Open Justice versus Suppression Orders: A Battle of Attrition

Larina Mullins considers the impact of recent legislation and court practices in granting suppression orders on the public interest in 'open justice'.

The need to be vigilant arises from the natural tendency for the general principle to be eroded and for exceptions to grow by accretion as the exceptions are applied by analogy to existing cases.'[1]

Open justice is the cornerstone of the Australian judicial system. It is a principle so universally accepted and widely reported that this article does not need to extol its virtues. However, it is a principle that is slowly but surely under attack. Courts are routinely ordering the suppression of evidence, the concealment of identities and even shielding entire hearings from public view.

This battle of attrition against open justice has reached the point where there are more than 200 pieces of legislation granting powers to courts and tribunals to make suppression orders. The subject matter of the legislation is wide-ranging from witness protection[2], to chemical weapons technology,[3] to a quaint provision regarding evidence that is likely to offend against public decency.[4] Some of this information is justifiably restricted but the enormous scope of the legislation and the multiple jurisdictions involved makes it practically impossible to monitor the impact of the legislation on the principle of open justice. That, in itself, is cause for concern.

Recent attempts to understand the impact of these restrictions on the principle of open justice have been undertaken in Victoria.[5] One empirical study of suppression orders relied on the courts procedure of notifying the media of such orders as its source. Even on that restricted basis, the study found that 1,501 suppression orders were made by Victorian courts from 2008 to 2012. A separate study indicated that the true number of suppression orders may be around double that figure.[6] Anecdotal evidence suggests that Victoria is the most prolific state when it comes to granting suppression orders, followed by South Australia and New South Wales. Orders from other states such as Queensland are not routinely provided by the courts to the media and so the total number of orders is simply unknown.

In 2010, the Standing Committee of Attorneys-General sought to introduce some order to the legislative chaos by proposing model legislation that standardises the considerations and procedures for suppression orders. The legislation was adopted by New South Wales in 2010,[7] in modified form at the federal level in 2012[8] and in a substantially amended form in Victoria in 2013.[9] This article focuses on these pieces of legislation and how they are being applied in practice.

1. What are Suppression Orders and Non-Publication Orders?

Suppression orders prohibit the disclosure of information that would otherwise be publicly available during an open hearing. For example, during a criminal proceeding a judge may suppress the police fact sheet that is tendered, which a media representative would otherwise be entitled to inspect.[10]

Non-publication orders only prohibit the further publication of information. This means that the information is disclosed to persons who attended the open hearing, but those persons must not disseminate that information to the general public. For example, a witness could give evidence in open court but the judge can prohibit the publication of the name or identity of the witness. Publication by any means is prohibited, which includes in a newspaper, a television broadcast or on the internet (so yes, 'tweeting' counts).

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For the sake of brevity, this article will refer to both types of orders as suppression orders.

2. What information can be suppressed?

Under the NSW Act suppression orders can be made in relation to any information (including documents) that:

(a) tends to reveal the identity of any party to or witness in proceedings or any related person; or

(b) comprises evidence, or information about evidence, given in proceedings.[11]

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1 *R v Legal Aid Board, ex parte Kaim Todner* 7 [1998] QB 966 at 977 per Lord Woolf MR

2 s 28 *Witness Protection Act 2004* (Cth) and similar state legislation

3 s 82 *Chemical Weapons (Prohibition) Act 1994* (Cth)

4 s57 *Evidence Act* (NT)

5 Jason Bosland and Ashleigh Bagnall, 'An Empirical Analysis of Suppression Orders in the Victorian Courts: 2008-12' (2013) 35(4) *Sydney Law Review* 671

6 Andrea Petrie and Adrian Lowe for the Media, Entertainment and Arts Alliance, '*Kicking at the Cornerstone of Democracy: The State of Press Freedom in Australia*' (Report, May 2012) 58

7 *Court Suppression and Non-publication Orders Act 2010* (NSW) (the **'NSW Act'**)

8 Schedule 2, *Access to Justice (Federal Jurisdiction) Amendment Act 2012* (Cth) (the **'CTH Act'**)

9 *Open Courts Act 2013* (Vic) (the **'VIC Act'**)

10 s 314, *Criminal Procedure Act 1986* (NSW)

11 s 7 NSW Act

The CTH Act goes slightly further to include information obtained by the process of discovery, produced under a subpoena, or lodged with or filed in the federal courts.[12]

The VIC Act goes further still. It broadly defines information without any qualifying reference to identities or evidence, and adds a power to prohibit reports of the whole proceeding or any specified material relevant to a proceeding, and to close the court. [13]

3. What do courts take into account in granting a suppression order?

Under the NSW Act and the CTH Act, the courts must take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice.[14] In the VIC Act, there is a presumption in favour of disclosure, to strengthen and promote the principles of open justice and free communication of information.[15] However, these provisions appear to pay little more than lip service to these principles when they are followed by numerous and detailed provisions permitting suppression and prohibition on disclosure of information.

The grounds for courts to grant suppression orders vary between the jurisdictions, as shown in the table below:

No.	NSW Act	CTH Act	VIC Act
1.	To prevent prejudice to the proper administration of justice	Same as NSW	To prevent a real and substantial risk of prejudice to the proper administration of justice that cannot be prevented by other reasonably available means
2.	To prevent prejudice to the interests of the Commonwealth or a State or Territory in relation to national or international security	Same as NSW	Same as NSW
3.	To protect the safety of any person	Same as NSW	Same as NSW
4.	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)	*Same as NSW*	To avoid causing undue distress or embarrassment to a **complainant** or witness in any criminal proceeding involving a sexual offence or a family violence offence
5.	Where necessary in the **public interest** for the order to be made and that public interest significantly outweighs the public interest in open justice	*No equivalent provision*	To avoid causing undue distress or embarrassment to a child who is a witness in any criminal proceeding

The New South Wales and federal legislation referred to in item 4 above provides for a suppression order to be made to avoid causing undue distress or embarrassment to any party, including the party accused of a sexual offence. The Victorian equivalent, however, limits this scope to refer to the complainant, not the accused.

The New South Wales legislation referred to in 5 above provides for a balancing exercise between '*the public interest for the order to be made*' and the public interest in open justice. This part of the model legislation is notably absent from the CTH Act and VIC Act.

4. Two-Stage Process in New South Wales

The NSW Act was only intended to be the second stage of a two-stage process. The first stage was the passage of the *Court Information Act 2010* (NSW), which set a clear statutory entitlement to access to documents and other court information.[19] In introducing the *Court Information Act,* the then Parliamentary Secretary for Justice noted that it was the product of an extensive and comprehensive consultation process and had been broadly supported by the Chief Justice of New South Wales, the Chief Judge of the New South Wales District Court, the Chief Magistrate, the Law Society of New South Wales, the New South Wales Bar Association and media organisations such as Australia's Right to Know Coalition and the Australian Press Council.[20]

Despite this overwhelming support and despite receiving the legislature's assent on 26 May 2010, the *Court Information Act* is awaiting executive proclamation to come into effect and has therefore not yet commenced.[21] In January 2014, the Attorney-General stated that he was considering his options including amending the *Court Information Act* to address '*a range of practical concerns that have been identified*' in implementing the Act including developing the necessary court rules, the regulation, and practices and procedures.[22]

The result is a clear imbalance. The Act enshrining an entitlement to court information has fallen by the wayside, while the Act permitting the suppression of information has been in effect for years.

5. How are Suppression Orders made in practice?

News media organisations have standing to oppose suppression orders but in practice, they rarely exercise this right.[23] Typically these organisations do not receive any notice of an application for a suppression order and usually they are only informed of the order if the court's media liaison emails a notification after the fact.[24] Furthermore, often the court reporter covering the proceedings is the only representative from a news media organisation in court and this person is typically unaware of their organisation's standing to intervene or understandably unwilling to interrupt the proceedings to advocate for open justice. In even the most fortuitous circumstances (such as an application being stood over for the luncheon adjournment), the organisation's lawyers may have less than an hour to obtain instructions and get to the court.

News media organisations also have standing to seek a review of a suppression order after it has been made.[25] However, in light of the well-publicised budget pressures of such organisations, these legal costs can be difficult to justify.

12 Schedule 2 CTH Act)
13 Parts 3-5 VIC Act
14 s 6 NSW Act and Schedule 2 Cth Act
15 s 4 VIC ACT
16 s 8 NSW Act
17 Schedule 2 Cth Act
18 s 18 VIC Act
19 Second reading speech,*Court Suppression and Non-publication Orders Act 2010* (NSW) 23 November 2010
20 NSW Legislative Assembly debate *Hansard* 19 March 2010.
21 As at the time of writing this article(July 2014)
22 Legislative Council Questions and Answers No. 185 dated 30 January 2014
23 s 9 NSW Act, Schedule 2 CTH Act, s 19 VIC Act
24 Despite ss 10-11 VIC Act requiring the applicant give the court three days' notice, with the exceptions thereto being regularly invoked
25 s 13 NSW Act; Schedule 2 CTH Act; s 15 VIC Act

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Finally, suppression orders are also often granted in circumstances when other legal regimes or principles apply. In particular, some suppression orders are encroaching on the realm of *sub judice* contempt, as recently stated by the Hon. P.D. Cummins:

> Many orders are properly made; others not so. It is clear that some orders are wrongly made, because legislation already prohibits publication, or because the principle of sub judice already governs the situation. It would be seriously retrograde if that powerful principle came to be supplanted by suppression orders. On other occasions, therapeutic, prophylactic or prudential grounds falling short of necessity are the occasion for suppression orders. And on other occasions, inadequate understanding of the integrity and discipline of the jury system founds suppression orders. Long experience of the jury system shows that juries, when given proper and full instruction by judges, are well able to put aside extrinsic material and to act solely on evidence led in court.
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> In law, the touchstone of issuance of suppression orders is, and must be, necessity. Nothing less. We must be astute to the tendency of multiple issuance of suppression orders eroding that critical test. We must resist a tendency to resile from necessity to convenience. Suppression orders should only be a last resort and should never be a first resort.[26]

6. Silent Listings

On 12 March 2014, the Magistrates' Court of Victoria issued a practice direction regarding *silent listings*'.[27] This permits a hearing to occur without the name of the accused person appearing on any court list. The practice direction refers to this being necessary in some cases for the safety of the accused. However, this does not limit the grounds upon which a silent listing could be arranged.

An application is made by completing a form and providing a supporting affidavit to the Chief Magistrate. The media has no opportunity to oppose the application, and the Chief Magistrate does not publish any reasons for judgment that could otherwise be the subject of an appeal.

The result is that there is no public record of the hearing taking place and the media cannot discover where or when the hearing will be held. This circumvents the procedures and considerations required for closing the court. The court is, instead, closed by default because only the parties and Magistrate know the hearing's time and location.

There is no way of knowing how many silent listings have taken place, or on what grounds they have been granted. This is a troubling development that flies in the face of the principle of open justice, and could have wide ranging ramifications if other courts implement silent listings – if they have not done so already.

7. Conclusion

There is growing concern amongst legal practitioners and academics that the principle of open justice is being eroded by the practices set out above.

The media represents the general public when it comes to access to court information.[28] It is often in individual proceedings and single hearings that suppression orders are being made and it is on these small battlegrounds, when the opportunity arises, that the media must act to defend the public interest in open justice. Otherwise applications and arguments in favour of suppression orders day after day will be met by nothing more than resounding silence.

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26 The Hon. P.D. Cummins, chair of the Victorian Law Reform Commission, '*Open Courts: who guards the guardians?*' paper delivered at the '*Justice Open and Shut*' seminar organised by the Australian Centre for Independent Journalism at UTS and the Rule of Law Institute of Australia on 4 June 2014, and published by the Gazette of Law and Journalism on 16 July 2014. *Sub judice* contempt is the offence of publishing material while proceedings are still to be determined by the court where that material has a tendency to interfere with the administration of justice

27 Magistrates' Court of Victoria, *Practice Direction 3 of 2014: Silent Listings* 11 March 2014

28 *Richmond Newspapers Inc. et al v Virginia et al* 448 US 555 (1980) at 572-3 (Burger CJ)

CAMLA CUP 2014

The 2014 CAMLA Cup was once again a night of great fun, frivolity and healthy competition. The event was over-subscribed this year and more than 150 of Sydney's best media and communications law packed into the NSW Leagues Club to catch up with colleagues and battle it out for trivia honours.

Congratulations to this year' winning team, NSW Young Lawyers, Communications, Entertainment and Technology (CET) Law Committee.

CAMLA thanks and pays tribute to Debra Richards, quiz master extraordinaire whose endless enthusiasm and effort for trivia ensures the night is a success.

Thanks also to CAMLA board members Page Henty, Cath Hill, Gulley Shimeld and to CAMLA young lawyers committee members Maggie Chan and Raeshell Tang for their work in staging a great event.

CAMLA acknowledges and thanks the following law firms and organisations for contributing generous prizes to the CAMLA Cup:

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