhelmingly open to public scrutiny.

11.2 Overview of all orders

331. The Open Courts Act came into effect on 1 December 2013. Over a period of around three years from 1 December 2013 until 31 December 2016, a total of 1,621 orders relating to open justice (inclusive of interim orders, suppression orders, orders varying or extending suppression orders, revocation orders and closed court orders) were made by all courts in the Victorian jurisdiction under various sources of power. 1,299 suppression orders were made under the Open Courts Act. 290 orders with the effect of suppression were made under sources of power apart from the Open Courts Act. 24 closed court orders were made under section 30 of the Open Courts Act.

332. As multiple orders were often made in single proceedings, the total number of orders does not correspond to the total number of proceedings.[339] It was not possible to identify with precision the number of cases in which multiple orders were made for a number of reasons.[340] Divided into individual courts, the estimated number of cases in which more than one order was made is as follows:

    a. Magistrates' Court: 80 cases (142 out of 445 orders were further orders made in cases involving multiple orders)

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337 These figures are based on the annual reports of Victorian courts and VCAT. These are available at: <http://www.supremecourt.vic.gov.au/find/publications/annual+reports+(home)>; <http://www.countycourt.vic.gov.au/annual-reports>; <http://www.magistratescourt.vic.gov.au/practice-directions-publications/annual-reports> and <https://www.vcat.vic.gov.au/news/vcat-annual-report-2014-15-now-available>.

338 See 11.2.1 and 11.3.1 below.

339 The terms 'cases' and 'proceedings' are used interchangeably here.

340 For example, this estimate does not take into account the number of proceedings which were appealed from the decision of a lower court and in which a suppression order was made both in a lower court and on appeal. This factor would further diminish the number of actual cases.

b. County Court: 137 cases (218 out of 638 orders were further orders made in cases involving multiple orders)

c. Supreme Court:[341] 53 cases (108 out of 230 orders were further orders made in cases involving multiple orders)

d. VCAT: 18 cases (20 out of 308 orders were further orders made in cases involving multiple orders)

333. This indicates that the aggregate figure of 1,621 orders mentioned earlier is somewhat misleading, with the true number of cases in which suppression orders were made being significantly lower.

11.2.1 Dataset

334. For the purpose of this data analysis, the dataset consists of orders made between 1 January 2014 and 31 December 2016. Where the term 'order' is used without more, it encompasses all the distinct categories of orders, including proceeding suppression orders, broad suppression orders, interim orders, variation orders, extension orders and revocation orders. The decision to exclude orders made in December 2013 was made so as to focus on trends arising from data across three complete calendar years.

335. Between the period 1 January 2014 and 31 December 2016, Victorian courts made 1,594 orders with the effect of suppressing information under various sources of power.[342] This amounted to an average of 531 orders made per year. Of the total 1,594 orders, 136 were interim orders, 1,411 were suppression or variation orders, and 31 were extension orders.[343] 16 orders revoking suppression orders were made in this period.

336. These data, by nature of order and court, are set out in Table 1 of Appendix 3.

11.3 Suppression orders under the Open Courts Act

11.3.1 Overall number of orders

337. Over the period 1 January 2014 until 31 December 2016, 1,279 orders with the effect of suppression were made under various provisions of the Open Courts Act. As Table 2 of Appendix 3 indicates, roughly consistent numbers of orders were made each year following the Open Courts Act's passage. Each year accounted for approximately a third of the orders made in the period between 2014 and 2016. This amounted to an average of 426 orders made annually.

338. In overall terms, the Magistrates' Court made the most suppression orders under the Act (430 orders, or 33.6%), followed by the County Court (377 orders, or 29.5%), then VCAT (299 orders, or 23.4%), and finally, the Supreme Court (173 orders, 13.5%). However, it should be noted that the Supreme Court is responsible

341 In this chapter, the term 'Supreme Court' includes the Court of Appeal, unless stated otherwise.

342 Two orders of the set of 1,594 orders do not clearly identify the date on which they were made. However, other information established that they were likely made within the period of the dataset.

343 Cf n 346 below.

for a much higher number of suppression orders, proportionate to caseload, than the other courts and VCAT.[344]

11.3.2 Type of order

11.3.2.1 Proceedings and broad orders

339. As Table 3 in Appendix 3 demonstrates, courts overwhelmingly made more proceedings orders relative to broad suppression orders. The proceedings order provisions under part 3 of the Act were relied upon in 1,174 instances. The provisions under part 4 of the Act, permitting the making of broad suppression orders, were relied upon in making 117 orders.[345] One order appeared to be an order with features of both a proceedings order and a broad order, in contravention of the scheme under the Act.

340. The Magistrates' Court was responsible for the vast majority of broad suppression orders, having made 109 of the 117 orders. It nevertheless made substantially more proceedings orders (74.9% or 322 orders) than it did broad suppression orders (25.3% or 109 orders). The County Court made just 6 orders (representing 1.6% of orders made by the County Court) in reliance on its power to make broad suppression orders under section 25. The County Court appeared to have erroneously made two orders, and the Supreme Court four orders, under section 26, the power conferred solely upon the Magistrates' Court to make broad suppression orders.

11.3.2.2 Interim orders

341. A total of 142 orders in the dataset were interim orders made under section 20 of the Open Courts Act.[346] Of the courts, the Magistrates' Court was the most frequent maker of interim orders, having made 73 interim orders (51.4% of all interim orders). The County Court made 37 interim orders (26.1%). The Supreme Court made 25 interim orders (17.6%). VCAT made only 7 interim orders (5%).

11.3.3 Duration

342. Overall, courts, excepting VCAT, exhibited similar behaviour in setting the duration of orders. Somewhere in the range of 40-50% of orders made by all courts apart from VCAT set out specific dates of expiry, as opposed to setting the date of expiry by reference to a triggering event or failing to specify the time of expiry. A significant proportion of orders (336 out of 980 orders, or 34%) made by courts apart from VCAT expired when an event in relation to a proceeding had taken place, for example upon the hearing of the substantive application in the case of interim orders or the return of the jury's verdict or conclusion of a co-accused's trial in the case of substantive orders.

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344 See the caseloads of each court at 11.1 above.

345 31 orders were made under multiple provisions of Part 4 of the Act. To avoid double-counting, those orders were isolated and counted a single time, bringing the total number of orders made under Part 4 to 117.

346 Although Table 1 of Appendix 3 indicates that 136 interim orders were made, the small discrepancy between the figures stated in Table 1 and in this section reflects that a small number of orders indicated that they were suppression orders made on a full basis whilst conflictingly being made under section 20 of the Open Courts Act. The difference in their treatment in the presentation of the data does not affect the overall numbers.

343. By contrast, the overwhelming majority of VCAT orders (277 out of the 299 orders made by VCAT, or 93%) expired when an event unconnected to the proceeding took place, for example the death of the applicant for a suppression order or a witness in the proceeding.

344. Of all orders made by all courts, only 7% (94 out of 1,279 orders) did not specify a date of expiry, including by stating that the order would remain in effect 'until further order'. The Magistrates' Court was responsible for the bulk of this category of orders, accounting for 52 of the 94 orders with no specified date of expiry. 2 orders appeared to be indefinite in duration.

345. Table 4 in Appendix 3 sets out the raw figures relevant to the duration of the orders.

11.3.3.1 Orders made for five years

346. A complaint raised in submissions to the Review was that orders were commonly made without regard for the duration necessary in the specific circumstances of the case. In order to assess this complaint, the Review examined the number and content of orders which expired after a duration of 5 years, that period being the 'default' duration provided for under section 12 of the Open Courts Act. The Review's findings do not bear out the existence of a significant issue given the relatively small number of such orders and the typical justification for making them.

347. 143 orders, or 11% of the 1,279 orders made under the Act overall, had a duration of approximately five years.[347]

348. The Review examined five-year orders in terms of the court that issued the order, the grounds for the order and the subject-matter for the order. Five-year orders were most likely to be issued by the County Court. The 85 five-year orders made by the County Court represent 59% of all five-year orders and 23% of the 377 orders made by the County Court under the Act. Five-year orders comprised 18% of Supreme Court orders and just 6% of Magistrates' Court orders.

349. In sharp contrast to the bases on which orders were made generally, five-year orders were most commonly made on the ground of necessity to protect the safety of any person; 87 of the 143 total orders relied at least partially on this ground. The second most common basis for making these orders (67 of 143 orders) was the general ground of necessity in the public interest.[348] To the limited extent that a justification for the order was stated where an order was made on the general ground (11 of the subset of 67 orders), the most common purpose stated for such orders was to encourage informers, witnesses or notifiers to give evidence by protecting their privacy. It would appear that the lengthy duration of these orders was supported by a justification likely to extend past the typical duration of proceedings, namely to protect the safety of persons, typically witnesses or informers.

350. The most frequent category of subject-matter for orders made for 5 years was 'non-specific', that is, the order did not sufficiently identify, at least to some extent, the information to be suppressed. This issue affected 42 orders, with the County Court responsible for the majority of such orders. As might be expected from the most

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[347] Orders coded as having a duration of 5 years reflect that they were made for a duration of between 1,730 and 1,878 days. There are 1,825 days in 5 years.

[348] See n 350 below.

common grounds for orders made for 5 years, the subject matter of such orders, where adequately specified, primarily concerned information relating to witnesses. Although concealment of information relating to the accused and the victim also represented significant categories of suppressed subject matter, in view of the small number of orders made for 5 years in total, of which these orders represent a still smaller subset, it is difficult to detect a significant systemic problem.

11.3.4 Grounds

11.3.4.1 Overall patterns

351. Orders suppressing information were often made on multiple grounds. As a consequence, the raw numbers used here in tables represent individual instances where the ground in question was relied upon to make an order. Relatedly, although the *language* of each of the grounds used in the Review's data analysis corresponds to the terms in which the statutory grounds available under sections 18, 25 and 26 of the Open Courts Act are expressed, it is not necessarily the case that the specific statutory power under the applicable Open Courts Act provision was relied upon in instances where its *language* was used. This is because orders were sometimes made pursuant to a statutory power under the relevant sub-section, for example under section 18(1)(a), being a variation of the general ground that the order was necessary in the interests of justice, but incorporated the language of other grounds as the purpose for making the order, for example that it was necessary to avoid distress or embarrassment to a witness.

352. The data included records a second, related tier of information where available: the purpose of, or stated justification for, the order. The intention of including this field of information was twofold: first, there is a reasonable argument that the Open Courts Act contemplates a scheme by which orders must identify both a purpose and ground for making orders, having used those terms separately in the statute.[349] Second, as mentioned above, the grounds for making an order can broadly be divided into general and specific grounds. Orders made on general grounds required further elaboration as to their justification in order to understand the specific rationale for them.

353. A brief overview of the overall results by ground is set out in Table 5 of Appendix 3. Table 6 sets out the additional purposes or justifications specified or apparent from the face of orders, where available.

354. The key findings of the overall results are that the most common ground was the general ground of necessity in the interests of justice,[350] whether relied upon under section 18(1)(a) or (f)(ii) in relation to proceeding suppression orders or under sections 25 or 26 in relation to broad suppression orders. The number of orders with at least one general ground was 797 (accounting for 62% of orders). As VCAT orders were principally made under the VCAT-specific power under section 18(1)(f)(ii), it is unsurprising that the VCAT-specific ground of necessity in the interests of justice of itself represented 282 orders, or 22% of the total.

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349 Jason Bosland, 'Two Years of Suppression under the Open Courts Act 2013 (Vic)' (2017) 39 *Sydney Law Review* 1, 22.

350 For clarity, the phrase 'necessity in the interests of justice' is intended to capture orders made 'to prevent a real and substantial risk of prejudice to the proper administration of justice that cannot be prevented by other reasonably available means', as stated under section 18(1)(a).

355. The second most frequently used basis for orders was the ground of necessity to protect the safety of a person, accounting for 426 orders (33%). When viewed cumulatively, the ground of necessity to prevent undue distress or embarrassment to a person, either a complainant, witness or child witness, accounted for 253 orders (20% of orders).

356. Contrary to the requirements of the Act, there were 148 of 1,279 orders (12%) where no ground was specified.

11.3.4.2 Overall patterns: general ground as sole ground

357. Of the orders which relied on the general ground, there were 519 orders, or 41% of the total 1,279 orders made under the Act, where the sole stated ground for the order was the general ground. 210 of those orders were made by VCAT under its unique statutory power, while 309 orders were made by the courts under the general statutory power available under section 18(1)(a).

358. It is useful to break this subset of orders down by jurisdiction, as the VCAT orders reflect different considerations to the orders made by the courts.

359. In relation to the courts, in the majority of instances where the general ground was the sole ground for making an order, no additional justification was apparent from the face of the order (173 of 309 orders, or 56%). Where justifications were provided, orders were largely made to ensure the fair trial of, or not compromise an ongoing investigation into, a person, including ensuring the jury did not have access to prejudicial information. 106 orders appeared to have this purpose.

360. The subject matter of orders made by courts solely on the general ground was not adequately specified in a significant proportion of cases (125 of 309 orders, or 41%). Of the 184 orders that adequately specified the subject matter, the primary categories of suppressed material were miscellaneous information about the accused or defendant (79 orders, or 43%), the identity of the accused or defendant (55 orders, or 30%) and specific evidence (44 orders, or 24%).

361. The duration of orders made by courts on the general ground only was most commonly expressed by reference to an event in relation to a proceeding (130 of 309 orders, or 42%). A substantial number of orders (113 orders, or 37%) provided a specific date on which they were to cease. Only 26 orders (8%) did not adequately specify their duration.

362. In relation to VCAT orders where the general ground was the sole ground relied upon, the primary justification, accounting for 127 of the 210 orders (60%) made by VCAT, was that suppression was necessary to conceal sensitive health information of the subject. Sensitive health information typically concerned the subject's mental health or disability. 43 orders (23%) made solely on the general ground were justified on the basis of sensitive personal information of the subject, for example the commission of past offences or protection of the privacy of the subject's family. 41 orders (20%) were justified on the basis that the proceeding closely concerned a child.

363. In line with the purpose for such orders, and the tendency of VCAT orders to apply pseudonyms in order to conceal identity, the most frequently suppressed categories of subject matter in VCAT were the identity of the applicant or respondent (193 of

210 orders, or 92%) and other information about the applicant or respondent, including the identity of the subject's family members (186 of 210 orders, or 89%). A substantial number of orders (110 of 210 orders, or 52%) also concealed the whereabouts of the applicant or respondent.

364. The duration of VCAT orders made solely on the general ground was overwhelmingly determined by reference to an event outside of the proceeding, typically the death of the subject. 198 of 210 orders (94%) were set to expire on this basis.

11.3.4.3 Supreme Court

365. Consistent with the picture revealed by the overall results, there were two grounds that accounted for the vast majority of orders made by the Supreme Court. The main ground was the general ground of necessity in the public interest. This ground was relied upon in 100 of the 173 orders (58%) made by the Supreme Court over this period. A significant proportion of orders were also made, at least partially, on the ground of necessity to protect the safety of any person (72 of 173 orders, or 42%). 23 orders (13%) did not specify the grounds on which they were made.

11.3.4.4 County Court

366. The County Court relied most frequently upon the general ground of necessity in the public interest, whether described in terms of its power to make proceeding suppression or broad suppression orders. 222 of 377 orders (59%) made under the Open Courts Act by the County Court were made on the general ground. 158 orders (42%) were made on the basis of the need to protect the safety of any person. 44 orders (12%) were made on the grounds of necessity to prevent undue distress or embarrassment to a person. Only 6% of orders did not specify the ground on which they were made.

11.3.4.5 Magistrates' Court

367. The Magistrates' Court was the only court which relied on a specific ground more frequently than the general ground. 193 of its 430 orders (45%) in total relied on the ground of necessity to protect the safety of any person. 190 of 430 orders (44%) were made on the general ground, either as proceeding or broad suppression orders. The ground for making 95 out of the 430 orders (22%) was referable in some respect to the necessity to prevent undue distress or embarrassment to a person. 92 orders (21%) were non-specific as to the ground for their making.

11.3.4.6 VCAT

368. The most commonly-used ground for an order made by VCAT, by a large margin, was the special power committed to VCAT under section 18(1)(f) to make an order 'in the interests of justice'. 282 of 299 orders relied upon this ground, accounting for 94% of all VCAT orders.

369. A modest proportion of orders were made to avoid causing undue distress or embarrassment to a complainant or witness (61 of 299 orders, or 20%) and to avoid causing undue distress or embarrassment to a child who is a witness (13%).

370. 4% of the orders made by VCAT were inadequately specific as to their ground to some extent.

11.3.5 Subject matter

11.3.5.1 Overall patterns

371. Due to the different compositions of the types of cases heard by each court and tribunal, it is useful to consider trends in suppressed subject matter segregated by each jurisdiction. Nevertheless, some insights can be gained from considering the subject matter suppressed overall. Table 7 of Appendix 3 sets out the raw data for this field.

372. As with the grounds for suppression orders, orders suppressing information covered multiple categories of subject matter. The raw numbers used here reflect individual cases where a particular category of subject matter was relied upon rather than representing individual orders. Orders which suppressed the identity of a party to the proceeding, particularly in VCAT, were expressed on occasion as orders applying a pseudonym, although Open Courts Act provisions were used. Although pseudonym orders and suppression orders are distinct, from a functional assessment of the type of subject matter that is withheld from the public it is appropriate to regard them as similar. Pseudonym orders have accordingly been treated without distinction in the data analysis.

373. The leading two categories of suppressed material overall were the identity of the applicant or respondent in a proceeding and instances where information was not adequately specified. Expressed in terms of individual cases, 307 of 1,279 orders (24%) concerned the identity of the applicant or respondent, while non-specificity of subject matter was a feature of 306 of 1,279 orders (24%). The former result is attributable to the functions of a single Tribunal because VCAT made a large volume of such orders. Although the second result is troubling on its face, the high proportion of non-specific orders should be qualified for two reasons. This issue is discussed below.[351]

374. Information broadly relating to the accused or defendant, including identities, images, whereabouts, prior convictions, and other information referable to the accused or defendant in some way, constituted 22% of all categories of suppressed information. Strikingly, given that suppression of the accused's prior convictions is often a source of complaint, the prior convictions of the accused or defendant represented just 1% of all categories of suppressed information. Information broadly relating to witnesses represented 16% of all categories of suppressed information. Information generally relating to victims amounted to 15% of all categories of suppressed information.

11.3.5.2 Overall patterns: blanket bans

375. Of 1,279 orders, 274 orders (22%) were 'blanket bans' on information, that is, they either did not identify the subject matter to be suppressed or, more commonly, stated that what was to be suppressed was the 'whole or any part of the

351 See 11.3.5.3 below.

proceeding'.[352] The two courts responsible for the majority of 'blanket ban' orders were the County Court (139 orders, or 51%) and the Magistrates' Court (103 orders, or 38%). The Supreme Court accounted for 28 such orders (10%). VCAT made 3 'blanket ban' orders (1%).

376. There were two main grounds for making orders that did not particularise any subject matter. 177 orders were made, at least in part, on the general ground of necessity in the public interest, whether as proceeding orders or broad orders. 105 of the 139 such orders (76%) by the County Court were made on this ground, in contrast to the Magistrates' Court, which made 53 of its 103 orders (51%) at least partially on this ground. The second most common ground was necessity on the basis of protection of safety of any person, accounting for 105 orders in total. Both the County Court and the Magistrates' Court each made 53 orders which relied on this ground in part.

377. 154 orders did not provide any further specification as to the purpose of the order. This represents 56% of blanket ban orders, or 12% of all orders. A further 48 orders indicated that they were made for one of three possible purposes: ensuring the fair trial of another person, preventing the jury from access to prejudicial information and ensuring that ongoing investigations were not prejudiced.

378. Tables 8 and 9 of Appendix 3 provide data related to the stated grounds and apparent justifications for blanket ban orders respectively.

11.3.5.3 Accounting for inadequate specificity

379. Although the failure to particularise the subject matter suppressed by an order represents formal non-compliance with the provisions of the Open Courts Act, it does not necessarily indicate failure to comply with the spirit of the Act for two reasons.

380. First, the inclusion of interim orders in the total number of orders made under the Open Courts Act tends to inflate the number of orders which are non-specific as to subject matter. As interim orders are provisionally made in advance of a court or tribunal determining the substantive application for a suppression order, they may not sufficiently particularise the scope of suppression. The inclusion of interim orders accounts for a modest proportion of non-subject specific orders; 40 of the instances where orders were not specific in some respect as to their subject matter involved interim orders, representing 13% of all orders not specific enough as to their subject matter.

381. Second, as courts have long recognised, disclosure of the information that is the subject of suppression will, in some cases, frustrate the very objective of suppression.[353] For example, protection of the identity of a police informer will be undermined if the terms of a suppression order provide any information which identifies that person. This may extend to obscuring the ground upon which an order was made; in some cases, stating that an order was made on the basis of protecting a witness's safety may be sufficient to reveal the identity of that person. From the results discussed in the previous section, it is clear that a significant proportion of the 'blanket ban' orders served the need of protecting a person's

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[352] For clarity, 'blanket ban' orders do not represent orders where multiple subject matter categories were selected, only one of which was the 'not specified' category.

[353] See, eg, *Brady* (2015) 252 A Crim R 50.

safety, as that category was the second highest basis for making such orders (representing 105 of 274 orders, or 38%). It is also plausible that some proportion of the 177 orders made on general grounds, without further information as to their purpose, were made to protect the identity of an informer.

11.3.5.4 Supreme Court

382. The largest single category of information suppressed by the Supreme Court was the identity of witnesses, accounting for 28% of orders (48 of 173 orders) made by the Supreme Court under the Open Courts Act. Expressed as a proportion of all categories of suppressed material rather than of individual orders, information relating to witnesses, including images, whereabouts or other identifying information, composed 24% of suppressed matter by subject overall.

383. The second largest category of suppressed material was where suppressed information was not specified with sufficient particularity, at least to some degree (43 of 173 orders, or 25%).

384. The only other significant category of subject matter suppressed by the Supreme Court was information pertaining to specific evidence, which made up 33 of 173 orders (19%) made by the Supreme Court.

11.3.5.5 County Court

385. The County Court had the poorest performance of all courts in failing to adequately specify the subject matter being suppressed. The single-biggest subject matter category was where information was not specified at least partially, amounting to 150 of 377 orders (40%) made by the County Court.

386. The next largest categories of suppressed material were the identity of the accused or defendant in the proceeding (85 of 377 orders, or 23%) and other information relating to the accused or defendant (100 of 377 orders, or 26%). Altogether, expressed as a proportion of all suppressed material rather than individual orders, categories of information relating to the accused or defendant accounted for 37%.

387. Specific evidence (55 of 377 orders, or 15%) and the identity of witnesses (43 of 377 orders, or 11%) also made up significant categories of suppressed information.

11.3.5.6 Magistrates' Court

388. The largest category of material suppressed by the Magistrates' Court (110 of 430 orders, or 26% made by the Magistrates' Court) was where the suppressed information was not adequately specified.

389. Where the subject matter was specified, the most frequently relied upon categories were suppression of the identity (98 of 430 orders, or 23%), whereabouts (80 of 430 orders, or 19%) of the accused or defendant in the proceeding, and other identifying information relating to the accused or defendant (99 of 430 orders, or 23%). Taken together and expressed as a proportion of all suppressed material rather than individual orders, categories of information referrable to the accused or defendant in some respect represented 37% of the kinds of information suppressed overall.

390. The identity of witnesses (85 of 430 orders, or 20%), specific evidence (76 of 430 orders, or 18%) and the identity of victims (64 of 430 orders, or 15%) also represented significant categories of suppressed information.

11.3.5.7 VCAT

391. The major categories of information suppressed by VCAT were the identity (262 of 299 orders, or 88%) or whereabouts (159 of 299 orders, or 53%) of the applicant or respondent in the proceeding, or other information (generally of an identifying nature) relating to either of those parties (250 of 299 orders, or 84%). Cumulatively, and expressed as a proportion of all categories of suppressed material rather than individual orders, these categories represented 69% of all categories of information suppressed by VCAT.

392. Of the remaining kinds of information, the most significant categories of suppressed information were the identity of victims (70 of 299 orders, or 23%) and other, typically identity-related, information pertaining to them (65 of 299 orders, or 22%).

393. There were only 3 occasions on which VCAT orders lacked specificity as to subject matter in some respect, representing a negligible percentage of the kinds of information suppressed.

11.3.6 Notice

11.3.6.1 Notice and dispensation with requirement

394. The figures below were gathered on the assumption that an applicant for a suppression order under the Open Courts Act generally complied with the requirement under section 10 to give three business days' notice of the application. This is because the form of the orders only record when the requirement to give notice was dispensed with, pursuant to section 10(3) of the Act. The Review requested records of notification of applications from each of the courts, but such records were either not kept or were not easily accessible.[354] In the absence of easily available records of notification, it is not possible to verify the assumption that notice was given by default.

395. It would appear that, at least from the face of orders, the requirement to give notice has been dispensed with in only 2% of cases. Altogether, only 20 out of the 1,279 orders made under the Act record that the notice requirement was dispensed with. Dispensation of the requirement predominantly arose in the jurisdictions of the Supreme Court (11 cases) and the County Court (8 cases).

11.3.6.2 Own motion

396. By virtue of section 10(4) of the Open Courts Act, no notice is required when a court or tribunal makes a proceeding suppression order on its own motion. Between 2014 and 2016, 361 orders, or 28% of all 1,279 orders under the Open Courts Act, were made on a court or tribunal's own motion. That is to say, 918 orders, or 72% of all orders, required the applicant for a suppression order to give notice or satisfy the court of grounds to dispense with the requirement.

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354 See 10.4.4 above.

397. The vast majority of the 361 orders made on a court or tribunal's own motion were made by VCAT (299 orders, or 83%), reflecting the specialised nature of the Tribunal's jurisdiction. In contrast to other Victorian courts, VCAT made more orders on its own motion than by application of the parties to a proceeding; 211 orders were made on the Tribunal's own motion, accounting for 71% of the total orders made by VCAT. The County Court, Supreme Court and Court of Appeal made orders on the court's own motion approximately 20-30% of the time an order was made. The Magistrates' Court almost never made orders on its own motion.

398. Table 10 of Appendix 3 sets out the data in relation to orders made on a court or tribunal's own motion.

11.3.7 Unopposed orders

399. Under section 14 of the Open Courts Act, the court or tribunal must be satisfied that the grounds for making an order are established on the basis of evidence or other sufficiently credible information. It follows that orders under the Act cannot simply be made 'by consent'; the judge or tribunal member must be affirmatively satisfied.

400. Although minor in scale, it is troubling that 46 orders made by the courts, or 4% of orders under the Open Courts Act, record that they were obtained by consent. It is unclear whether the use of 'by consent' simply indicates that there was no opposition to an application for a suppression order otherwise substantiated by evidence. The County Court and VCAT were responsible for the bulk of these orders, having made 22 orders and 17 orders respectively.

11.4 Suppression orders under other sources of legislation

401. Between 1 January 2014 and 31 December 2016, a total of 285 orders with the effect of suppression were made under sources of power apart from the Open Courts Act.[355]

402. Two Acts were responsible for the overwhelming majority of these 285 orders. The most common basis for making an order was section 184 of the *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) ('SSODSA'). Orders made under this provision accounted for 143 of the total orders made under other sources of power or approximately 50%. The second most frequently-used source of power was section 75 of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) ('CMIA'), which represented 120 of the total orders or approximately 42%.

403. It is noteworthy that the County Court was responsible for making the vast bulk of orders made under other sources of power, having made all but one of the 143 orders under the SSODSA and 92 orders under the CMIA.

404. A virtually negligible number of orders was made under other Acts such as section 7 of the *Bail Act 1977* (Vic), section 534 of the *Children, Youth and Families Act 2005* (Vic), section 133 of the *Public Health and Wellbeing Act 2008* (Vic) and relevant provisions of the *Confiscation Act 1997* (Vic).

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355 For clarity, this figure excludes closed court orders made under the Open Courts Act, although Table 11 incorporates this category of orders.

405. 15 orders appeared to be made in the exercise of the courts' inherent jurisdiction.[356]

406. The data are set out in Table 11 of Appendix 3.

11.4.1 Orders made under SSODSA

407. The terms of reference for this Review specify that the provisions of the SSODSA be given special consideration. Table 12 and Table 13 of Appendix 3 offer a profile of orders made under this Act.

408. An examination of the 143 orders made under the SSODSA shows that close to 70% of the orders made were set to expire upon the occurrence of an event unrelated to the proceeding, typically upon the start of the next review of the detention or supervision conditions of the offender. This is likely to reflect the operation of section 65(4) of the SSODSA, which requires the court hearing the review of a supervision order to review any suppression order made under section 184. 15% of orders expired upon a specified date. Together, these two categories accounted for 84% of all orders.

409. Orders almost never provided any justification in addition to reliance upon the terms of section 184 of the SSODSA themselves. Predictably, the subject matter of the suppression orders focused on identifying details of the offender: 134 of 143 orders (94%) suppressed the offender's name, 137 orders (96%) suppressed the offender's location and 37 orders (26%) suppressed other information about the offender.

410. The vast majority of orders (94%) were made by application of a party, as opposed to on the court's own motion.

11.4.1.1 Data collected by Corrections Victoria

411. The Review was assisted by the provision of records maintained by Corrections Victoria on suppression orders under the SSODSA. This information is set out at Appendix 4. The overall figures are slightly larger than the findings of the Review for reasons that could not be identified.

412. In the period of the dataset of the Review (2014–2016), a total of 182 applications for non-publication orders in respect of identity and whereabouts were made by offenders under section 184 of the SSODSA (Table 1, Appendix 4). Of these, 178 applications (98%) were successful, either completely (173 applications, or 95%) or partially (5 applications, or 3%) on the terms sought (Table 3, Appendix 4).

413. The Secretary to the Department of Justice and Regulation opposed the making of an order under section 184 in respect of an offender's identity and whereabouts on 53 occasions, or in 30% of applications (Table 2, Appendix 4).

414. Table 5 in Appendix 4 sets out the number of SSODSA offenders who have transitioned into the community and committed sexual reoffending on an annual

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356 Although, strictly speaking, section 3 of the Open Courts Act defines 'suppression order' to include orders made in the exercise of a court's inherent jurisdiction, these orders were dealt with separately in the process of data collection and analysis. As they represent a very small proportion of orders, their exclusion from the section of this analysis concerning orders made under the Open Courts Act has no major impact upon the findings of the Review.

basis. There was no information as to the total number of offenders on a supervision order, barring the information available for 2017 in Table 4, Appendix 4. Table 4 indicates that, as at 24 July 2017, a total of 136 offenders are currently subject to the SSODSA supervision scheme. The number of breaches committed in 2017, available in Table 5, only represented figures as at 24 July 2017. Estimating those figures for the year based on the rate of breaches per month, approximately 6 breaches are likely to be committed in 2017. Consequently, the rate of reoffending appears to be 4% (6 of 136 offenders).

12 Comparison with Position Prior to the Open Courts Act

12.1 Comparison dataset

415. Prior to the introduction of the Open Courts Act, a number of studies were conducted on features of Victorian suppression orders. These include a study conducted in 2008 by Prue Innes for the organisation, Australia's Right to Know;[357] figures set out in 2010 by the Hon Philip Cummins at a Melbourne Press Club address;[358] findings made in 2012 by Andrea Petrie and Adrian Lowe for the Media, Entertainment and Arts Alliance;[359] and a study published in 2013 by Jason Bosland and Ashleigh Bagnall ('the Bosland and Bagnall study').[360]

416. The most comprehensive of these is the Bosland and Bagnall study. A comparison between the findings of the Review and the Bosland and Bagnall study, however, bears some caveats. First, and most significantly, there are methodological differences between the two analyses in relation to the categories used to classify data and the approach taken to interpreting and coding orders under specific categories.[361] For example, the Bosland and Bagnall study did not include orders that vary or extend earlier orders in the count of orders, in contrast to the approach of the Review.[362] Another noteworthy difference is that the Bosland and Bagnall study did not incorporate reference to the grounds on which orders were made. Second, there are differences in the extent of access to orders: as mentioned previously, the Review was provided with all suppression orders made by Victorian courts and tribunals by the heads of each jurisdiction while the Bosland and Bagnall study relied on all suppression orders distributed to the media by the Victorian courts.[363] As Bosland and Bagnall acknowledge, there is no way of knowing whether the media was notified of all orders made by the courts during the period of their study.[364] A related issue is that the Bosland and Bagnall study is limited to orders made by the Supreme Court, the County Court and the Magistrates' Court, while the Review has a broader dataset encompassing orders made by VCAT. Third, the results of the Bosland and Bagnall study captured orders made across a period of four years, between 25 February 2008 and 31 December 2012, in contrast to the three year period of the dataset in this Review between the start of 2014 and the end of 2016. Finally, quite apparently, the legal regime introduced by the Open

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357 Prue Innes, 'Report of the Review of Suppression Orders and the Media's Access to Court Documents and Information' (Report, Australia's Right to Know, 13 November 2008).

358 P D Cummins, 'Justice and the Media' (Speech delivered at the Melbourne Press Club, Melbourne, 17 August 2010) <http://www.lawreform.vic.gov.au/sites/default/files/Justice%20and%20the% 20Media%20-%20Melbourne%20Press%20Club%202010.pdf>.

359 Media, Entertainment and Arts Alliance, 'Kicking at the Cornerstone of Democracy: The State of Press Freedom in Australia' (Report, May 2012) <http://issuu.com/meaa/docs/press_ freedom_2012>.

360 Jason Bosland and Ashleigh Bagnall, 'An Empirical Analysis of Suppression Orders in the Victorian Courts: 2008–12' (2013) 35 *Sydney Law Review* 670 ('Empirical Analysis').

361 For a full discussion of the methodology used in the Bosland and Bagnall study, see Bosland and Bagnall, 'Empirical Analysis', 678–9. Critically, for the purpose of this comparison, 'subject matter specific' orders were excluded from the Bosland and Bagnall study, enabling comparison with suppression orders made under the Open Courts Act: 681.

362 Ibid 678.

363 Ibid 672.

364 Ibid 678, n 63.

Courts Act differs in some respects from the position before its enactment. This difference makes it difficult to compare results across some categories.

417. Consequently, the analysis in this chapter makes three simplifying assumptions. First, it focuses on comparing three key categories: the number, duration and scope of orders before and after the commencement of the Open Courts Act. Second, where stated, the results of each study have been isolated to the orders produced in a single calendar year to accommodate the difference in the length of the periods covered by the study. Third, the results of the Review are confined to the orders made by the Supreme Court, the County Court and the Magistrates' Court, in order to be consistent with the scope of the Bosland and Bagnall study. The primary objective of this comparison is to identify general trends and patterns, rather than measure precise changes, in features of orders made before and after the Act.

418. It should be noted that in a subsequent 2017 study, Jason Bosland published an empirical analysis comparing the position prior, and subsequent to, the Open Courts Act.[365] That study drew on a more limited number of orders in comparison with the dataset of the Review, although there was a closer relationship between the methodology adopted in that study and the initial study in 2013. While its account of the differences caused by the Open Courts Act is more comprehensive in some respects than the observations made here, the main findings of the 2017 study are corroborated by the results of the Review: namely, that the introduction of the Open Courts Act has not led to a significant overall reduction in the number of orders or marked improvements in the scope of orders, although it has brought more rigour to the duration of orders.

12.2 Total number of orders

419. A comparison of the number of orders, excluding those made under subject-specific powers, in 2012, prior to the Open Courts Act, relative to 2016, after the Act's commencement, is produced below.[366] As orders were made at approximately the same level per year following the introduction of the Act,[367] it suffices to present the overall number of orders in 2016.

420. For the purpose of this section, an additional simplifying assumption has been made: the results of the Review have excluded further orders that varied or extended the suppression order first made in a proceeding, in order to achieve consistency with the approach taken in the Bosland and Bagnall study. The overall decline between 2012 and 2016 was 11%.

421. A comparison of the two time periods according to court level reveals that the volume of suppression orders was relatively unchanged in the Magistrates' Court, and there appear to be solid reductions in the number of suppression orders in both the Supreme Court and County Court (29% and 17% respectively).

422. Given that precise percentages have to be approached with some scepticism for the reasons stated above, it is clear that the number of orders has not significantly reduced despite the introduction of the Open Courts Act.

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365 Jason Bosland, 'Two Years of Suppression under the Open Courts Act 2013 (Vic)' (2017) 39 *Sydney Law Review* 1.

366 The 2012 figures are sourced from Bosland and Bagnall, 'Empirical Analysis', 681.

367 See 11.3.1 above.

Table 1: Comparison of the overall numbers of suppression orders made in a single year before and after the Open Courts Act

Court	2012	2016
Supreme Court	48	34
County Court	106	88
Magistrates' Court	105	108
Overall	259	230

12.3 Duration

423. Tables 2 and 3 illustrate the difference between the duration of orders made before and after the Open Courts Act. Unlike the approach of the Review, the Bosland and Bagnall study does not distinguish between orders expiring upon an event in relation to the proceeding, for example upon jury verdict, and orders expiring upon an external event, for example the death of the complainant. For ease of comparison, the results of the Review have been presented by treating orders expiring upon an event in relation to the proceeding and an external event as a single category. As the emphasis of this comparison is on examining overall patterns rather than raw numbers, no adjustment has been made to the number of orders, for example by isolating the basis of this comparison to orders made in a single calendar year, to account for differences in the time period of each study.

424. As indicated by the results of the column titled 'not specified', expressed as a proportion of the total across Tables 2 and 3, a comparison of the results of each study suggests that the duration requirements in the Open Courts Act have led to a substantial drop in the number of orders being made without adequate specification of the date of expiry, from 69% to 9%. Correspondingly, as indicated by the shifts in the proportion of orders set to expire by reference to a specified date (Column 3) or upon the occurrence of an event (Column 5), the main bases on which orders are now set to expire under the Act are upon a specified date or the occurrence of an event. While this represents a substantial improvement, these results do not indicate whether the dates of expiration now set are determined appropriately, that is, whether they are made with proper consideration of whether the temporal limitation is no longer than is necessary in the circumstances.

Table 2: Date of expiration of suppression orders made before the Open Courts Act

Court	Not specified (inclusive of 'until further order')	Specified date	Specified period from order	Occurrence of event	Total
Supreme Court	174	25	0	48	247
County Court	275	62	4	91	432
Magistrates' Court	398	18	110	21	547
Overall	847	105	114	160	1226
Proportion of total	69%	9%	9%	13%	100%

Table 3: Date of expiration of suppression orders made after the Open Courts Act

Court	Not specified (inclusive of 'until further order')	Specified date	Specified period from order	Occurrence of event	Total
Supreme Court	13	74	17	69	173
County Court	19	168	30	160	377
Magistrates' Court	52	197	26	153	428

Overall	84	439	73	382	978
Proportion of total	9%	45%	7%	39%	100%

12.4 Subject matter

425. Tables 4 and 5 compare the subject matter of suppression orders collected in the Bosland and Bagnall study conducted prior to the Open Courts Act with the subject matter of suppression orders made under the Open Courts Act.

426. In addition to the caveats regarding the difficulty of straightforward comparison noted above,[368] the figures underlying Tables 4 and 5 have been modified for presentation in two main ways:

    a. Table 4 consolidates the figures for proceedings-only and proceedings-plus orders[369] in a single table;

    b. Table 5 discards other categories of subject matter collected in the Review and consolidates figures across categories to provide a point of comparison with the categories in the Bosland and Bagnall study;

    c. Tables 4 and 5 include percentages, representing a proportion of the raw total subject matter, to indicate the relative size of categories because the size of the overall set of cases differs between the two studies.

427. It is unlikely that the introduction of the Act would have brought about changes in the nature of suppressed material. This hypothesis is confirmed by comparing the position before and after the Act, which reinforces that the categories of subject matter remain more or less stable as proportions of the whole. The identity of victims and witnesses remains the largest category of suppressed material (representing 28% before the Act and 29% after the Act), followed in decreasing order by the identity of the accused or the defendant (representing 24% before the Act and 21% after the Act) and specific evidence (representing 20% before the Act and 17% after the Act). The stability of categories such as the identity of victims and witnesses suggests greater scope for the operation of statutory prohibitions in place of suppression orders.

368 See 12.1 above.

369 Bosland and Bagnall use the term ‘proceedings-plus orders’ to denote orders prohibiting the publication of information related to a proceeding but without limiting the prohibition on publication to either reports of proceedings or information derived from proceedings: Bosland and Bagnall, ‘Empirical Analysis’, 682.

Table 4: subject matter of suppression orders made prior to the Open Courts Act

Subject matter	Supreme	County	Magistrates'	Total	Category as a Proportion of Whole
By subject matter: Identity of accused/defendant	53	94	185	332	24%
By subject matter: Image of accused/defendant	9	32	30	71	5%
By subject matter: Whereabouts of accused/defendant	14	17	213	244	17%
By subject matter: Identity of victim / witness	68	107	225	400	28%
By subject matter: Image of victim / witness	14	22	22	58	4%
By subject matter: Whereabouts of victim / witness	6	4	14	20	1%
By subject matter: Evidence (specific)	83	63	140	286	20%
Total	**247**	**335**	**829**	**1411**	

Table 5: subject matter of suppression orders made under the Open Courts Act, modified for comparison

Subject matter	Supreme	County	Magistrates'	Total	Category as a Proportion of Whole
By subject matter: Identity of accused/defendant	15	85	98	198	21%
By subject matter: Image of accused/defendant	11	6	36	53	5%
By subject matter: Whereabouts of accused/defendant	8	33	80	121	13%
By subject matter: Identity of victim / witness	55	71	149	275	29%
By subject matter: Image of victim / witness	21	7	38	66	7%
By subject matter: Whereabouts of victim / witness	14	7	50	64	6%
By subject matter: Evidence (specific)	33	55	76	164	17%
Total	**157**	**257**	**527**	**941**	

13 Recommendations

13.1 Overview

428. The recommendations in this report flow from six primary propositions identified at an early stage of the Review which reflect the aims of Parliament when enacting the *Open Courts Act 2013* (Vic). These well-established fundamental principles sufficiently address an issue raised in the Terms of Reference as to the nature of any overarching principles required under a legislative framework to prohibit or restrict publication.

> *First, it is of fundamental importance that our system of justice must be open to public scrutiny and assessment to the maximum extent possible. Orders suppressing the dissemination of information should be approached as necessary exceptions to the transparent functioning of our courts and tribunals, required in the particular circumstances of the cases involved.*
>
> *Second, any order for suppression must be directed solely to the advancement of the interests of justice and be supported by adequate information.*
>
> *Third, each ground upon which an order has been made should not only be identified but separately justified.*
>
> *Fourth, an order should not be made if the objective to which it is directed could be achieved by other means, such as the use of pseudonyms or other non-identifying descriptions of persons or events.*
>
> *Fifth, the terms of an order for suppression should be clear and confined in both scope and duration to the minimum required for the purposes for which it has been imposed.*
>
> *Sixth, reasonably available and inexpensive opportunities should exist to challenge the making of an order, its scope and duration or, once made, to seek its review.*[370]

429. However, claims that further reform is required because these objectives have not been achieved have continued to be made.[371] The present Review has been initiated in an endeavour to ascertain what, if any, justification exists for these complaints and, if so, what improvements should be effected.[372]

430. While the issues raised for consideration in the Review are important and must be addressed, the dimensions of the problems posed by these orders need to be kept in perspective. It must be reiterated that, save for very few exceptions, the processes of our courts and tribunals and the reasons for their decisions are open to public scrutiny. As a percentage of the total number of cases handled in the various jurisdictions, the number in which suppression orders have been made is

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370 See Chapter 1 at [2].

371 See Chapter 10.

372 A number of issues of a smaller technical or practical character were raised by contributors in the course of the Review that are not addressed in these recommendations, which are directed to the major changes seen to be required. Reference is made to them in Chapter 10. These matters could either be more appropriately addressed in the implementation process or would not arise in the reformed structure.

minuscule.[373] Overall, there is very little concealed from view and community assessment as a consequence of suppression orders, and almost always, when a suppression order is made, it is perceived by the court or tribunal involved, whether appropriate or not, as a necessary measure.

431. Controversy and discussion concerning suppression orders is predominantly directed to those made in a small number of high-profile matters coming before the courts exercising criminal jurisdiction. These are cases in which there is considerable public interest but also some concern in the minds of the judicial officers involved that the dissemination of all of the information relating to them will be, in some way, a potential source of injustice. However, equally significant decisions from the community perspective are made in other contexts, such as in civil litigation and in VCAT proceedings, and issues similar to those in criminal cases can and do arise.

13.2 Presumption or principle?

432. The policy objectives informing the Open Courts Act have been discussed previously.[374] When introducing the Open Courts Act, the then Attorney General, the Hon Robert Clark, emphasised that its purpose was the creation of 'a clear, fair and effective regime that reinforces the importance of open justice and confines exceptions to those limited circumstances where exceptions are justified.'[375] As noted earlier,[376] this notion finds expression in two statutory mechanisms: the presumptions under sections 4 and 28 of the Act, which relate to suppression orders and closed court orders respectively, and the test of necessity in making orders. The terms of section 4 of the Act illustrate the objectives outlined by Attorney-General Clark. The provision reads:

> To strengthen and promote the principles of open justice and free communication of information, there is a presumption in favour of disclosure of information to which a court or tribunal must have regard in determining whether to make a suppression order.

433. The intention of Parliament in referring to a 'presumption' in conjunction with the other considerations set out would seem to be obvious; that is, the starting point for determination of whether an order is required is the principle of transparency but it was recognised that there also must be sufficient flexibility to enable sensible limitations to be imposed on its operation if the system itself was not to become a possible source of injustice. However, the use of the term 'presumption' with its normal legal connotations to facilitate the achievement of this objective is unfortunate, as it suggests that, in the event of tension arising between the need for transparency and the potential for damage from disclosure, there is simply a bias, albeit a powerful one, towards transparency.[377] What is involved in the making of an order of this kind should be more clearly identified as an exception, effectively forced by the circumstances, from the operation of the underlying principle. This is not adequately emphasised in section 4 nor in section 28.

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373 See the discussion at 11.1 above.

374 See 8.1.3.1 above.

375 Victoria, *Parliamentary Debates*, Legislative Assembly, 27 June 2013, 2420 (Robert Clark, Attorney-General).

376 See 8.1.3.1 at [137] above.

377 See Richard Wilson's submissions to the Review, discussed in 10.1 at [247] above.

434. Additional emphasis on the importance of transparency and, in consequence, the exceptional character of permitted departures from it could be provided by the inclusion of a preamble to the Act.[378]

Recommendation 1: That sections 4 and 28 of the Open Courts Act be amended to make clear that orders made under the Act constitute exceptions, based on necessity in the circumstances, to the operation of the principle of open justice rather than it being a matter of the operation of a presumption in favour of transparency.

Recommendation 2: That the Open Courts Act be amended to include a new preamble emphasising the fundamental importance of transparency in our legal system.

13.3 A broader context

13.3.1 Harmonising related areas of the law

435. The Review was initiated to address the issues relating to suppression orders, not the *Judicial Proceedings Reports Act 1958* (Vic), the contempt powers of the courts or the principles relating to the discretionary exclusion of evidence in court proceedings. Mention is made of these other sources of restriction upon the use and dissemination of information because, as a number of stakeholders encouraging greater use of alternatives to suppression orders have raised in submissions to the Review,[379] the approach adopted to each of them in legislation and our courts and tribunals is based in large measure on similar concerns and, in the areas of contempt and exclusion of prejudicial material, a similar view of the extent to which the community can be expected to deal properly with the kinds of information involved. They rest on a number of common assumptions and the possible actions or circumstances to which they are directed frequently overlap. Indeed, as observed in consultation with the Supreme Court of Victoria, the making of suppression orders by Victorian judges and magistrates has in part been motivated by the perceived lack of efficacy in relying upon other forms of restriction upon access to information.[380] While the shortly stated conclusion of the Review is that statutory reform of the processes relating to suppression orders is necessary, it is also considered that its value will be limited unless there is reconsideration of all of these areas, and, in particular, some of the traditionally accepted assumptions, underlying the common approach.

436. A requirement for making a proceeding suppression order under section 18(1)(a) of the Open Courts Act is that the judge must be satisfied that the risk to the administration of justice cannot be prevented by other reasonably available means. The availability of other means to redress the concern in question does not have to be considered as a precondition to making suppression orders on other grounds. However, analysis of the suppression orders made since the introduction of the Act, indicates that they may, at least on some occasions, have been made in

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378 Ibid.

379 See 10.4.2.4 and 10.6 above.

380 See 10.2.1 at [249] above.

circumstances where dissemination of the encompassed information would have been contrary to law by virtue of provisions contained in other legislation.[381] Overall, approximately 20% of suppression orders made under the Open Courts Act were made on the basis of preventing undue distress or embarrassment to complainants or child witnesses.[382] Information generally relating to victims amounted to 15% of all categories of suppressed information.[383] It is likely that some of these orders overlapped with existing statutory restrictions, such as those available under the Judicial Proceedings Reports Act, to some extent. In at least one of the cases in which the Review inspected court documents underpinning the making of a suppression order, the order was made to suppress the identity of a complainant of sexual offending, although publication of that information was already prohibited by section 4(1A) of the Judicial Proceedings Reports Act.

437. The suggestion was advanced, when the matter was raised with contributors in the course of consultation, that the judges may have doubted that members of the public, including many media representatives, would be aware of the relevant restrictions on reportage and considered that it was safer, although unnecessary, to make an order. It has not been possible to determine the extent to which that has been the situation. However, the making of unnecessary orders is not justified by the presence of a concern that, through ignorance or inadvertence, there may be failure to comply with the law.

438. Part of the recommended solution to the better identification of the circumstances in which orders need to be made is their limitation to situations not already encompassed by specific legislative prohibitions. This is the approach adopted by the courts in a number of other Australian jurisdictions.[384] Indeed, legal practitioners in Victoria have supported the expanded use of statutory proscriptions on the dissemination of information.[385] Some thought should be given to this suggestion in the context of possible reform of the Judicial Proceedings Reports Act. Similar considerations apply to the making of orders in cases where protection of identity is in issue if pseudonym orders would be sufficient for this purpose.

439. To a substantial extent, assessments in the areas of contempt and the discretionary exclusion of evidence, as a consequence of the evolutionary development of the common law, rest more upon institutional distrust of the capacity of the ordinary citizen to perform their duty as a juror if exposed to certain kinds of information, rumour or opinion. For most of its history, our legal system has been self-informing and self-justifying with the perceived wisdom or prejudices of earlier generations of judges, through our system of precedent, becoming the principles of law binding later judges and influencing our structures and processes. The American jurist, Oliver Wendell Holmes, made this point succinctly over a century ago:

> The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, institutions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have a good deal more to do than the syllogism in determining the rules by which men should be governed.[386]

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381 Relevant Victorian statutory prohibitions against publication are set out in Appendix 2.
382 See 11.3.4.1 at [355] above.
383 See 11.3.5.1 at [374] above.
384 See Chapter 9 and Appendix 2.
385 See 10.2.1 at [250] above.
386 Oliver Wendell Holmes, *The Common Law* (The Lawbook Exchange Ltd, 1881) 1.

440. As one of the earliest of the social sciences, the principles and practices of the law have largely developed through anecdotal experiences as perceived and interpreted by generations of judges rather than the analytical and evidence-based techniques employed by newer disciplines. One important consequence has been the presence of a considerable reluctance within the legal system to acknowledge the insights into its functioning of these other disciplines or to employ their methodologies.[387]

441. This history lies at the heart of some of the controversy concerning suppression orders as it continues to influence policy and judicial decision-making. The general need for exposure of what is happening in our courts and tribunals is unchallenged but at the same time, there is an embedded institutional distrust of the capacity of ordinary community members and a concern that, unless certain kinds of information are quarantined from them, the outcome may be based on prejudice rather than reliable evidence and legal principle. This perception provides the basis for the relatively common exclusion of evidence found to be relevant and otherwise admissible, as well as the view taken of the kinds of statements or actions encompassed by the notion of contempt of court. The research that has been conducted to date, explored in consultation with expert stakeholders,[388] and recent anecdotal experience casts considerable doubt on the justification for the underlying distrust. A more nuanced range of solutions has been proposed to address the problem of jury exposure to prejudicial material than the quarantining of such material.[389]

442. Decisions are regularly made in criminal proceedings excluding sometimes important information on the basis that its probative value is outweighed by its potential prejudicial impact. This determination often rests upon the essentially subjective assessment of the trial judge and is, for practical purposes, unchallengeable. Judges must have the discretion to exclude evidence that is capable of creating unfairness and a miscarriage of justice, and it is impossible to identify in advance all of the circumstances that call for its exercise. The decision to exclude relevant evidence should always be well based and treated as exceptional in a similar fashion to orders to suppress the dissemination of what is sometimes the same information.

443. As an example of how this principle operates in practice, the prior criminal history of the accused is almost always automatically concealed on this basis. However, only a moment's thought is required to appreciate that evidence of this kind may well be highly significant when considering, in the context of the other circumstances of the case, the question of the probability that the individual may have acted as alleged.

444. The exclusion of evidence of prior convictions in most cases rests upon acceptance of the largely unchallenged view that there is a real risk that the jury would be overwhelmed by this knowledge. Yet, some extremely high profile trials are conducted where the criminal antecedents of the accused or their perceived character are matters of notoriety or where their earlier involvement in serious offending is a part of the case itself. There are many examples of such cases where

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387 See Jacqueline Horan, *Juries in the 21st Century* (Federation Press, 2012) 5–6.

388 See 10.2.2.1 at [261]–[262] above. See also the research findings set out in 13.5.1.

389 See, eg, David Harvey, 'The Googling Juror: The Fate of the Jury Trial in the Digital Paradigm' [2014] (2) *New Zealand Law Review* 203; Roxanne Burd and Jacqueline Horan, 'Protecting the Right to a Fair Trial in the 21st Century – Has Trial by Jury Been Caught in the World Wide Web?' (2012) 36 *Criminal Law Journal* 103.

the risk of prejudice would seem to be extremely high and the outcomes could not be comfortably accepted, if the accepted concern was justified. Nevertheless, they are conducted.

445. The question to which this reality gives rise is: how is the position different in these cases from that generally and regularly encountered and in which the need to exclude evidence of relevant prior convictions would never be seriously queried? It hardly needs to be said that, if evidence of this kind were admitted in the trial, care would have to be taken to ensure that its proper use was explained to the jury but there is nothing special about it in that regard.

446. The central point here is that reform of the statutory regime governing the suppression of information, if it is to achieve the objectives underlying the Open Courts Act, must be concerned not only with improving the efficacy of the formal processes involved but also with the premises on which orders may be made. More research is required in order to develop a consistent evidence-based approach to this issue.

447. It is also a matter of concern that, although breaches of prohibitions against publication in various forms are by no means rare, there has seldom been any response when they occur. In part, this appears to have been due to obvious difficulties in seeking to enforce suppression orders that lacked clarity with respect to their scope or duration. In some situations it could be reasonably perceived as almost pointless to pursue the matter when the order lacked efficacy in the first place or where the information has become widely available.

448. The Director of Public Prosecutions ('DPP') in his submission to the Review drew attention to the particular difficulties encountered in some high-profile cases involving multiple trials. He referred to the four trials listed in the County Court of Adrian Bayley whose previous conviction for murder was widely known. In March and June 2014, proceeding suppression orders were made prohibiting publication of any report of any proceedings relating to the trials and any information relating to previous convictions and sentences of the accused. There were, at least, six major breaches of these orders by television, radio and print media.

449. This case is informative in a number of respects. It highlights the issue of efficacy of suppression in high-profile cases. Yet, if the reasoning underpinning them is correct, these are cases in which the risk of contamination of the outcome would have to be viewed as extremely high. If they were to be of any value, the restrictions on publication had to be of a very wide or 'blanket ban' kind, but orders of this kind can only be justified in the rarest of circumstances as they can present serious issues relating to freedom of discussion concerning significant questions of public policy and administration as well as the scope of the order itself.

450. The concerns in relation to enforcement of suppression orders are not limited to the area of suppression. If the system is to possess credibility, the imposition of sanctions for non-compliance must be anticipated. Attention must be directed to developing a consistent approach across related areas of the law.

Recommendation 3: That the Open Courts Act be amended to restrict the power to make suppression orders to situations not otherwise encompassed by statutory provisions prohibiting or limiting publication.

Recommendation 4: That, in order to ensure consistency of approach to principle and practice in relation to suppression orders and related areas, the Victorian Law Reform Commission be requested to report on the possible reform of the Judicial Proceedings Reports Act 1958 and the codifying of the law relating to contempt of court, including the legal framework and processes for enforcement.

13.3.2 Unifying the law across jurisdictions

451. It is apparent that the possible inefficacy of suppression orders is an increasing problem. Setting to one side the difficulties currently being encountered within the jurisdiction in effectively preventing dissemination, there is the virtual impossibility of controlling it beyond the jurisdictional limits in an era of instant mass communication and the ability of almost everyone to access information across borders.[390] There have been a number of examples over recent years where orders could be argued to have been of substantially reduced value because the information was available to any who wished to obtain it because it was published interstate or could be viewed online.[391] Interestingly, this has occurred most frequently in matters that have attracted broad media attention or in publications and television programmes involving the portrayal of events and individuals before the courts; in short, in high-profile matters where the courts considered that the risk of prejudice was greatest. The airing of parts of the very popular Underbelly series of television programmes was the subject of suppression orders in Victoria but copies were no doubt available within the community as they were not the subject of suppression in other Australian jurisdictions.[392] If the system of suppression orders is to maintain credibility, this issue should be addressed.

452. As a number of stakeholders recognised in the course of consultation,[393] the development of a national approach to the principles and standards and the harmonisation of the law applicable to suppression orders is highly desirable and, although previous attempts have not been successful,[394] it is recommended that the issue be referred to the Council of Attorneys-General for further consideration.

453. Whether or not a broad-based reassessment of this kind is undertaken, the problem presented by the operational limits of suppression orders in our multi-jurisdictional country requires attention. It is unsatisfactory that orders can be rendered redundant or significantly less effective through dissemination of the material

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390 Roxanne Burd, 'Is There A Case for Suppression Orders in an Online World?' (2012) 17(1) *Media & Arts Law Review* 107, 107; Brian Fitzgerald and Cheryl Foong, 'Suppression Orders after Fairfax v Ibrahim: Implications for Internet Communications' (2013) 37 *Australian Bar Review* 175, 175.

391 See, eg, the suppression of online publicity in the criminal trial of Tony Mokbel, described in *R v Mokbel [No 3]* [2009] VSC 653 [4]. The Victorian case of *DPP (Cth) v Brady* (2015) 252 A Crim R 50, referred to in this chapter, is the first decision in Australia where a court has revoked an order because the online dissemination of the information subject to suppression has been so widespread as to render suppression futile: Jason Bosland, 'Wikileaks and The Not-So-Super Injunction: The Suppression Order in DPP (Cth) v Brady' (2016) 21(1) *Media & Arts Law Review* 34, 34.

392 See *General Television Corporation Pty Ltd v The Queen* (2008) 19 VR 68 (Warren CJ, Vincent and Kellam JJA).

393 See 10.7 above.

394 See the background to the enactment of the Open Courts Act at 8.1.2 and the legal regimes in other jurisdictions in Chapter 9 above.

interstate. A better system for the recognition and enforcement of orders is necessary.

Recommendation 5:

(1) That the harmonisation of the law and practice relating to suppression orders be referred to the Council of Attorneys-General[395] for further consideration.

(2) That, whether or not this recommendation is accepted, the Council of Attorneys-General be requested to consider the desirability of the development of a system for interstate and territory recognition and enforcement of suppression orders.

13.4 Reforming the Open Courts Act

13.4.1 The duty to give reasons

454. It is clear that the intention behind the enactment of the Open Courts Act has not been realised fully in a number of respects. As discussed earlier, one of the primary objectives of the Act was to impose greater rigour on the powers of courts and tribunals to make suppression orders.[396] This was effected by the adoption of a number of statutory requirements, such as the requirement under section 13 to specify adequately the subject matter and purpose of suppression orders.[397]

455. The data analysis undertaken by the Review, however, shows that the Open Courts Act has not led to a significant overall decrease in the making of suppression orders. Although there are difficulties in comparing the average number of orders made since the Act's passage with the position prior to the Act,[398] it would appear that there is a modest overall reduction in the total number of orders of approximately 11%.[399] It should be noted that while the volume of suppression orders was relatively unchanged in the Magistrates' Court, the Supreme Court and County Court appear to have reduced the number of orders each court makes in the region of between 20% to 30%.[400] Troublingly, no annual decline in the number of orders made by all Victorian courts and tribunals following the introduction of the Act can be detected; instead, each year between 2014 and 2016 accounted for approximately a third of the orders made in the dataset,[401] contrary to the expectation that the number of orders would diminish as judges and magistrates became more familiar with the requirements of the Act.

395 This was formerly designated the Standing Committee of Attorneys-General and, subsequently and most recently, the Law, Crime and Community Safety Council of the Council of Australian Governments.
396 See 8.1.3.1 above.
397 Section 13 is set out at 8.1.3.2.6.3 above.
398 See 12.1 at [416] above.
399 See 12.2 above.
400 Ibid.
401 See 11.3.1 above.

456. The Review has also identified concerns with the subject matter of orders and the basis upon which they were made, although complaints as to the duration of orders were not substantiated.[402] In 24% (306 of 1,279 orders made under the Open Courts Act) of all suppression orders in the dataset, the information subject to suppression was inadequately specified to some extent.[403] The County Court performed particularly poorly in this respect, with 40% of its orders (150 of 377 orders) lacking adequate specificity to some extent. When 'blanket bans' were considered as a subset of all suppression orders, being orders either not identifying the subject matter to be suppressed at all or, more commonly, stating that what was to be suppressed was the 'whole or any part of the proceeding', 22% (274 of 1,279 orders) were found to be blanket bans.[404] Although there are likely to be legitimate justifications at least in part for these two findings,[405] they suggest a striking departure from the requirement under section 13.

457. Contrary to the requirements of section 13, 148 of 1,279 orders (12%) did not specify a ground upon which they were made. This finding is largely attributable to the Magistrates' Court, having made 92 orders (21% of its orders) that were non-specific as to their ground, and, to a lesser degree, the Supreme Court, having made 23 such orders (13% of its orders). Of particular concern were cases relying upon the general ground for their making, that is, cases in which the conclusion was reached by a court or tribunal that disclosure of particular information might impact adversely upon the administration of justice or the fair and proper conduct of the proceeding,[406] or where an order may be deemed necessary 'for any other reason in the interests of justice'.[407] Although different expressions are employed in these provisions, they are effectively directed to the same considerations.

458. In relation to section 18(1)(a), it is apparent that Parliament was concerned to strictly confine orders made, using what is effectively an undefined reserve power, from the language employed in the provision. The court or tribunal must be satisfied 'on the basis of evidence, or sufficient credible information', pursuant to section 14 of the Act, that 'the order is necessary to prevent a real and substantial risk that cannot be prevented by other reasonably available means.' There are several elements that must be present before an order can be lawfully made. Quite remarkably, there was no reference to this very strict standard in any of the individual matters considered in the Review in the course of conducting a 'spot test'. Yet it was clearly set to indicate the exceptional character of the decision involved.

459. It is important to bear in mind when considering the manner in which this provision has been used that the decision to suppress is not treated by the statute as a matter of judicial discretion but as the exercise of a statutory power that is dependent on the presence of a number of identified elements. To some extent, the justification for orders made on the other grounds will be apparent from the ground

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402 Although various stakeholders raised complaints in relation to the duration of orders made under the Act (see 10.4.3 above), these complaints are not supported by the Review's data analysis. Only 7% of suppression orders did not specify a date of expiry, including by stating that the order would remain in effect 'until further order': see 11.3.3 above. There was also no substance to the complaint that orders were frequently made for a default period of five years: see 11.3.3.1 above. These findings, when viewed in conjunction with a comparison of the position before and after the introduction of the Open Courts Act (see 12.3 above), suggest that the Act has had a positive impact upon the duration of suppression orders.

403 See 11.3.5.1 at [373] above.

404 See 11.3.5.2 above.

405 See 11.3.5.3 generally and 11.3.5.2 specifically in relation to blanket bans above.

406 *Open Courts Act 2013* (Vic) ss 18(1)(a), 25 and 26(1)(a).

407 *Open Courts Act 2013* (Vic) s 18(1)(f)(ii) (VCAT).

relied on. It is not so for those made on this broad ground unless there are some reasons provided to support them.

460. Of the 1,279 suppression orders made under the Open Courts Act in the period of the Review's dataset, 797 (or 62%) were made at least in part on the general grounds.[408] 309, or 24% of all orders, were made solely relying on the non-VCAT general ground, usually with little explanation, and without adequate identification of the subject matter in 125 of them (41% of such orders).[409] This does not mean that there was no proper foundation for these orders and there is no reason to suppose that they were not regarded by the judge as required at the time. However, the absence of any indication of the reasoning behind them on such a large number of occasions raises a number of questions, including the degree of care being taken to observe both the letter and objectives of the legislation. There is a reasonable possibility that, on many occasions, this ground was not separately considered at all but added as a default support for the order that was being made for another reason. The reason for its inclusion was often uncertain and it became apparent from the transcripts examined that there was some conflation of the issues raised by the different grounds in discussion when applications were made.

461. It is obviously not possible to identify in advance the range of circumstances in which the dissemination of information may need to be restricted by reason of its likely impact upon the proper administration of justice. The courts and VCAT must have the power to make such orders when required. However, the community needs to be able to be confident that any departure from full transparency of the process by reference to this broad principle in whichever of the forms set out in section 18 is applicable has been carefully considered and is justified.

462. It is surprising and troublesome that judges and magistrates appear to have a limited understanding of their responsibilities under the Open Courts Act. It was particularly concerning that, in one of the cases heard in 2016 that was individually examined, it seemed from the questions asked that the judicial officer was not even aware that there was governing legislation. In fairness, it needs to be added that, this is not indicative of a systemic issue and that once his attention was drawn to the relevant sections by counsel, the application was handled appropriately.

463. The current situation is quite unsatisfactory. The obligation to prepare a statement of reasons is necessary to impose an additional level of discipline to the process that regrettably is required. There will be circumstances in which the public dissemination of a statement of reasons for the order may well negate its efficacy but it certainly does not follow that nothing at all need be said or that one should not be available to the court in any subsequent challenge or review.[410]

464. The present approach under the Open Courts Act in relation to the giving of reasons is not sufficiently onerous. At common law, it is well settled that the requirement to give reasons is an 'incident of the judicial process',[411] and of

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408 See 11.3.4.1 at [354] above.

409 See 11.3.4.2 above.

410 Similarly, on some occasions, in order to ensure the security of what is regarded as very sensitive information or to conceal, at that stage, the identities of those who may be involved in the case, matters are not publicly listed. As an approach, this needs to be very carefully monitored and should only be employed in circumstances where the mere listing of the case would attract the kinds of concerns justifying the making of a suppression or closed court order.

411 *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656, 667 (Gibbs CJ), quoting *Housing*

particular benefit in areas where the right to appeal is engaged.[412] Though not universally accepted, there is an emerging view in case law that there is a duty to give reasons *publicly*, as an expression of the principle of open justice.[413]

465. Although the Explanatory Memorandum to the Open Courts Act states, in relation to section 16, that the giving of reasons for final decisions and important interlocutory rulings is central to the judicial function by reference to *Wainohu*, the terms of section 16 provide no more than a statement that the requirements under the Act are consistent with the giving of reasons. The provision states:

> Nothing in this Act limits or otherwise affects any duty of a court or tribunal to publish reasons for judgment or decisions, subject to the court or tribunal editing those reasons to the extent necessary to comply with any order of a court or tribunal or statutory provision restricting the publication of information.

466. It is clear that the explicit imposition of a duty to give reasons publicly for the making of suppression orders is desirable.

467. The provision of reasons in all circumstances when an order is made would also assist interested parties, such as media organisations, to assess whether the making of the order or its terms should be challenged. The current notice requirement under section 10 of the Act does not prescribe the content of any notice given of an application to make a suppression order.[414] Media contributors to the Review have criticised the content of the notice that tends to be provided, asserting that the current form of notice provides an inadequate basis upon which to determine whether the application should be contested.[415] More fundamentally, the terms of the suppression orders themselves are often deficient in articulating the justification for, and scope of, the suppressed material. Provision of the orders may not suffice to help interested parties form a view as to whether the suppression order is appropriate in the circumstances. Read in conjunction with the Review's recommendations that the existing system of notice be replaced by the making of interim orders, and that a central, publicly accessible register for all orders be instituted,[416] the giving of reasons serves as an important mechanism by which suppression orders can be reviewed and the overall system can be monitored.

Recommendation 6: That, in each matter in which a suppression order is made, the court or tribunal be required to prepare a written statement of its reasons for the order, including the justification for its terms and duration. Save for restrictions and redactions reasonably required to effect the purpose and efficacy of the order, these reasons should be publicly available.

Commission (NSW) v Tatmar Pastoral Co Pty Ltd [1983] 3 NSWLR 378, 386 (Mahoney JA). See Jason Bosland and Jonathan Gill, 'The Principle of Open Justice and the Judicial Duty to Give Public Reasons' (2014) 38(2) *Melbourne University Law Review* 482.

412 See *Donovan v Edwards* [1922] VLR 87, 88 (Irvine CJ); *Brittingham v Williams* [1932] VLR 237, 239 (Cussen ACJ); *Lock v Gordon* [1966] VR 185; *Australian Timber Workers' Union v Monaro* Sawmills Pty Ltd (1980) 29 ALR 322.

413 *Wainohu v New South Wales* (2011) 243 CLR 181, 215 [58] (French CJ and Kiefel J) ('*Wainohu*').

414 See 8.1.3.2.6.1 above.

415 See 10.4.4 above.

416 See 13.4.2 below.

13.4.2 Notice and the opportunity to challenge

468. It is unsatisfactory that the system is dependent upon the court or tribunal making the order to notify the individual or body concerned of an application to make an order in the first instance and the order once made. Stakeholders have raised a number of practical concerns with the present email mode of notice of applications and notification of orders.[417] It is unknown how many orders have been made without notice.[418] The decision of a judge to make what is seen as a necessary order although there has not been compliance with the notice provisions or to address the exigencies that can emerge is easily understandable. Viewed from the perspective of transparency, however, it can be problematic.

469. What is required is not an incomplete list of persons to be notified but a central, publicly accessible register of orders to which media organisations and other interested parties would be expected to refer before reporting on or discussing proceedings before courts and tribunals.[419] Public access to a register of suppression orders is currently available in other jurisdictions such as South Australia and Tasmania.[420] A register of this kind would be of value in monitoring the use of suppression orders generally. It would provide a mechanism for public scrutiny of our processes of justice, as demanded by the principle of open justice.

470. A further reason for the adoption of a central register, accessible by the public generally, is the need to improve the existing enforcement provisions. Under section 23 of the Open Courts Act,[421] a person who acts in breach of a suppression order is guilty of an offence if they know or are reckless as to the fact that the order is in force. This requirement of awareness is taken to be satisfied by the transmission of notice of the order to the person by the court or tribunal involved, pursuant to section 23(2). While this would seem to have operated reasonably satisfactorily in informing major media organisations, which constitute the major sources of public information to the present time, there is an increasing number of sources of individuals and organisations not covered by this system. This can be expected to continue and create further problems of efficacy.

471. It is also apparent that there are issues with the timeliness and content of notice of applications and orders provided to media organisations.[422] Media contributors to the Review, while not arguing against the general imposition of restrictions upon the publication of information that could lead to the identification of victims, witnesses or others whose lives or wellbeing could be put at risk or otherwise affect the administration of justice, claimed that it was particularly difficult in situations of blanket prohibition or loosely expressed orders to ascertain what or who was encompassed and therefore how much detail of the matter or its background could be reported or discussed. As discussed above,[423] there is substance to this complaint with inadequate care having been taken in the formulation of the grounds, content and duration of some orders. In one matter referred to the Review, the

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417 See 10.4.4 above.

418 See 11.3.6.1 above.

419 Although the implementation of this recommendation is a matter for the Department's consideration, a potential body which might operate a central register of all suppression orders made by Victorian courts and tribunals is Court Services Victoria.

420 See [213] and [218] above.

421 See 8.1.3.2.2 above.

422 See 10.4.4 above.

423 See 13.4.1 above.

publication of 'anything to do with the case' was prohibited 'indefinitely'. Whether it was intended to operate as a proceeding suppression order or to impose a permanent restriction of extraordinary breadth was not indicated.

472. The difficulties posed in relation to challenge or clarification of the terms of orders by the absence of notice could be substantially alleviated by amending the Open Courts Act to render all suppression orders, whether made on application by party or upon the court's own motion, as interim for a period of five working days. If this was done in conjunction with a requirement that reasons be provided in all cases,[424] and a central register of orders be created to which the media or interested parties could refer, many of the current issues would be resolved. In the absence of challenge within that period, the orders would operate automatically for the period stated and their terms. Of course, situations can be expected to arise in which the judge does not have sufficient information at the time that the application is made to decide what, if any, order is required and issues what has previously been regarded as an interim order. In those circumstances, the order would so state.

473. In cases where there is an appeal lodged by one of the parties, the order would continue in effect unless set aside or varied by the appellate court. This would also address an issue raised in relation to the disincentive to appeal in cases in which the lower court or tribunal is conferred a broader power to make suppression orders than that available to the appellate court.[425]

Recommendation 7: That a central, publicly accessible register of suppression orders made by all Victorian courts and tribunals containing details of their terms and duration and, to the extent reasonably possible in the circumstances the reasons for them, be established.

Recommendation 8: That all suppression orders should be treated as interim for a period of five days to enable interested parties to present submissions as to their necessity or terms. In the absence of any such challenge, the orders would continue in effect for the period and terms stated.

Recommendation 9: That, in the event of an appeal being lodged against the outcome of proceedings in which a suppression order was made, the order would continue in effect until the determination of the appeal or it is discharged or varied on application to the court or tribunal hearing the appeal.

13.4.3 Distinction between proceeding and broad orders

474. Given the divergent views of stakeholders on this issue,[426] a feature of the regime governing suppression orders established by the Act that requires reconsideration is the distinction drawn between broad and proceeding suppression orders. It rests

424 Ibid.
425 See 10.4.5.2 above.
426 See 10.4.5.1 above.

upon the notion that a difference can be detected between the objectives for the making of the two types.

475. The distinction appears to have developed from a differentiation drawn between orders seen to impinge on freedom of speech, by virtue of attaching to specific matters concerning a party, and orders seen to impinge on the principle of open justice, by virtue of attaching to information emerging from a proceeding. It emerged from questions that arose concerning the interaction between the inherent power of the Supreme Court to make orders of a general kind and that conferred by section 18 of the Supreme Court Act.

476. Prior to the introduction of the Open Courts Act, the Victorian Court of Appeal, by reference to the above-mentioned two sources of power of the Supreme Court to make a suppression order, drew a distinction in *News Digital Media Pty Ltd v Mokbel* between 'proceedings suppression orders' and 'general suppression orders' in the context of multiple suppression orders made in relation to Mokbel:[427]

> These orders fall into two parts: orders restraining publication of the three proceedings involving Mr Mokbel ('the proceedings suppression order'), and those restraining the publication of the specific matters concerning Mr Mokbel ('the general suppression order'). …
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> [W]e make the general observation that these two types of suppression order are essentially different; they raise very different issues of policy and jurisdiction.
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> Superior courts have long asserted the power to prevent the publication of proceedings or parts of proceedings before them where justice requires that this be done. Such an order brings into play two very important policy matters: the requirement that justice be administered in public; and the requirement that justice be administered. In a context such as the present, the latter principle includes a requirement that an accused person is entitled to a trial conducted in accordance with law by an impartial tribunal. The former principle, which has been described as the cornerstone of our judicial system, means that the work of the courts is to be performed under public scrutiny, this being a powerful safeguard against the risk of their abusing their power, or departing from the strictest standards of impartiality. In the modern environment, the media, as the eyes and ears of the general public, play an important part in this. By the fair and accurate reporting of court proceedings they ensure that the public, who may not be able to attend a hearing, are kept informed of the functioning of the court process. The importance of this principle is such that the making of an order restraining, restricting, or postponing the reporting of a court proceeding or any part of a court proceeding is exceptional and, in general, will be made only where it is necessary to preserve the integrity of the court process, to ensure that the process can function properly, or to protect privacy or confidentiality of very limited kinds. These include confidentiality with respect to trade secrets or confidential information, where the trial publicity might defeat the purpose of the litigation, and confidentiality with respect to police informers, where it might jeopardise this source of police intelligence.
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> The second type of order, which we have referred to as a general suppression order, is directed to the same objective, namely to protect and preserve the court process. But the countervailing principle is not the preservation of open justice; it is that of free speech or the public's 'right to know'. The public has a right to know about matters that lie within their legitimate area of interest, and the media

[427] (2010) 30 VR 248, [33]–[36] (Warren CJ and Byrne AJA) (citations omitted). See also *Re Percy* [2004] VSC 67 [32]–[33] (Kellam J).

> have a right to disseminate information, presumably to satisfy this right to know. A moment's reflection, however, will demonstrate that this countervailing principle will assume a greater or lesser importance depending upon the subject-matter of the information. This information, may, at one end of the spectrum, concern the performance of the functions of those in the highest office; and at the other no more than salacious gossip about personal shortcomings of the less lofty.

477. The Explanatory Memorandum to the Open Courts Act accordingly refers to this distinction in the context of section 4:

> Where the order being considered would prohibit or restrict the disclosure of a report of part or all of a proceeding or of any information derived from a proceeding, the presumption strengthens and promotes the principle of open justice. If the order being considered would prohibit or restrict the disclosure of other information not derived from a proceeding, the presumption strengthens and promotes the principle of free communication of information. (This distinction was made clear in *News Digital Media Pty Ltd v Mokbel* (2010) 30 VR 248.)

478. In his second reading speech, Attorney-General Clark set out the rationale for adopting the distinction in the Open Courts Act in the following terms:

> The bill also addresses two recent and significant court decisions.[428] These decisions distinguish between orders relating to information disclosed in court proceedings and orders relating to other information not arising from proceedings that might be suppressed, for example, because it could prejudice a future case.
>
> The bill also distinguishes between these two types of orders. Part 3 consolidates the general statutory powers to make 'proceeding suppression orders' relating to information derived from proceedings. Part 4 consolidates and reforms the existing powers of the County Court and Magistrates Court to make suppression orders which relate to information that is not derived from proceedings (such as information about the identity or character or prior convictions of an accused) which have not been presented to a court but if made public could prejudice a fair trial or, in the case of the Magistrates Court, could endanger the safety of a person. The Supreme Court can also make such orders in its inherent jurisdiction.[429]

479. The underlying objectives of all suppression orders are the same. They are directed to securing the efficacy and integrity of our system of justice in individual cases and generally, although the source of the potential problem and the terms and duration of the order required to address it will vary. To deal with the range of situations in which an order may be necessary, does not require the creation of the arbitrary and artificial categories adopted, as is apparent from the absence of such a distinction in other Australian jurisdictions by and large.[430] While drawing a distinction between proceedings and broad suppression orders can be useful as a shorthand device to indicate the particular purpose and general parameters for a requested order, the division, by emphasising the source of information rather than its content, is

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428 Although unnamed, these two decisions appear to be *News Digital Media Pty Ltd v Mokbel* (2010) 30 VR 248 and *General Television Corporation Pty Ltd v The Queen* (2008) 19 VR 68 [10]–[16], dealing with the suppression of the Underbelly television programme. See also *Herald and Weekly Times v A* [2005] VSCA 189 [14]–[20] (Maxwell P and Nettle JA).

429 Victoria, *Parliamentary Debates*, Legislative Assembly, 27 June 2013, 2417 (Robert Clark, Attorney-General).

430 See Chapter 9 above. Cf the position in NSW, in which such a distinction appears to have been read into statute at common law: see [185] above.

unnecessary and should not have been incorporated into the statutory scheme. In some cases, of course, the factors militating in favour of a proceeding suppression order may also require that a broad order be made. In some situations, multiple orders are necessary to address a common concern.

480. Not only is the distinction unnecessary if orders are carefully considered and drawn but it has been productive on occasions of confusion as to the nature of the order and therefore what was encompassed by it.[431] It is noteworthy that, in practice, there have been very few broad suppression orders made (117 orders made between 2014 and 2016), with approximately ten times more proceeding suppression orders being made than the number of broad suppression orders.[432]

Recommendation 10: That the Open Courts Act be simplified by removing the unnecessary distinction between broad and proceeding suppression orders.

13.5 Participants in the process

13.5.1 The courts

481. Issues with the judicial application of the Open Courts Act, established by the Review's data analysis, have been discussed at some length previously.[433] These findings support the need perceived by a number of contributors to the Review for increased understanding of the Act's requirements on the part of judges and magistrates.[434] While there is no doubt that Victorian judicial officers would benefit from more rigorous training in the provisions of the legislative scheme, there is also a need for judicial reassessment of a more fundamental kind.

482. A basic feature and strength of our legal system is the democratic involvement of ordinary members of the community in determining questions of fact and applying the law, as stated by the trial judge. In a civil context, the jury may be tasked with deciding fault and damages or delivering a verdict on a number of issues, such as justification in defamation cases. In criminal trials, the central function of the jury is to determine the guilt of the accused. Our system of justice is in theory and practice heavily dependent upon jurors using their understandings of human behaviour and interactions in arriving at their verdicts. They are intended to be representative of the community, through the process of random selection, and reflect its basic values, including the right to a fair trial.[435] The danger of individual bias or idiosyncratic assessment is recognised and addressed through the engagement of a multitude of persons with different backgrounds and life experiences in the deliberative process. It is considered that, through their interaction and the application of their different perspectives, the risk of error can be minimised.[436]

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431 See 10.4.5.1 at [296] above.
432 See 11.3.2.1 above.
433 See 13.4.1 above.
434 See 10.2.2 above.
435 See generally *Juries Act 2000* (Vic) ss 1(b), 4; Victorian Law Reform Commission, *Jury Empanelment*, Report (2014) 8–9 [2.6]–[2.9].
436 Jacqueline Horan, *Juries in the 21st Century* (Federation Press, 2012) 61–3; Valerie Hans and Neil Vidmar, 'The Verdict on Juries' (2008) 91 *Judicature* 226, 227.

Under the legal direction of the trial judge, the requirement of a unanimous verdict in criminal trials by a number of unconnected members of the general population is regarded as further limiting the potential for personal bias or idiosyncratic decision-making and ensuring independence from political influence or pressure. Because it draws upon a range of community perspectives and experiences, the outcome can be accepted as factually reliable and reached in a proceeding that honours and implements the rule of law in a democratic society with community participation in the process.

483. At the same, there has also been a deeply-embedded concern within the judiciary and legal profession about the capacity of individual jurors to set aside any potential source of contamination arising from their possible exposure to external influences. The juror may not, it is broadly accepted, even be aware of their impact and endeavour conscientiously to perform their duty but nevertheless be diverted or simply unable to set aside their own biases or beliefs or understand how to apply the principles involved.

484. This perception originated historically in a distrust held by a formally educated and socially privileged judiciary of the capacity of the rest of the community to base their decisions solely on relevant evidence and the principles concerning its proper use.[437] As earlier mentioned and in common with other images developed in the evolution of the common law, the attitudes and perceptions of generations over time hardened into largely unchallenged propositions. Nowhere has this process been more obvious than in the treatment of complaints of sexual abuse by women and children whose evidence was once regarded as inherently unreliable,[438] but it is also apparent in the area of open justice. Although much has been done to improve the position, cultural change continues to be quite slow and is likely to remain a significant challenge to reform for some time.

485. To reduce the risk of miscarriages of justice arising from this perceived unreliability of juries, endeavours have been made over the years to quarantine certain kinds of information from them. Until relatively recently, an attempt to avoid their exposure to possible external influences, at least during the trial itself, was made through the sequestering of juries. This no longer occurs and they are instructed not to undertake any internet or social media searches themselves or to discuss the case with anyone outside the jury room.[439] A considerable level of claimed trust is reposed in them in this respect. The extent to which jurors obey such instructions is difficult to establish.[440] However, the inference can be reasonably drawn that for

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437 Jacqueline Horan, 'Communicating with Jurors in the Twenty-First Century' (2007) 29 *Australian Bar Review* 75, 76–7. See, eg, Glanville Williams, *The Proof of Guilt* (Stevens, 3rd edition, 1963) 272–3.

438 See, eg, Christine Eastwood, 'The Experiences of Child Complainants of Sexual Abuse in the Criminal Justice System' (Report, Australian Institute of Criminology, 2003) <http://www.aic.gov.au/publications/current%20series/tandi/241-260/tandi250.aspx>; Patricia Easteal, *Less than Equal: Women and the Australian Legal System* (Butterworths, 2001).

439 *Jury Directions Act 2000* (Vic) s 78A. See also Judicial College of Victoria, '1.5.2 – Charge: Decide Solely on the Evidence', *Criminal Charge Book*, 19 September 2013 <http://www.judicialcollege.vic.edu.au/eManuals/CCB/index.htm#1286.htm>.

440 As jury research expert Jacqueline Horan notes: 'The extent of detective juror work is unknown and will remain that way. Researchers are not permitted to ask jurors to implicate themselves in illicit activity. Furthermore, most jurors surveyed will not admit misbehaviour. For important public policy reasons, our courts are reluctant to receive evidence about jury deliberations in the jury room.' See Jacqueline Horan, *Juries in the 21st Century* (Federation Press, 2012) 155 (citations omitted). Studies of juries show that jurors generally obey judicial directions, but will act contrary to those directions and engage in their own research if they regard it as necessary: Michael Chesterman, Janet Chan and Shelley Hampton, *Managing Prejudicial Publicity: An Empirical Study of Criminal Jury Trials in New South Wales* (Law and Justice Foundation of

some there is possibly little more likely to produce the opposite result than to inform them that there may be potentially probative information that, for some usually unexplained reason, is to be denied to them. It would also be naive to assume that discussion with families and friends who are not bound by any such restrictions does not occur, even if the jurors have been living in an information vacuum themselves.

486. In practice, whether this question has arisen as a result of adverse pre-trial publicity or commentary involving contempt of court, breach of a suppression order, or unfair or colourful media reportage concerning the events or those who may be involved, the approach of the courts has been constant. The outcome that, in consequence of prejudicial publicity, sometimes disingenuously sanitised by use of the word 'alleged', a fair trial could never be conducted has been unambiguously rejected.[441] For the courts to hold otherwise would have extremely serious implications not only for the operation of the criminal justice system and those directly affected but for the entire society. A question would arise as to whether or not community participation through the jury system could continue, particularly in high profile cases.

487. The tensions within this system can be easily seen in criminal trials conducted in regional areas. There is a distinct possibility that jury members may already possess what is currently accepted to be potentially prejudicial knowledge, for example, the criminal propensities or reputation of the accused or their families, or have sympathy or perceptions concerning the events and those involved in them. Often, because they are from the same community, the lawyers and others involved in the case may possess similar knowledge of the history and attitudes of members of the panel from which the jury is selected and make assumptions concerning their likelihood to favour one side or the other.

488. Seldom is any serious reference made to these realities and little, if any, exploration of the position is usually conducted. Occasionally, a change of venue is ordered where it is evident that there is considerable local feeling about the case but this is inconsistent with the norm that trials should be conducted as far as reasonably possible in the area most directly affected. Unavoidably in these circumstances, in the vast majority of cases reliance has been placed upon the provision of appropriate instruction by the trial judge.

489. At most, and whether the trial is to be held in a city or regional centre, it may be delayed for a matter of months in consequence of the dissemination of accepted potentially prejudicial material; presumably on the theory that any impact will, by that time, have sufficiently dissipated for the matter to proceed. The relatively recent and highly-publicised trial for murder of Adrian Bayley, which was deferred for this reason, provides an example of the dilemma. It was adjourned for several months as a consequence of considerable pre-trial reportage. Whether or not the situation had actually changed must be a matter of serious doubt. In situations of that kind, the necessity that a trial be held as expeditiously as possible inevitably becomes the overriding consideration.

490. The increased dissemination of information and comment, whether reliable or not, is converting our metropolitan and regional centres into a single small village in which many of the residents possess and pass on images of the participants and know, or

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New South Wales, 2001) 82-84; Cheryl Thomas, *Are Juries Fair?* (United Kingdom Ministry of Justice, 2010) 43. See also n 290 above.

441 *R v Glennon* (1992) 173 CLR 592; *Dupas v The Queen* (2010) 241 CLR 237.

at least believe they know, what has happened.[442] Even if the already problematic attempts to quarantine information from jurors were not becoming less and less effective, the bases upon which this determination could be made requires reconsideration. It should certainly not rest upon the unchallenged acceptance of the unproven propositions and prejudices of an earlier time. Nor, of course, should the participation and role of juries in our criminal trials be assessed by reference to those beliefs and prejudices.

491. The judiciary has a vital role to play if community participation in these processes is to continue, and must undertake what might be called a 'real world' reappraisal of the circumstances in which suppression orders, proceedings for contempt of court and decisions for the discretionary exclusion of evidence are justifiable both in principle and efficacy. Rather than being treated as a position of last resort in responding to these possible influences, trust in the community and the juries that represent it should be the start point for this reassessment.

492. The central point here is that reform of the legislative regime is required but this can only be partially effective without the development of a culture of challenge within the judiciary itself.

Recommendation 11: That the Judicial College of Victoria be approached with a view to establishing programs and materials to improve the level of understanding within the judiciary concerning the operation of the Open Courts Act and other legislation restricting the public dissemination of information relating to legal proceedings.

13.5.2 Media organisations and legal practitioners

493. In many high-profile cases that have attracted widespread public attention, a great deal of information, accurate or otherwise, will be available from a wide variety of sources. The public may have been informed and, on occasions entertained, by elaborate descriptions of the circumstances of the crime or possibly related events and involved individuals and have formed strong impressions concerning all of those matters. By the time that a jury is empanelled, considerable feeling and prejudice may have been engendered by dramatic media presentations and commentary.

494. This is a matter of deep concern to many members of the judiciary.[443] They are troubled by the impact that sensationalist, selective and distorted description of events and subsequent proceedings, sometimes as part of a politically motivated agenda, may have upon the fairness of the trial and confidence in our system for the administration of justice as well as the standing of the courts themselves.

495. There are, unfortunately, many examples of this kind of reportage but it suffices to draw attention to the issue by reference to two cases that have come before the Supreme Court of Victoria in the last few years.

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442 Roxanne Burd and Jacqueline Horan, 'Protecting the Right to a Fair Trial in the 21st Century – Has Trial by Jury Been Caught in the World Wide Web?' (2012) 36 *Criminal Law Journal* 103.

443 See 10.2.1 at [249] above.

496. In *Director of Public Prosecutions (Cth) v Brady* ('*Brady*'),[444] the issue to be determined was whether a proceeding suppression order made on the application of the Australian Department of Foreign Affairs and Trade ('DFAT'), acting on behalf of the Commonwealth of Australia ('the DFAT order') should be revoked. The order prohibited the publication of information that suggested that particular foreign politicians had engaged in bribery-related activities in connection with contracts for the printing of bank notes. The relevant matters for the purposes of the Review were set out by Justice Hollingworth in her outline of the background to the proceeding:

a. On 13 June 2014, DFAT gave notice to the court of intention to apply for an order.

b. On the same day, the court emailed a copy of this notice to all media organisations on its email list, which included 90 representatives of the major Australian electronic and print news media.

c. There was no media attendance at the hearing which was conducted on 19 June 2014 and the order was made in the terms sought.

d. On the same day, a copy of the order was emailed to the same 90 media representatives who had received advance notice of the application.

e. Minter Ellison, lawyers acting on behalf of Fairfax Media Limited, contacted the court and requested a copy of the transcript of the hearing. This was provided a few days later.

f. No media organisation exercised its right under the Open Courts Act to review the order until late September.

g. This application followed the publication by WikiLeaks of the terms of the suppression order in clear contravention of the law and assertions on its website on 29 July 2014 about the making of a blanket ban on the reporting of a corruption case.

h. A number of media organisations recited WikiLeaks's inaccurate allegations about the DFAT order, describing it as a 'super injunction', a 'super gag order', a 'blanket ban' or 'blanket censorship order'.

497. A reader of any of these sensationalist descriptions, which omitted very important features of the background, would have been seriously misled into the belief that the proceeding had been cloaked in secrecy throughout, when, in fact, notice of the application and the making of the order had been given in accordance with the provisions of the Open Courts Act. None of the large number of organisations contacted by the court exercised its rights under the Act to object to the making an order or even attended the court when the application was made. A review was sought only after the publication by WikiLeaks of its terms. At that stage, outrage was expressed in a number of publications concerning the asserted secrecy of the entire process.

498. More recently, the President of the Victorian Court of Appeal, in a judgment expressed concern following the submission of counsel that their media client would

444 (2015) 252 A Crim R 50.

only oppose the making of a suppression order if the individual before the court were to be released on bail.[445] His Honour interpreted this stance as indicating that the organisation was far less concerned with the public's right to have the information than with the opportunity to criticise the judicial system and present the court in an unfavourable light. He stated:

> Critical scrutiny of the operations and decisions of this Court–and of every other court and tribunal–is a matter of the highest public interest. The proper functioning of our democracy demands nothing less. But if that scrutiny is to be balanced and fair, and is to give the community an accurate picture of how the justice system is functioning, it cannot be confined to those decisions which–in the view of a particular news media organisation–might give rise to public concern.
>
> The present case illustrates the point. If it is important for the community to know that bail has been granted in a case where there are concerns about interference with witnesses, it must be equally important for the community to know that bail has been refused precisely because of those concerns.[446]

499. The President did not accept the argument that the release of the individual on bail presented a danger to the community and that, viewed in that light, the media interest in opposing the making of a suppression order only where the individual in question was released into the community was a justifiable course of action. Irrespective of whether the President accurately assessed the media's interest in the proceeding, his remarks reflect the distrust that Victorian judges and magistrates have developed towards media organisations concerning the manner in which their decisions and the legal process generally will be reported.

500. Just as the courts need to re-examine the principles and approaches to the making of suppression orders which are clearly problematic, media organisations should address not only their legal obligations but their ethical responsibilities and culture in reporting what is happening in the courts. It is simply not sufficient to for them to recite as a mantra 'the public's right to know' without answering the questions 'to what information does this right attach and how does the right arise in the particular circumstances?'

501. The media perform a crucially important function of informing the community and ensuring the accountability of our public institutions and structures, including the courts and the operation of our system of justice.[447] They also constitute the major means by which the courts communicate with the public. In these respects, they not only report on the operation of the system but are integral to its effective functioning. It is unfortunate, to put it mildly, that, as a consequence of their experiences in the way matters have sometimes been reported, the courts have developed a concern about the risk of damaging misuse of media power that appears to underlie the making and breadth of a number of suppression orders.

502. There will inevitably be some antagonism towards the media felt by courts when their decisions are publicly criticised, particularly if it is felt to be unfair: a viewpoint that often depends on perspective. Justifiable criticism of a decision or outcome, although uncomfortable for the subject, constitutes an important element of accountability and serves to draw attention to problems that require attention.

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445 *Re Williams (a pseudonym) [No 2]* [2016] VSC 364 (Maxwell ACJ).

446 Ibid [13]–[14].

447 See 6.4 at [103]–[104] and 10.1 at [246] above.

However, its value can only be properly assessed by those among whom it is disseminated if the foundation on which it rests is accurately presented. In relation to suppression orders and the reportage of court proceedings generally that provides a background to those orders, there needs to be a more formalised structure established than the present loose arrangements directed to improving the current situation.

503. Similar considerations apply to the necessity for legal practitioners to be included in any forum for a broader cultural re-examination of the issues raised. As various contributors to the Review have observed, applications for orders brought by legal practitioners on tenuous bases or where an applicable statutory prohibition exists contribute to the jurisdictional problems identified with the use of suppression. Just as judges and magistrates should be expected to increase their level of awareness of the legislative framework governing the restriction or prohibition of publication of information, legal practitioners should develop greater knowledge of the relevant requirements than they demonstrate at present. Senior representatives of the Victorian Bar and the Law Institute of Victoria should participate in the formal structure for discussion of the issues presented in this area, with a view to increasing the level of understanding of legal practitioners more generally of the applicable legislation.

Recommendation 12: That a formal relationship be developed through the Department of Justice and Regulation between the media, the courts and legal practitioners with the purpose of addressing the issues presented in effecting an appropriate balance between openness and the suppression of information in our court and tribunal processes.

13.5.3 Offenders

13.5.3.1 Adult offenders with a history of juvenile offending

504. There was general acceptance encountered in the course of the Review as to the broad justifications underlying the grounds set out in section 18. A notable exception relates to the permanent concealment as adults of individuals' earlier offending propensities as juveniles, regardless of the seriousness of their subsequent criminal conduct.

505. It is not within the scope of the Review to address the social policy underlying the prohibition generally of publication of information identifying young offenders and it is enough, for present purposes, to state that it rests on an appreciation of the factors contributing to juvenile crime, the potential lifelong consequences of public disclosure and the importance of rehabilitation when dealing with young people.

506. However, these considerations can be reasonably regarded as far less influential in situations where the entire criminal history of an individual demonstrates an entrenched propensity for serious criminality extending from their early years. In that situation, the justifications for concealment would no longer be present.[448] A change in the law to this effect would enable the offender's adult conduct to be placed into proper context. It is important to emphasise that the decision to permit

448 This was acknowledged by stakeholders consulted on this issue: see 10.8 above.

such disclosures should only be made on a careful assessment of the relevance of the earlier history to the case under consideration.

Recommendation 13: That consideration be given to statutory reform to enable the discretionary disclosure of the relevant convictions of juvenile offenders in cases of their continuing and entrenched propensity to engage in serious offending as adults.

13.5.3.2 Serious sexual offenders

507. One hundred and forty three orders (of 1,594 orders in the Review's dataset, or 9%) suppressed information relating to the whereabouts and identity of individuals released into the community under supervision pursuant to section 184 of the *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) ('SSODSA').[449]

508. This legislation was enacted in recognition of the danger posed by a number of sex offenders who were considered 'to present an unacceptable risk of harm to the community'[450] and who otherwise would have been free from any form of monitoring after the expiration of the sentences imposed upon them for earlier offending.

509. The establishment of a new process for a limited class of serious sex offenders has arisen from concern as to engagement in deeply-entrenched criminal behaviour and that the victims are usually vulnerable women and children. Designed as a civil scheme, the primary objective of the regime to which offenders within this category can be subjected is identified in the SSODSA as the enhancement of 'the protection and safety of victims of serious sex offences and the community'.[451] To achieve this, the scheme incorporates both detention and release into the community under supervision. The secondary objective of the regime is 'to provide for the continuing rehabilitation, care and treatment' of offenders under the SSODSA.[452]

510. The objective of reducing the risk of offending by persons in this category through their rehabilitation, it has been accepted, would be considerably more difficult to achieve if the individuals released under supervision were subjected to discrimination or harassment by community members who became aware of their presence.[453] Accordingly, as part of the overall endeavour to effect a balance between transparency, effective risk reduction and the human rights of offenders who otherwise would have been free after completing the sentences imposed on them, section 184 of the legislation allowed for the making of suppression orders to conceal their identity or whereabouts.[454]

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449 See the results of the data analysis at 11.4, especially 11.4.1, above. Although an order made under section 184 is termed a 'non-publication order', the term 'suppression order' has been used in this section for consistency. Nothing substantive turns on the adoption of one term over another.

450 SSODSA (Vic) s 1(1).

451 SSODSA (Vic) s 3(1).

452 SSODSA (Vic) s 3(2).

453 See 10.9.1 at [317] above.

454 The provisions of the SSODSA (ss 182–186) relevant to the publication of information relating to serious sex offenders are set out at 8.2 above. Except where necessary to effect the recommendation proposed in this section, the Review did not consider that these provisions required amendment.

511. The process presents the community with a genuine dilemma. Our system to deal with and reduce criminal offending, with very few exceptions, addresses past behaviours. For a number of good reasons, including the uncertainty of prediction, only limited regard is had to future risk. Ordinarily, an offender who has undergone the period of incarceration fixed as appropriate in all of the circumstances for their offending, including an allowance for their personal deterrence and rehabilitation, would be under no further restraint.

512. Those subject to control under the SSODSA have been found, after having served the sentence imposed upon them, to still present a very significant threat to the community against which protection is required. Obviously, to the extent that this risk can be reduced through rehabilitation, it is highly desirable and in society's interest that the avenue is pursued. Equally apparent is the increased difficulty in achieving that objective if they become the subject of discrimination or adverse attention. Few people would be comfortable with the knowledge that a convicted serious sex offender was in their midst and most would be understandably apprehensive about the possible danger that this could present for their families and themselves.

513. The overriding consideration as a matter of justice for potential victims and the rights of members of the community must be, as the SSODSA states, their 'protection' from serious offenders. Herein lies the dilemma. Rehabilitation of serious offenders is extremely important in endeavouring to achieve this safety. At the same time, those who are potentially vulnerable to predatory behaviour by those offenders must be able to be confident that the process adopted does not itself subject them to a risk of which they are kept unaware.

514. The practical problems likely to be encountered by the staff of the Department of Justice and Regulation for the day to day operation of the system do not require elaboration. There is realistically no truly 'safe' location in which to house determined offenders and the notion of rehabilitation incorporates the presence of opportunities to interact lawfully with those around them. Nevertheless, as the tables set out in Appendix 4 prepared by Corrections Victoria indicate, the Department objected to the making of suppression orders in between 25% and 30% of cases. It also submitted that it tends not to consent to, or oppose an application for, a suppression order under section 184 where an offender has been compliant with the conditions of a supervision order. The courts view the situation differently, with orders being made on 98% of applications. It is not clear why this is the case and there are several possible explanations which could not be explored within the present Review.

515. Two central arguments appear to have been relied upon in applications for suppression orders: first, that the prospects for the successful rehabilitation of the offenders would be substantially impeded if their identities and whereabouts were disclosed as they would be likely to be shunned or subjected to discrimination; second, that they might be subjected to vigilantism or personal harassment. While there is some force in the first of these claims, the second, although regularly made and accepted, lacks any adequate evidentiary foundation.[455]

516. The Review notes that the operation of the SSODSA was recently examined by the Review of Complex Adult Victim Sex Offender Management ('Harper Review'), the

[455] See Victoria Police's submission at [325] above.

second and final report of which was published in November 2015.[456] The Harper Review neither endorsed nor criticised the operation of the SSODSA provisions concerning non-publication of information in relation to serious sex offenders. It concluded, however, that serious breaches of the SSODSA regime were rare and referred to a vast body of research establishing that the rate of reoffending by sex offenders in general was low.[457] Relevantly, it said:

> The diversity of offenders subject to the scheme, including their age, offending profiles, the absence or presence of protective factors, individual characteristics and amenability to treatment all impact on what 'success' should look like. For some it will be avoiding further offending, whether by an exercise of their own will, or through their opportunities to reoffend being restricted by the conditions of their orders. For others, engagement with supervision, treatment and order conditions, along with proactive goal-setting and risk management, may support their ability to transition from the post-sentence scheme.
>
> Since the SSODSA came into effect five offenders' orders have expired without renewal, as their risk had reduced while subject to the scheme. The orders of a further 12 were revoked upon review, as their risk had also reduced while subject to the scheme. It may be that for these offenders, their access to rehabilitation and reintegration programs contributed towards such reduction in their risk. That, of course, is precisely the aim of the scheme.
>
> While any breach of a supervision order by serious offending is unacceptable as an outcome – not only (and especially) for the victim of that offending but also for those who have invested much professional and personal endeavour into the management of the offender – the fact is that serious breaches are rare. This suggests that the Department of Justice and Regulation has, in the vast majority of cases, managed (and is managing) the risk of reoffending appropriately.[458]

517. There has been no ongoing evaluation of the effectiveness of the SSODSA in reducing the rate of recidivism of serious sex offenders. Relying on the data supplied by Corrections Victoria at Appendix 4, offending of a sexual kind occurred in breach of a supervision order in 4% of cases in 2017.[459] This is consistent with the findings of the Harper Review, which concluded that the scheme under the SSODSA has generally caused a significant reduction of risk and facilitated the successful operation of the system.[460] While the complete elimination of reoffending is unlikely to be achieved, a rate of reoffending of 4% is nevertheless a concern bearing in mind the character of the offenders and offences involved and the relatively short periods of supervision to which they have been subject. It is difficult to conclude determinatively whether the making of a section 184 order tends to reduce the risk of reoffending; there is no indication, for example, that those who committed further offending while on supervision orders were unsuccessful in having their identities or whereabouts suppressed or reoffended in part, because of the increased stress suffered as a result of not having their identifying information suppressed.

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456 Complex Adult Victim Sex Offender Management Review Panel, *Advice on the Legislative and Governance Models under the Serious Sex Offenders (Detention and Supervision) Act 2009 (Vic)* (2015) ('Harper Review Report').

457 Harper Review Report (2015) viii, 25–9, 54–6.

458 Ibid 55–6 [2.157]–[2.159].

459 See 11.4.1.1 above.

460 Harper Review Report (2015) 55–6 [2.157]–[2.159].

518. As the SSODSA makes clear, victim and community safety must remain at the centre of the process and the protection of the public is by far the most important consideration to be taken into account. In practice, as media stakeholders indicated to the Review,[461] the making of non-publication orders in such a high percentage of cases suggests that the balance seems to have shifted from the priorities set out in the Act. This needs to be addressed. Consistent with the approach to transparency in our legal system generally and in conformity with the priorities established by Parliament in the Act, suppression orders under this Act should be treated as exceptional departures from the underlying principle.

Recommendation 14: That section 184 should be amended to restrict the making of suppression orders concealing the identity or whereabouts of persons subject to supervision under the SSODSA. In so restricting the making of suppression orders, the Act should continue to have regard to the ramifications of disclosure, including the personal safety of individuals.

13.5.4 Victims

13.5.4.1 Consenting to disclosure of identity

519. The possibility that the identity of victims of sexual assault or family violence may be revealed by the publication of information concerning the offence or that identifies the offender has been a source of some difficulty.

520. Unfortunately, it is clear from submissions by victims' groups to the Review that although the situation has improved markedly over recent years, many victims still experience a sense of great shame and embarrassment and even, in some circumstances or communities, social stigma from the disclosure of what has happened to them.[462]

521. Endeavours have been made to limit this additional damage by the use of suppression orders and pseudonyms. However, the employment of these devices has, on many occasions, also resulted in concealment of the identity of perpetrators. The injustice of this transference of protection is increasingly appreciated by victims and the wider society. They object to the ability of the perpetrator of life-changing offences against their victims to hide from public accountability and become the principal beneficiary of measures designed for victim protection.

522. An increasing number of victims reject the absurd notion that they have been in any way diminished by the commission of criminal acts committed against them by another and are prepared to have their identities disclosed. There seems to be no good reason why a person who adopts this view, or an adult who has previously suffered abuse as a child, and makes an informed decision to do so should not be entitled to opt for disclosure and to have that publicly recorded upon the conviction of the perpetrator. The Commonwealth Royal Commission into Institutional

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461 See 10.9.1at [320]–[323] above.

462 See 10.3 above.

Responses to Child Sexual Abuse and the Victorian Royal Commission into Family Violence are both testament to the power and value of survivors of sexual abuse and family violence telling their stories publicly.[463] Allowing victims to opt to talk openly about their experience is also consistent with the Victorian Royal Commission's emphasis on keeping the actions of perpetrators in view.

523. Of course, not all victims are able to view their situation in this fashion. For many reasons they do not wish to have what happened to them to be generally known, and their privacy must be respected and protected. In situations where there is more than one victim, and different views are adopted by them concerning exposure of their identity or circumstances, there would need to be some flexibility in the process to respect the position of any who wish, for personal reasons, to retain anonymity. This could be achieved by requiring the court to refuse an application where disclosure of the identity of a victim or perpetrator would result in the disclosure of that of a victim who was not prepared to make this disclosure or impose any conditions required in the circumstances to secure their anonymity.

524. A particular issue concerning the denial of the opportunity to victims to describe what has happened to them arises in relation to the *Children, Youth and Families Act 2005* (Vic). Section 534 of that Act prohibits publication, except with the permission of the President of the Children's Court or a magistrate, a report of a proceeding in the Court that contains particulars likely to lead to the identification of '(iii) a witness in the proceeding'. Strictly interpreted, the provision would appear to mean that few victims would ever be in a position to engage in meaningful discussion with any other person about the issues arising from the commission of the offence against them without securing prior permission.

525. The presence of the provision and the consequent care required in reporting matters coming before the Children's Court was recently drawn to public attention by the President of the Court on 1 August 2017.[464] Her reminder has attracted criticism that victims of crime committed by young offenders are denied the opportunity to tell their personal stories, including through their social media.[465]

526. The objective of personal protection underlying this provision would seem to be obvious; but, as victims are normally also witnesses, the breadth of the restriction has emerged as an issue. It is one thing for the reasons adverted to above to conceal the identity of young offenders and quite another to prevent the victim who, within the necessary restrictions required to do so, wishes to disclose or discuss publicly what has occurred. That Parliament may have intended that a provision included for the purpose of protecting them would have this effect, and that it is not an unintended consequence, must be doubted.

527. At a late stage of the Review, the immediate need for this situation to be addressed, and the law clarified, was recognised by the Victorian Government. The

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463 Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse (ongoing); Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016).

464 President of the Children's Court of Victoria, *Media Warning* (2017) <http://www.childrenscourt.vic.gov.au/media-warning-1-august-2017>. The warning updates an earlier media warning issued by former President of the Children's Court, Judge Paul Grant, on 28 May 2009.

465 See, eg, Editorial, 'Victims' Voices May Be Silenced', *The Herald Sun* (online) <http://www.heraldsun.com.au/news/opinion/victims-voices-may-be-silenced/news-story/2aad87b8fd5fa33491c4fb0e6ab12454?>; Olivia Caisley, 'Clamp on Youth Crime Media Reports', *Legal Affairs, The Australian* (online), 10 August 2017, <http://www.theaustralian.com.au/business/legal-affairs/clamp-on-youth-crime-media-reports/news-story/bacc06ae9e06850f63b026a669bd9614>.

Government has indicated that it will amend section 534 consistently with the recommendation proposed by the Review.

Recommendation 15: That adult victims of sexual assault or family violence, or who as children have been so subjected should, on the conviction on the offender, be able to opt for disclosure of their identity. In situations where there is more than one victim, the court would be required to refuse an application where disclosure of the identity of a victim or perpetrator would result in that of a non-consenting victim or impose any conditions required in the circumstances to secure the anonymity of a non-consenting victim.

Recommendation 16: That section 534 of the Children, Youth and Families Act be amended to enable adult victims who are also witnesses to disclose their own identities, provided that to do so does not breach any other of the requirements of the section.

13.5.4.2 Protection at the stage of bail proceedings

528. A problem of the absence of consideration of the possible necessity for a suppression order to protect victims has emerged in relation to initial bail hearings.[466] In one recent case, a number of statements and allegations were made at the initial hearing after charges were laid against the defendants for sexual offences alleged to have been committed against a young girl. The assertions were both distressing and potentially identified her in her local community. Not until a complaint was made by her concerned parents was any action taken to protect her. By that stage, the statements had been extensively reported in the media and disseminated widely via the internet. Section 7 of the *Bail Act 1977* (Vic) permits the court to make suppression orders in limited circumstances[467] and the juvenile was the alleged victim of sexual assault but it seems that no reference was made to these considerations in the course of the hearing. This was extremely unfortunate and contributed to immense distress that may well have been avoided.

529. In his submission to the Review, the DPP stated that anecdotal evidence from the Witness Assistance Service indicated that most but not all victims do not have any prior knowledge about statutory prohibitions or suppression orders.[468] At present, there was no general information provided to them by the Office of Public Prosecutions ('OPP') in relation to these matters and they are approached on a

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466 See 10.3 at [273] and 10.4.5.2 above.

467 Section 7(1) of the Bail Act provides:

> Where the informant or prosecutor or any person appearing on behalf of the Crown intends to oppose the grant of bail to any person he shall so state to the court and the court may, before or at any time during the course of the application for bail, make an order directing that the evidence taken, the information given, and the representations made and the reasons (if any) given or to be given by the court shall not be published by any means—
>
> (a) if a committal proceeding is held—before the accused in respect of whom the application is made is discharged; or
>
> (b) if the accused in respect of whom the application is made is tried or committed for trial—before the trial is ended.

468 See 10.3 at [274] above.

case by case basis. That was, of course, too late in this case. Consideration is being given, the Review was informed, to inclusion of general information on the new OPP website for victims. This initiative should certainly be pursued, but what may be required in some cases is protection against potential identification and undue distress and humiliation at the earlier stage of the arrest of the alleged perpetrator of the crime. Victims cannot be expected to be sufficiently well informed nor, in this stressful situation, be assertive and seek an order themselves. The protection should be automatically provided.

530. In cases involving allegations of sexual offending whether involving children or adults, or those concerned with family violence, it is recommended that there should be a mandatory interim suppression order issued at the commencement of the hearing confining reports to the laying of the charges and the fact and date of the hearing. The order would remain in effect for a period of five working days. This should be sufficient for a proper assessment of the circumstances to be made and the application for any further order to be made and would impose only a limited restriction of the reportage of the case. An alternative method to address this issue could be the addition of a similar prohibition to the restrictions already existing under the Judicial Proceedings Reports Act.

Recommendation 17: That it becomes mandatory at initial bail hearings consequent upon the laying of charges in relation to alleged sexual or family violence criminal offences for an interim suppression order to be issued, confining publication of reports to the laying of the charges and the fact and date of the hearing. This order would remain in effect for five working days. Alternatively, the Judicial Proceedings Reports Act should be amended to the same effect.

13.5.5 The Public Interest Monitor

531. As earlier mentioned in this chapter, the publication of information concerning an order sometimes may not be realistic, as, for example, where it is made to conceal the identity of an informant or the nature of their cooperation with the authorities. This may result in the creation of the very problem that the order was intended to avoid. In order to ensure both the integrity of our system of justice and the maintenance of justifiable public confidence in its operations in situations of that kind, there must be a mechanism available to monitor the process and enable the intervention of an independent person as contradictor when necessary.

532. Although there are opportunities available under the present arrangements to challenge the making and content of orders, media contributors complained about the difficulties and expense incurred in their operation.[469] These concerns cannot be disregarded as simply the consequence of a changing communications environment upon the commercial activities of media organisations. Whether or not information relevant to decision-making in our system of justice has been justifiably concealed from public view presents questions for the community generally. There can be no doubt that the media play an important role in the dissemination of information about what is happening in our courts and tribunals and their reportage does provide a form of monitoring that serves an important public interest. They

469 See 10.5 above.

regularly challenge the use and content of suppression orders that they contend unduly restrict their ability to inform the public in individual cases but it is not their responsibility to monitor the system or to ensure that orders are properly made.

533. Nor is it reasonable to anticipate that parties involved will provide the necessary assistance to the judge in identifying the issues that might arise in relation to the need, terms and efficacy of an order. Indeed, they may be indifferent to whether it is made or prefer that exposure of the full details of the case and their role and conduct does not occur.

534. The existence of a problem in this area has been recognised by the Chief Justice of Victoria who, with the cooperation of the Bar Council, has instituted a pro bono assistance scheme to respond to complaints that may arise in individual cases.[470] While this initiative is significant and the contribution of the participants must be commended, it is inappropriate for the resolution of an acknowledged systemic issue concerning the transparency of our legal processes to be handled in this way. To the time of writing, little use has been made of it.

535. From the perspective of a judge about to preside over a trial that can be expected to involve complex and difficult issues of fact and law, an application for a suppression order may be seen as peripheral to their main task; just another preliminary matter to be disposed of as quickly as possible. While this is, to some extent, understandable in many situations, in the absence of any objection to the making or terms of the order, little attention may be given to the importance of public transparency and order made that is too loosely expressed or unnecessarily broad in its scope.

536. What is required is the creation of a system for the independent monitoring of the process and the availability of an independent contradictor who could be called upon to assist the court when required or review orders, once made, in the public interest. A possible means of achieving this would be to empower the Public Interest Monitor ('PIM') to perform these functions.

537. It is contemplated that the PIM could be called upon by the court to act as contradictor or assist in the preparation of the terms of an order under the Open Courts Act. The PIM would, at the request of an affected party and if it was considered to be in the public interest to do so, be empowered to lodge an appeal against the making or terms of an order or seek its review. The existing opportunities for the appeal or review of orders would remain unaffected.

538. The response of the PIM has been noted above.[471] It is apparent, despite the willingness of the PIM to be involved, that his capacity to assume all the responsibilities envisaged is limited by the resources currently available to his Office.

Recommendation 18: Provided the PIM receives the additional funding and resources necessary to perform the following functions:

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470 Ibid at [302] above.
471 Ibid at [306] above.

(1) The PIM should be empowered, if requested by the judge to appear as contradictor, to make submissions and ask questions when the judge is determining whether orders should be made under the Open Courts Act, on what grounds and the framing of their scope.

(2) Orders, once made, can be referred to the PIM for consideration by interested parties to enable the independent consideration of the need, terms and duration of the order while maintaining the security of the underlying information. The PIM's decision whether or not to pursue the review of an order is final.

(3) If it is considered necessary in the public interest to intervene, the PIM should be able to seek the review of the order by the judge or prosecute an appeal.

(4) The PIM would report annually to the Attorney General on the operation of the Open Courts Act.

Appendix 1 Contributors

Consultations

1. Supreme Court of Victoria
2. County Court of Victoria
3. Magistrates' Court of Victoria
4. Victorian Civil and Administrative Tribunal
5. Children's Court of Victoria
6. Director of Public Prosecutions Victoria
7. Victorian Bar: representatives of Criminal Bar Association (P Justin Hannebery), Commercial Bar Association (Luke Merrick), Pro Bono Committee (Richard Wilson, Haroon Hassan), Georgina Schoff QC
8. Mark Sneddon
9. Law Institute of Victoria (Melinda Walker, Rob Stary)
10. Victoria Police
11. Victoria Legal Aid
12. Corrections Victoria
13. Commission for Children and Young People, Victoria
14. Victims of Crime Commissioner, Victoria
15. Victims of Crime Consultative Committee (Victims representatives)
16. Sandy and Tony[472]
17. Janine Greening, Forget Me Not Foundation
18. Public Interest Monitor, Victoria
19. Judicial College of Victoria
20. Liberty Victoria
21. Justin Quill and John-Paul Cashen, Macpherson Kelley Lawyers
22. Georgia-Kate Schubert, News Corp and Right to Know Coalition
23. Grant McAvaney, ABC

[472] These names have been pseudonymised by request.

24. Sam White, Minter Ellison
25. Jason Bosland, University of Melbourne
26. Professor Jonathan Clough, Monash University
27. Professor James Ogloff, Swinburne University of Technology
28. Senator Derryn Hinch (Senator for Victoria)
29. Anne Stanford (former Strategic Communications Manager at the Supreme Court of Victoria)
30. Supreme Court of Queensland
31. Supreme Court of South Australia
32. Supreme Court of Western Australia
33. Supreme Court of New South Wales
34. Supreme Court of Tasmania
35. Supreme Court of Australian Capital Territory

Written submissions

1. Director of Public Prosecutions Victoria
2. Public Interest Monitor, Victoria
3. Supreme Court of Australian Capital Territory
4. Supreme Court of Northern Territory
5. Media, Entertainment & Arts Alliance
6. Joint Media Organisations: Australian Associated Press, Australian Broadcasting Corporation, Australian Subscription Television and Radio Association, Bauer Media Group, Commercial Radio Australia, Community Broadcasting Association of Australia, Fairfax Media, Free TV, HT&E – Here, There and Everywhere, Media, Entertainment & Arts Alliance, News Corp Australia, NewsMediaWorks, SBS and The West Australian
7. The Herald and Weekly Times
8. Michael Bachelard, Fairfax Media
9. Patrick O'Neil, Fairfax Media
10. Victorian Aboriginal Legal Service
11. Richard Wilson

12. Sandy and Tony[473] (victims of crime)
13. Janine Greening, Forget Me Not Foundation
14. Lynell Crowther
15. Tracey May
16. Name Withheld (victim of crime)

[473] These names have been pseudonymised by request.

Appendix 2

Table of statutory provisions

Cells are shaded red when the prohibition applies automatically
Cells are shaded green when the application of the prohibition requires an order of the court

	Victoria	NSW	Queensland	SA	Tasmania	WA	NT	ACT	Cth	UK
Sex offences										
Identifying information of victims	*Judicial Proceedings Reports Act 1958 (*Vic) s 4(1A).	*Crimes Act* 1900 (NSW), s 578A	*Criminal Law (Sexual Offences) Act* 1978 (Qld), s 6.	*Evidence Act 1929* (SA), s 71A	*Evidence Act 2001* (Tas) s 194K.	*Evidence Act 1906* (WA), s 36C.	*Sexual Offences (Evidence and Procedure) Act* (NT), s 6 - 13.	*Evidence (Miscellaneous Provisions) Act 1992* (ACT) s 40	*Crimes Act 1914* (Cth) s 15YR	*Sexual Offences (Amendment) Act 1992* (UK) s 1
Proceeding information				*Evidence Act 1929* (SA),	*Evidence Act 2001* (Tas) s 194L (in					

	Victoria	NSW	Queensland	SA	Tasmania	WA	NT	ACT	Cth	UK
				s71A	civil cases).					
Closed court	*Criminal Procedure Act 2009* (Vic) s 123.	*Criminal Procedure Act* 1986 (NSW), ss 291, 291A (note s 291B provides that incest proceedings must be held entirely in camera)	*Criminal Law (Sexual Offences) Act* 1978 (Qld) s 5.	*Evidence Act 1929* (SA), s 69(1a) (where the alleged victim is a child)			*Evidence Act* (NT) s 21A	*Evidence (Miscellaneous Provisions) Act 1992* (ACT) s 39(3)	*Crimes Act 1914* (Cth) s 15YP	
Coroners court										
Identifying information		*Coroners Act 2009* (NSW) ss 75 (for information about suicides and their families)					*Evidence Act* (NT) ss 4, 57	*Coroners Act 1997* (ACT) s 40; *Evidence (Miscellaneous Provisions) Act 1992* (ACT) s 111		
Proceeding	*Open Courts Act* 2013	*Coroners Act 2009* (NSW)	*Coroners Act 2003* (Qld) s	*Evidence Act 1929* (SA) Pt	*Coroners Act* 1995 (Tas) s	*Coroners Act* 1996 (WA) s	*Coroners Act* (NT) s 43;	*Coroners Act 1997* (ACT)		

	Victoria	NSW	Queensland	SA	Tasmania	WA	NT	ACT	Cth	UK
information	(Vic) s 18(2).	ss 47, 74, 75	41	8.	57.	49.	*Evidence Act* (NT) ss 4, 57	s 40; *Evidence (Miscellaneous Provisions) Act 1992* (ACT) s 111.		
Closed court	*Open Courts Act* 2013 (Vic) s 30.	*Coroners Act 2009* (NSW) ss 47, 74, 75.	*Coroners Act 2003* (Qld) ss 31, 43	*Evidence Act 1929* (SA) Pt 8.	*Coroners Act* 1995 (Tas) s 56.	*Coroners Act* 1996 (WA) s 45.	*Coroners Act* (NT) s 42; *Evidence Act* (NT) ss 4, 57.	*Coroners Act 1997* (ACT) s 40		
Terrorism										
Proceeding information			*Terrorism (Preventative Detention) Act 2005* (Qld) s 76		*Terrorism (Preventative Detention) Act 2005* (Tas) s 50(3).	*Terrorism (Preventative Detention) Act 2006* s 53.	*Terrorism (Emergency Powers) Act* (NT) s 27Y (for information about covert search warrants).			
Closed court		*Terrorism (Police Powers) Act* 2002 (NSW),	*Terrorism (Preventative Detention) Act 2005*		*Terrorism (Preventative Detention) Act 2005* (Tas) s	*Terrorism (Preventative Detention) Act 2006* s				

	Victoria	NSW	Queensland	SA	Tasmania	WA	NT	ACT	Cth	UK
		s 26P.	(Qld) s 76		50(2).	53.				
Youth justice										
Identifying information	*Children, Youth and Families Act 2005* (Vic) s 534.	*Children (Criminal Proceedings) Act 1987* (NSW) s 15A; *Young Offenders Act 1997* (NSW) s 65.	*Youth Justice Act* 1992 (Qld), ss 283, 301.	*Young Offenders Act 1993* (SA) s 13.	*Youth Justice Act 1997* (Tas) ss 22, 31; *Magistrates Court (Children's Division) Act 1998* (Tas) s 12(1).	*Children's Court of Western Australia Act 1988* (WA) ss 35(1) and 36A; *Young Offenders Act 1994* (WA) s 40.		*Criminal Code 2002* (ACT) s 712A		*Youth Justice and Criminal Evidence Act 1999* (UK) s 45, 45A
Proceeding information				*Young Offenders Act 1993* (SA) s 13.	*Magistrates Court (Children's Division) Act 1998* (Tas) s 12(3).	*Young Offenders Act 1994* (WA) s 40.	*Youth Justice Act* (NT) s 50.			*Children and Young Persons Act 1933* (UK) s 49
Closed court	*Children, Youth and Families Act 2005* (Vic) s 523.	*Children (Criminal Proceedings) Act* 1987 (NSW) s 10.	*Children's Court Act 1992* (Qld) s 20	*Youth Court Act 1993* (SA) s 24.	*Youth Justice Act 1997* (Tas) ss 30, 31; *Magistrates Court*	*Young Offenders Act 1994* (WA) s 40.	*Youth Justice Act* (NT) s 49.	*Children and Young Person's Act 2008* (ACT) s 710	*Crimes Act 1914* (Cth) s 15YP	

	Victoria	NSW	Queensland	SA	Tasmania	WA	NT	ACT	Cth	UK
					(Children's Division) Act 1998 (Tas) s 11.					
Child protection and child witnesses										
Identifying information		*Children and Young Persons (Care and Protection) Act 1998* (NSW) s 105.	*Child Protection Act 1999* (Qld) s 99ZG		*Children, Young Persons and Their Families Act 1997* (Tas) s 103.	*Children and Community Services Act 2004* (WA) s 237	*Care of Protection of Children Act* (NT) s 301	*Court Procedures Act 2005* (ACT) s 72; *Criminal Code 2002* (ACT) s 712A.	*Crimes Act 1914* (Cth) s 15YR(1).	
Proceeding information			*Child Protection Act 1999* (Qld) s 99ZG	*Child Protection Act 1993* (SA) ss 59, 59A	*Children, Young Persons and Their Families Act 1997* (Tas) s 40.		*Care of Protection of Children Act* (NT) s97		*Crimes Act 1914* (Cth) s 15YR	
Closed court	*Children, Youth and Families Act 2005* (Vic) s	*Children and Young Persons (Care and*	*Child Protection Act 1999* (Qld) s 99J;				*Care of Protection of Children Act*	*Children and Young People Act 2008* (ACT)	*Crimes Act 1914* (Cth) s 15YP	*Youth Justice and Criminal Evidence Act*

	Victoria	NSW	Queensland	SA	Tasmania	WA	NT	ACT	Cth	UK
	330 (when the case is on appeal)	*Protection) Act 1998* (NSW) s 104A (note the media can attend under s 104C); *Children (Criminal Proceedings) Act 1987* (NSW) s 10.	*Evidence Act 1977* (Qld) s 21AU.				(NT) s 99	s 710; *Court Procedures Act 2005* (ACT) s 72		*1999* (UK) ss 16, 17, 25.
Family violence										
Identifying information of children	*Family Violence Protection Act 2008* (Vic) s 68.	*Crimes (Domestic and Personal Violence) Act* 2007 (NSW) s 45(1).	*Domestic and Family Violence Protection Act 2012* (Qld) s 159.	*Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 33.	*Family Violence Act 2004* (Tas) s 32; *Justices Act 1959* (Tas) s 106K.	*Restraining Orders Act 1997* (WA), s 70(2).	*Domestic and Family Violence Act* (NT)	*Family Violence Act 2016* (ACT) s 149.		
Identifying information about other parties	*Family Violence Protection Act 2008* (Vic) s 68.	*Crimes (Domestic and Personal Violence) Act* 2007 (NSW) s	*Domestic and Family Violence Protection Act 2012* (Qld) s 159.	*Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 33.	*Justices Act 1959* (Tas) s 106K.	*Restraining Orders Act 1997* (WA), s 70(2).	*Domestic and Family Violence Act* (NT) s 26.	*Family Violence Act 2016* (ACT) s 149.		

	Victoria	NSW	Queensland	SA	Tasmania	WA	NT	ACT	Cth	UK
		45(2).								
Proceeding information			*Domestic and Family Violence Protection Act 2012* (Qld) s 159.					*Family Violence Act 2016* (ACT) s 60.		
Closed court	*Family Violence Protection Act 2008* (Vic) s 68.		*Domestic and Family Violence Protection Act 2012* (Qld) s 158.				*Domestic and Family Violence Act* (NT) s 106.	*Family Violence Act 2016* (ACT) s 60.		
Police investigations										
Information about covert operations		*Surveillance Devices Act* 2007 (NSW) s 42(5); *Law Enforcement (Controlled Operations) Act 1997* s 28.		*Criminal Investigation (Covert Operations) Act 2009* (SA) s 38.	*Witness (Identity Protection) Act 2006* (Tas) s 11.				*Crimes Act 1914* (Cth) s 15MK(4).	

	Victoria	NSW	Queensland	SA	Tasmania	WA	NT	ACT	Cth	UK
Witness protection		*Witness Protection Act* 1995 (NSW), s 26	*Witness Protection Act 2000* (Qld) s 27A	*Witness Protection) Act 1996* (SA) s 25.	*Witness (Identity Protection) Act 2006* (Tas) s 11.	*Witness Protection (Western Australia) Act 1996* (WA) s 32		*Witness Protection) Act 1996* (ACT) s 16.	*Witness Protection Act 1994* (Cth) s 28	*Serious Organised Crime and Police Act 2005* (UK) s 75.
Witness protection proceedings – closed court	*Witness Protection Act 1991* (Vic) s 13	*Witness Protection Act 1995* (NSW) s 26	*Witness Protection Act 2000* (Qld) s 27A	*Witness Protection) Act 1996* (SA) s 25.	*Witness Protection Act 2000* (Tas) s 16	*Witness Protection (Western Australia) Act 1996* (WA) s 23	*Witness Protection (Northern Territory) Act* (NT) s 38.	*Witness Protection) Act 1996* (ACT) s 16.	*Witness Protection Act 1994* (Cth) s 28	
Mental health and guardianship										
Proceeding information			*Mental Health Act* 2016 (Qld), ch 17 pt 4.						*Crimes Act 1914* (Cth) s 15YR.	
Closed court							*Evidence Act* (NT) s 21A		*Crimes Act 1914* (Cth) s 15YP	*Youth Justice and Criminal Evidence Act 1999* (UK) ss 16, 17, 25.

	Victoria	NSW	Queensland	SA	Tasmania	WA	NT	ACT	Cth	UK
Identifying information	*Victorian Civil and Administrative Tribunal Act 1998* Schedule 1, cl 37(1)									

Appendix 3

Data analysis conducted by Review

These tables set out different features of the dataset of orders made between 1 January 2014 and 31 December 2016.

Table 1 All orders relating to suppression made by Victorian courts and tribunals

Type of Order	County	Supreme	Magistrates	VCAT	Total
Extension		13	15	3	**31**
Interim	37	22	70	7	**136**
Suppression	497	128	263	291	**1,179**
Variation	93	52	84	3	**232**
Revocation	3	12	1		**16**
Total	**630**	**227**	**433**	**304**	**1,594**

Table 2 Open Courts Act orders relating to suppression, by date that order was made

Year	County	Supreme	Magistrates	VCAT	Total
2014	118	59	144	121	**442**
2015	139	58	110	86	**393**
2016	120	56	174	92	**442**
Unknown			2		**2**
Total	**377**	**173**	**430**	**299**	**1,279**

Table 3 Open Courts Act orders relating to suppression, by source of power used

Source of court's power	County	Supreme	Magistrates	VCAT	Total
Open Courts Act s 17	335	156	249	292	**1,032**
Open Courts Act s 20	37	25	73	7	**142**
Open Courts Act s 25	6				**6**
Open Courts Act s 26(1)(a)	2		76		**78**
Open Courts Act s 26(1)(b)		4	60		**64**
Total	**380**	**185**	**458**	**299**	**1,322**

Table 4 Open Courts Act orders relating to suppression, by duration of order

Duration	County	Supreme	Magistrates	VCAT	Total
Indefinitely			2		**2**
Not specified	19	13	52	10	**94**
Specified date provided	168	74	197	2	**441**
Specified time from order	30	17	26	3	**76**
Triggered by event in relation to proceeding	129	61	146	7	**343**
Triggered by other event	31	8	7	277	**323**
Total	**377**	**173**	**430**	**299**	**1,279**

Table 5 Open Courts Act orders relating to suppression, by ground of order

Ground	County	Supreme	Magistrates	VCAT	Total
Necessary to prevent a real and substantial risk of prejudice to the proper administration of justice that cannot be prevented by other reasonably available means OR interests of justice (*part of 'general ground'*)	222	100	190	3	**515**
Necessary to prevent prejudice to the interests of the Commonwealth or a State or Territory in relation to national or international security	4	3	7		**14**
Necessary to protect the safety of any person	158	72	193	3	**426**
Necessary to avoid causing undue distress or embarrassment to a complainant or witness	32	5	62	61	**160**
Necessary to avoid causing undue distress or embarrassment to a child who is a witness	12	9	33	39	**93**
VCAT only – Necessary to avoid the publication of confidential information or information the subject of a certificate under section 53 or 54 of the *Victorian Civil and Administrative Tribunal Act 1998*				4	**4**
VCAT only – For any other reason in the interests of justice (*part of 'general ground'*)				282	**282**
Not specified	21	23	92	12	**148**
Total	**449**	**424**	**577**	**404**	**1,642**

Table 6 Open Courts Act orders relating to suppression, by purpose of order (where available)

Purpose or justification	County	Supreme	Magistrates	VCAT	Total
Sensitive personal information of subject (e.g. general privacy of family, rehabilitation)	8	4	1	51	**64**
Sensitive health information of subject (e.g. mental health, disability)		1		131	**132**
Closely involves child (e.g. subject of proceeding)	11	12	26	84	**133**
Encouraging informers, witnesses, notifiers etc by protecting privacy	35	18	16	29	**98**
Ensuring fair trial of, or not compromising ongoing investigations into, other persons; not allowing prejudicial information in trial of subject of proceeding	81	33	4	2	**120**
Maintaining parity with the orders of other Australian States	1				**1**
Total	**136**	**68**	**47**	**297**	**971**

Table 7 Open Courts Act orders relating to suppression, by subject matter of order

Subject Matter	County	Supreme	Magistrates	VCAT	Total
Identity of applicant / respondent	15	8	22	262	**307**
Image of applicant / respondent				2	**2**
Whereabouts of applicant / respondent	1		1	159	**161**
Other information about applicant / respondent (e.g. info relating to family member)	6	2	4	250	**262**
Identity of accused / defendant	85	15	98		**198**
Image of accused / defendant	6	11	36		**53**
Whereabouts of accused / defendant	33	8	80		**121**
Prior convictions of accused / defendant	10	8	20		**38**
Other information about accused / defendant (e.g. info relating to family member)	100	39	99		**238**
Identity of victim	28	7	64	70	**169**
Image of victim	3	4	16		**23**
Whereabouts of victim		2	25	55	**82**
Other information about victim (e.g. info relating to family member)	23	5	56	65	**149**
Identity of witness	43	48	85	36	**212**
Image of witness	4	17	22	6	**49**
Whereabouts of witness	7	12	25	24	**68**
Other information about witness	22	29	49	32	**132**
Evidence (specific)	55	33	76	9	**173**
Judgment or sentencing remarks	17	10	3		**30**
Charges, sentence, plea or initiation of appeal	8	6	10		**24**
Submissions	10	4	2	1	**17**
Fact of proceeding or suppression order application being brought or order being made	7	17	9	1	**34**
Other aspects of proceeding (e.g. venue, identities of legal representatives or judges, transcript or recordings)	8	14	4		**26**
Not specified	150	43	110	3	**306**
Total	**641**	**342**	**916**	**975**	**2,874**

Table 8 Open Courts Act 'blanket ban' orders, by ground of order

Ground	County	Supreme	Magistrates	VCAT	Total
Necessary to prevent a real and substantial risk of prejudice to the proper administration of justice that cannot be prevented by other reasonably available means / public interest	105	19	53		177
Necessary to prevent prejudice to the interests of the Commonwealth or a State or Territory in relation to national or international security			1		1
Necessary to protect the safety of any person	53	5	47		105
Necessary to avoid causing undue distress or embarrassment to a complainant or witness	6		13		19
Necessary to avoid causing undue distress or embarrassment to a child who is a witness			12		12
VCAT only – Necessary to avoid the publication of confidential information or information the subject of a certificate under section 53 or 54 of the *Victorian Civil and Administrative Tribunal Act 1998*				2	2
VCAT only – For any other reason in the interests of justice				2	2
Not specified	4	7	25	1	37

Table 9 Open Courts Act 'blanket ban' orders, by purpose of order (where available)

Purpose or justification	County	Supreme	Magistrates	VCAT	Total
Sensitive personal information of subject (e.g. general privacy of family, rehabilitation)	2				2
Sensitive health information of subject (e.g. mental health, disability)					
Closely involves child (e.g. subject of proceeding)			5		5
Encouraging informers, witnesses, notifiers etc by protecting privacy	6				6
Ensuring fair trial of, or not compromising ongoing investigations into, other persons; not allowing prejudicial information in trial of subject of proceeding	33	15			48
Maintaining parity with the orders of other Australian States	1				1
Sensitive personal information of subject (e.g. general privacy of family, rehabilitation)	70	11	70	3	154

Table 10 Open Courts Act orders relating to suppression, by whether the order was made on the court's own motion

Made on court's own motion	County	Supreme	Magistrates	VCAT	Total
No	266	135	429	88	**918**
Yes	111	38	1	211	**361**
Total	**377**	**173**	**430**	**299**	**1,279**

Table 11 Orders made using sources of power other than the Open Courts Act provisions relating to suppression

Source of court's power	County	Supreme	Magistrates	VCAT	Total
Open Courts Act s 30	4	13	2	5	**24**
Adoption Act 1984 s 121					
Bail Act 1977 s 7		1			**1**
Children, Youth and Families Act 2005 s 534				2	**2**
Confiscation Act 1997 ss 17, 36L, 37	2	1			**3**
Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 s 75	93	27			**120**
Criminal Organisations Control Act 2012 part 4					
Major Crime (Investigative Powers) Act 2004 s 43					
Public Health and Wellbeing Act 2008 s 133	1				**1**
Serious Sex Offenders (Detention and Supervision) Act 2009 s 184	142	1			**143**
Terrorism (Community Protection) Act 2003 s 12					
Inherent jurisdiction	1	13		1	**15**
Total	**243**	**56**	**2**	**8**	**309**

Table 12 SSODSA orders, by duration of order

Duration	County	Supreme	Total
Not specified	3	1	4
Specified date provided	22		22
Specified time from order	5		5
Triggered by event in relation to proceeding	13		13
Triggered by other event	99		99
Total	**142**	**1**	**143**

Table 13 SSODSA orders, by subject matter of order

Subject matter	County	Supreme	Total
Identity of applicant / respondent	1		1
Image of applicant / respondent			
Whereabouts of applicant / respondent	1		1
Other information about applicant / respondent			
Identity of accused / defendant	133	1	134
Image of accused / defendant			
Whereabouts of accused / defendant	137		137
Prior convictions of accused / defendant			
Other information about accused / defendant	37		37
Identity of victim			
Image of victim			
Whereabouts of victim			
Other information about victim			
Identity of witness	3		3
Image of witness			
Whereabouts of witness	1		1
Other information about witness	2		2
Not specified			
Total	**315**	**1**	**316**

Appendix 4

Provision of data collected by Corrections Victoria regarding the making of non-publication orders under section 184 of the *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) ('SSODSA')

Table 1: How many applications for non-publication orders in respect of identity and whereabouts were made by offenders under s 184 of the SSODSA each year in proceedings involving the Secretary to DOJR ('Department of Justice & Regulation')?

Application Type	Overall	2010	2011	2012	2013	2014	2015	2016	2017
Applications for suppression of both Identity and Whereabouts	353	32	34	43	36	51	65	60	32
Applications for suppression of Identity only	11	6	2	1	1	1	0	0	0
Applications for suppression of Whereabouts only	6	0	0	0	0	3	0	2	1
Total	370	38	36	44	37	55	65	62	33
Unknown (including unclear if made at Court's own initiative or unclear which type of application made)	29	2	1	1	1	5	5	7	7

Table 2: How many times did the Secretary to DOJR oppose the making of a non-publication order in respect of identity and whereabouts under s 184 of the SSODSA each year?

Secretary's Position on Non-Publication	Overall	2010	2011	2012	2013	2014	2015	2016	2017
Oppose application for suppression of both Identity and Whereabouts	48	3	3	1	2	8	6	15	10
Oppose application for suppression of Identity and neither consent to nor oppose suppression of Whereabouts	41	5	2	4	1	8	14	2	5
Oppose application for suppression of Whereabouts and neither consent to nor oppose suppression of Identity	0	0	0	0	0	0	0	0	0
Total	**89**	**8**	**5**	**5**	**3**	**16**	**20**	**17**	**15**
Secretary's position Unknown	31	13	3	2	3	3	0	5	2

Table 3: How many times were offenders' applications for non-publication orders in respect of identity and whereabouts under s 184 of the SSODSA successful in proceedings involving the Secretary to DOJR?

Application	Overall	2010	2011	2012	2013	2014	2015	2016	2017
Successful Application for suppression of both Identity and Whereabouts was made	334	30	34	38	35	49	61	57	30
Successful application for suppression of Identity only was made	6	3	1	1	1	0	0	0	0
Successful application for suppression of Whereabouts only was made	7	0	0	0	0	3	1	2	1
Total (Successful Applications)	**347**	**33**	**35**	**39**	**36**	**52**	**62**	**59**	**31**
Application for suppression of both Identity and Whereabouts was made and only application for Whereabouts suppression was successful	8	0	0	3	1	2	0	2	0
Application for Identity Suppression only made but Whereabouts suppression only granted	1	1	0	0	0	0	0	0	0
Application for Identity Suppression only made but Identity and Whereabouts suppression granted	1	0	0	0	0	1	0	0	0
Total (Partially Successful Applications)	**10**	**1**	**0**	**3**	**1**	**3**	**0**	**2**	**0**

NOTES:

The data above in this Appendix relate only to:

- applications made under the *Serious Sex Offenders (Detention and Supervision) Act 2009*; it does not include applications made under the predecessor legislation, the *Serious Sex Offenders Monitoring Act 2005.*

- the Secretary to the Department of Justice and Regulation's position in respect of non-publication order applications. It does not include the relatively small number of proceedings under the Act that involve the Director of Public Prosecutions as applicant/prosecutor.

- non-publication orders made under s 184 of the *Serious Sex Offenders (Detention and Supervision) Act 2009*. This means that any *Open Courts Act* orders that are made in these proceedings from time to time have not been included (likewise any orders made under the relevant predecessor legislation).

- it does not include orders purporting to suppress documents under s 184. It appears that there was some confusion at the commencement of the *Serious Sex Offenders (Detention and Supervision) Act 2009* as to the necessity of such an order (there is automatic suppression of a number of documents under s 182, unlike the predecessor legislation).

- Applications to set aside or lift a non-publication order by the Secretary or another applicant (for example, a media outlet) have not been included.

Table 4: Number of persons currently subject to SSODSA, by number of suppression orders currently in operation

By Subject Matter	Overall (as at 24 July 17)
Suppression – Identity and Whereabouts	98
Suppression – Identity only	4
Suppression – Whereabouts only	10
No Suppression	24

Table 5: Number of people subject to SSODSA who are transitioning into the community, but have reoffended and appeared before the court

Year	Overall
2010	2
2011	5
2012	1
2013	2
2014	3
2015	6
2016	8
2017 (as at 24 July 17)	4