Social Media and Suppression Orders: The End of e-secrecy?

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I Introduction

11:00am, 26 February 2019. Digital news sites, TV bulletins and radio stations across the country rushed to break the news that Cardinal George Pell had been convicted of historical child sexual offences. Many Australians, however, already knew the verdict.

Throughout the previous year, a suppression order had prohibited media organisations from reporting on the case of *DPP v Pell* ('*Pell*')[1] and publishing its December 2018 verdict. However, immediately following the trial decision, news of Pell's conviction (since overturned by the High Court of Australia),[2] was published on international news websites and shared extensively across Australia through social media. The situation led then President of the Law Council of Australia, Arthur Moses, to recommend that the Australian Law Reform Commission review 'whether suppression orders have kept up with the digital age'.[3]

This essay examines when the wide dissemination of online material should be deemed to hinder the efficacy of proceeding suppression orders and to deny their ability to meet the requisite necessity test. It outlines the current operation of Victorian proceeding suppression orders, the legal principles which clash in granting orders and the high threshold courts must meet to curtail open justice. This essay then argues that the decision to maintain the *Pell* suppression order underestimated the accessibility of international publications and the capacity of social media to expose users to information. It contends that in high profile cases, courts must recognise how publication of suppressed material by international sources can deny suppression orders' efficacy. Equally, the impact and spread of information via social media cannot be considered as secondary to the power of mainstream media. This essay endorses the court's approach in *AB v CD & EF,* which recognised how 'very little effort' is required to obtain information online.[4]

A Proceeding suppression orders

Proceeding suppression orders prevent publication of trial proceedings as they occur in court. Victoria's *Open Courts Act* ('*OCA*')[5] empowers the Magistrates and County Courts to restrict publication of information relating to court proceedings in certain circumstances.[6] This essay focuses on s 18(1)(a) which permits courts to make orders where it is 'necessary to prevent a real or substantial risk of prejudice to the proper administration of justice which cannot be prevented by other reasonably available means'.[7] Courts in Victoria and New South Wales, where a similar necessity requirement applies in granting suppression orders,[8] have equated an order's necessity with its practical efficacy since 'logic dictates that a futile order cannot possibly be characterised as one of necessity'.[9] The *OCA* also maintains the Supreme Court's inherent jurisdiction to restrict publication of information in connection with proceedings.[10]

B Competing principles

Proceeding suppression orders see a conflict between the principle of open justice and the right to a fair trial. Open justice upholds that 'justice should not only be done, but should manifestly and undoubtedly be seen to be done',[11] through a courtroom open to the public.[12] The

1 *Director of Public Prosecutions v Pell* (sentence) [2019] VCC 260.

2 *Pell v R* (2020) 376 ALR 478 (*'Pell v R'*).

3 ABC Radio National, 'Law Council of Australia calls for inquiry into suppression orders', *RN Breakfast,* 27 February 2019 (Arthur Moses) <https://www.abc.net.au/radionational/programs/breakfast/law-council-calls-for-inquiry-into-suppression-orders/10852398> ; Arthur Moses 'Law Council calls for ALRC Review of suppression orders, uniformity across jurisdictions' (Media release, Law Council of Australia, 27 February 2019) <https://www.lawcouncil.asn.au/media/media-releases/law-council-calls-for-alrc-review-of-suppression-orders-uniformity-across-jurisdictions>.

4 *AB v CD & EF* [2019] VSCA 28, 73 (*'AB v CD & EF'*).

5 *Open Courts Act 2013* (Vic) (*'Open Courts Act'*) s 17(a); (b).

6 Ibid s 17.

7 Ibid s 18(1)(a).

8 *Court Suppression and Non-Publication Orders Act 2010* NSW ss 7; 8(1)(a).

9 Jason Bosland, 'Suppression Orders Vs Open Justice', *The University of Melbourne Centre for Media and Communications Law* (Article, 1 March 2017) <https://pursuit.unimelb.edu.au/articles/suppression-orders-vs-open-justice>; see also: *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* (2012) 83 NSWLR 52, 72 [76]-[78].

10 *Open Courts Act* (n 5) s 5.

11 *R v Sussex Justices* [1924] 1 KB 256, 259 quoted in Roxanne Burd, 'Is there a case for suppression orders in an online world?' (2012) 17 *Media and Arts Law Review* 107, 108 *('I*s there a case for suppression orders in an online world?*')*.

12 *John Fairfax Publications Pty Ltd v District Court* (NSW) (2004) 61 NSWLR 344 cited in Burd, 'Is there a case for suppression orders in an online world?' (n 11) 109. For further analysis on open justice see: Frank Vincent, *Open Courts Act Review* (Legislative Review, September 2017) 27 [95]; *Scott v Scott* [1913] AC 417 cited in Burd, 'Is there a case for suppression orders in an online world?' (n 11) 109.

media's right to report fairly and accurately on court proceedings is 'an adjunct' to this principle,[13] as citizens rely on the media as 'the primary channel through which the work of the courts is made known'.[14]

The *OCA* 'expressly reflects the importance of…open justice'.[15] Following the 2017 *OCA Review*,[16] an amended s 4 requires courts to give greater 'regard to the primacy of the principle of open justice… in determining whether to make a suppression order'.[17] Under the new s 14A,[18] courts must give reasons for an order's necessity which are 'sufficient to explain and justify the decision'.[19] These amendments reinforce that 'open justice and freedom of communication are the default position and can only be displaced in specific circumstances where it is necessary.'[20]

Proceeding suppression orders should therefore be made cautiously, to derogate from open justice only in 'exceptional circumstances',[21] such as when 'observance' of open justice would 'frustrate the administration of justice'.[22] This essay considers where such frustration occurs because an accused's right to a fair trial, a 'human right'[23] enshrined in case law[24] and legislation,[25] is prejudiced. Suppression orders can assist in achieving an unbiased, fair trial for an accused. Restricting the publication of information which could influence or prejudice a jury aims to ensure jurors' decisions are based solely on admissible, court-room evidence.[26]

II International Dissemination of Suppressed Information

Following the lifting of the *Pell* suppression order, academic Jason Bosland described how there are 'certain cases where it is predictable that suppression orders are likely to not be effective…usually where there is some kind of international media interest'.[27] In 2018, Cardinal George Pell (who has since been acquitted)[28] was committed to stand trial in Victoria's County Court in relation to historical child sexual offences involving multiple complainants.[29] The charges were to be heard over two separate trials, relating to different events and allegations.

Kidd CJ deemed a proceeding suppression order 'necessary' for the first trial, 'to preserve the integrity of the jury pools for two trials and to ensure the accused man receive[d] a fair and impartial trial'.[30] The order, applicable to any electronic or broadcast format accessible in Australia,[31] prohibited publication of any part of the trial or verdict.[32] It was to last until the second trial's commencement to ensure the future jury would remain uninfluenced by the first trial.[33] Kidd CJ accepted 'international exposure ha[d] the capacity to undermine, to some degree, the efficacy of any order.'[34] However, his Honour held that 'the fact…an order does not guarantee perfect impartiality does not mean that such an order is unnecessary' in protecting an accused's interests.[35]

When the verdict was delivered on 12 December 2018, the risk of its publication by international media and subsequent spread via 'social media chatter'[36] was realised. A

13 *R (On the Application of the DPP (Vic)) v The Herald & Weekly Times Ltd* (2007) 19 VR 248, 260 [38], cited in Jason Bosland, 'Restraining "Extraneous" Prejudicial Publicity: Victoria and New South Wales Compared' (2018) 41(4) *UNSW Law Journal* 1263, 1265.

14 Sharon Rodrick, 'Achieving the aims of open justice? The relationship between the courts, the media and the public' (2014) 19 *Deakin Law Review* 123, 131.

15 *Director of Public Prosecutions* (Cth) *v Brady & Others* (2015) 252 A Crim R 50, 59 ('*Brady*').

16 Frank Vincent, *Open Courts Act Review* (Legislative Review, September 2017) 108 [434].

17 *Open Courts Act* (n 5) s 4 amended through Explanatory Memorandum, Open Courts and Other Acts Amendment Bill 2019 (Vic) cls 5 ('Explanatory Memorandum, Open Courts and Other Acts Amendment Bill') implementing 'Recommendation 1', Vincent (n 16) 108 [434].

18 *Open Courts Act* (n 5) s 14A.

19 Explanatory Memorandum, Open Courts and Other Acts Amendment Bill (n 17) cls 9.

20 Ibid cls 5.

21 *Commissioner of the Australian Federal Police v Zhao* (2015) 316 ALR 378, [44] (French CJ, Hayne, Kiefel, Bell and Keane JJ) cited in Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, Interim Report No 127 (2015) 10.43.

22 *John Fairfax & Sons Limited v Police Tribunal of NSW* (1986) 5 NSWLR 465, [476]–[477] (McHugh JA, Glass JA agreeing) ('*John Fairfax & Sons Limited v Police Tribunal of NSW*') cited in ALRC (n 21) 10.48.

23 *X v General TV Corporation Pty Ltd and Others* (2008) 187 A Crim R 533, 539 [40] ('*X v General TV Corporation*'); *Nationwide News Pty Ltd v Qaumi* (2016) 93 NSWLR 384, 393 [29].

24 See for example: *Dietrich v The Queen* (1992) 117 CLR 292, 299-300.

25 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 24 cited in *X v General TV Corporation* (n 23) 536-537 [29] – [30]; *International Covenant on Civil and Political Rights,* opened for signature 19 December 1966, UNTS 999 (entered into force 23 March 1976) art 14.

26 Victorian Law Reform Commission, *Jury empanelment,* Consultation Paper (2013) 2.10 <https://www.lawreform.vic.gov.au/content/2-jury-trials-victoria#footnote-1282-2-backlink>.

27 ABC Radio National, 'Cardinal George Pell found guilty of child sex offences' *Law Report,* 26 February 2019 (Jason Bosland) <https://www.abc.net.au/radionational/programs/lawreport/2019-02-26/10850390> ('Cardinal George Pell found guilty of child sex offences').

28 *Pell v R* (n 2).

29 *DPP v Pell* (Suppression Order) [2018] VCC 905 (25 June 2018), 2 ('*DPP v Pell (Suppression Order)*').

30 Ibid 8.

31 Ibid 19.

32 Ibid.

33 Ibid.

34 Ibid 15.

35 Ibid.

36 Ibid 13.

13 December mention hearing discussed the 'most egregious', potential suppression order breaches that had occurred, referring specifically to overseas publications which raised 'issues in terms of jurisdiction'.[37]

When local media organisations subsequently sought review of the order,[38] Kidd CJ determined it could still prevent a substantial risk of prejudice to the second trial, despite the presence of international, online publications and communications about the verdict. His Honour reasoned that the order was not futile as the publicity accessible within Australia was 'largely confined to social media' and publication by local, mainstream media had 'not risen to saturation level'.[39] His Honour stated that learning of the verdict via social media, (such as through platforms like Facebook or Twitter),[40] required internet users to 'access the website in question and conduct some active level of investigation or enquiry'.[41] This was distinguished from mainstream media (such as print, television and radio)[42] which would leave viewers 'confronted by [the verdict] without any action on their part'.[43] Kidd CJ ultimately held that, while the order's effect was somewhat diminished by the overseas publicity and social media exposure, this did not render the order unnecessary in preventing what would otherwise be 'an extreme level of publicity'.[44]

Kidd CJ's reasoning included that there was no evidence before the court of the number of Victorians who may have been exposed to online publicity in the verdict's aftermath.[45] An analysis of web and social media data undertaken by Which-50 Media has since revealed 'hundreds of thousands of Australians' were circumventing the suppression order by searching for and reading details of the verdict.[46] Additionally, 'thousands more Australians appear[ed] to be directly in breach of the order' by tweeting, retweeting or sharing online relevant articles or information.[47] The study showed, through data provided by three US-based Catholic publications which published the verdict online, that '24 hours after publication those sites generated more than 300,000 views — of which 51 per cent were from Australian IP addresses.'[48] Which-50 believes this figure is 'very conservative' as it did not receive data from larger, mainstream publications which ran *Pell* stories, including *The Washington post, The Daily Beast* and *Slate.*[49] Streem Media Monitoring also recorded 144 'global news articles' published outside Australia in 24 hours.[50]

Some international publishers sought to "geoblock" their articles from Australian readers. "Geoblocking" allows companies to 'block…access to content according to a user's physical location'.[51] However, commentators have suggested these approaches can be 'easily circumvented'[52] and 'in an era of online "churnalism", it wasn't long before other sites copied the story and Facebook and Twitter were awash with news of Pell's conviction.'[53] The Australian Law Journal has specifically described how 'geoblocking has its limits when

37 Transcript of Proceedings, *Director of Public Prosecution v George Pell* (County Court of Victoria, Kidd CJ, 13 December 2018) 3 [22] located at Michael Smith, 'Chief Judge of Vic County Court releases transcript of today's hearing on media reporting', *Michael Smith News* (transcript of proceedings, 13 December 2018) <https://www.michaelsmithnews.com/2018/12/chief-judge-of-vic-county-court-releases-transcript-of-todays-hearing-on-media-reporting.html>.

38 *DPP v Pell* (Review of Suppression Order) [2018] VCC 2125 ('*Pell Review of Suppression Order*').

39 Ibid 10 [43].

40 Caroline Fisher, Sora Park, Jee Young Lee et al. *Digital News Report: Australia 2019* (University of Canberra, 17 June 2019) 95 < https://apo.org.au/sites/default/files/resource-files/2019-06/apo-nid240786.pdf>;
Derek Wilding, Peter Fray, Sacha Molitorisz et al. *The Impact of Digital Platforms on News and Journalistic Content* (University of Technology Sydney Report, 2018) 25 <https://www.uts.edu.au/node/247996/projects-and-research/impact-digital-platforms-news-journalistic-content>.

41 *Pell Review of Suppression Order* (n 38) 11 [45].

42 *DPP v Pell (Suppression Order)* (n 29) 7; Derek Wilding, Peter Fray, Sacha Molitorisz et al. (n 40) 25.

43 *Pell Review of Suppression Order* (n 38) 11 [46].

44 Ibid 11 [49].

45 Ibid 10 [44].

46 Andrew Birmingham and Tess Bennett, 'Data Reveals over 150,000 Australians Circumvented A Victorian Suppression Order Last Week', *Which 50* (online) 17 December 2018 < https://which-50.com/cover-story-data-reveals-over-150000-australians-circumvented-a-victorian-suppression-order-last-week/>;
Email from Which 50 editor Tess Bennett to author, 30 January 2020.

47 Ibid.

48 Ibid.

49 Ibid.

50 Mark Schliebs and Tessa Akerman, 'Suppression order failed to block overseas reports' *The Weekend Australian* (online) 27 February 2019 < https://www.theaustralian.com.au/search-results?q=Suppression+order+failed+to+block+overseas+reports>.
For examples of overseas publications see: Margaret Sullivan, 'A top cardinal's sex-abuse conviction is huge news in Australia. But the media can't report it there.' *The Washington Post* (online) 12 December 2018 <https://www.washingtonpost.com/lifestyle/style/a-top-cardinals-sex-abuse-conviction-is-huge-news-in-australia-but-the-media-cant-report-it-there/2018/12/12/49c0eb68-fe27-11e8-83c0-b06139e540e5_story.html>;
Lachlan Cartwright, 'Vatican No. 3 George Pell Convicted of Sexually Abusing Choir Boy' *Daily Beast* (online) 11 December 2019 < https://www.thedailybeast.com/vatican-no-3-cardinal-george-pell-on-trial-for-historical-child-sex-charges>.

51 Marketa Trimble, 'Copyright and Geoblocking: The Consequences of Eliminating Geoblocking' (2019) 25, *Boston University Journal of Science and Technology Law,* 476, 477; see also: Thomas Burke, 'Jumping the Wall: Geoblocking, Circumvention and The Law' (2017) 42(2) *University of Western Australia Law Review* 56; Karl Schaffarczyk, 'Explainer: what is geoblocking?' *The Conversation* (online) 17 April 2013 <https://theconversation.com/explainer-what-is-geoblocking-13057>.

52 Birmingham and Bennett (n 46); see also, Crispin Hull, 'Suppression orders lift the lid on fallible jurors', *The Age* (online, 2 March 2019) < https://www.theage.com.au/national/suppression-orders-lift-the-lid-on-fallible-jurors-20190228-p510ye.html >.

53 Stephen Brook, 'Pell's trial still casts a long shadow over freedom to report the truth', *Crikey* (online, 6 May 2020) < https://www.crikey.com.au/2020/05/06/pell-trial-media-freedom/>.

many internet users have access to virtual private network apps which disguise the user's location.'[54]

In response to his publication's decision to publish the verdict in print and not online, New York Times' journalist Damien Cave described how the publication considered geo-blocking. However, the paper ultimately concluded that its 'broad readership made it hard to imagine a scenario in which someone in Australia didn't see the online version and start sharing it on social media.'[55] Contrary to Kidd CJ's prediction that international exposure could merely undermine the suppression order's efficacy 'to some degree',[56] Cave's comment reflects the practical reality that online information can be shared across different jurisdictions easily, swiftly and indiscriminately.

This essay therefore contends that the dissemination of news by overseas sources described above, and the practical inability to stop their internet spread, meant the efficacy of the *Pell* order was lost. Its attempts to restrict potential jurors from learning of the conviction were drastically weakened, suggesting it could no longer be considered 'necessary' to prevent risk of prejudice to the administration of justice.[57] When considering whether an order can operate effectively, courts must give greater weight to the pervasive, real impact of international digital publications given that 'the internet has no borders'.[58]

The 2015 case of *DPP v Brady* ('*Brady*')[59] also affirmed how an inability to enforce suppression orders against international digital publications can deny an order's necessity. In *Brady,* Hollingworth J of Victoria's Supreme Court revoked an order suppressing the names of 14 influential, Southeast Asian government officials, their relatives and three political officers. The suppression order was deemed necessary to prevent prejudice to the proper administration of justice,[60] and to protect Australia's national security interests[61] in relation to charges of conspiracy to bribe foreign officials brought against Reserve Bank of Australia subsidiaries.[62]

Subsequent publication of the order's content on Twitter by Wikileaks, which specifically referred to suppressed information and reached its 2.3 million followers,[63] 'had the effect of rendering the order futile'.[64] The leak prompted international media to publish the information (evidence of which was listed in the *Brady* judgment),[65] while Australian media encouraged their audiences to access the information via WikiLeaks.[66] In revoking the order, Hollingworth J emphasised the impossibility of enforcing the order against international media in breach, as courts 'cannot make orders controlling publication… outside Australia'.[67] The ongoing, damaging effect of the order's presence online led Hollingworth J to conclude its continuation could not be 'necessary' under s 18(1).[68]

In *Pell,* online publication of the conviction overseas, which could be accessed in Australia, constituted a breach of the order.[69] However, to pursue a publication for contempt of court due to breaches of an order,[70] the media must have a presence in the Australian jurisdiction[71] (understood as carrying on business through a bureau or body).[72] This demonstrates how suppression orders can become futile through lack of enforceability against media operating outside the jurisdiction. Revoking orders which have been undermined by the spread of information from international media, as occurred in *Brady,* is therefore essential to ensure orders do not persist when they can no longer be effective in their practical application or legal enforcement.

54 Justice Francois Kunc (editor), 'Current Issues' *Australian Law Journal* 98 2019 79, 80.

55 Damien Cave and Livia Albeck-Ripka, 'How we reported on the Cardinal Pell Sex Abuse Case that for Months Was Kept Secret from the Public', *New York Times (online) 13 March 2019 <https://www.nytimes.com/2019/03/13/reader-center/cardinal-pell-sex-abuse-reporting.html?module=inline>.*

56 *DPP v Pell (Suppression Order)* (n 29) 15.

57 *Open Courts Act* (n 5) s 18(1)(a).

58 Arthur Moses (n 3).

59 *Brady* (n 15).

60 *Open Courts Act* (n 5) s 18(1)(a).

61 Ibid s 18(1)(b).

62 *Brady* (n 15) 52 [6].

63 Ibid 57 [44].

64 Jason Bosland, 'WikiLeaks and the not-so-super injunction: The suppression order in DPP (Cth) v Brady' (2016) 21 *Media and Arts Law Review* 34, 34 ('Wikileaks and the not-so-super injunction').

65 *Brady* (n 15) 57 [43].

66 Bosland, 'Wikileaks and the not-so-super injunction' (n 64) 35.

67 *Brady* (n 15) 62 [75].

68 Ibid 63 [78].

69 *DPP v Pell (Suppression Order)* (n 29) 19.

70 *Open Courts Act* (n 5) s 23.

71 See footnote no. 20 in Jane Johnston et al, *Juries and Social Media* (Report Victorian Department of Justice, 2013) 6<https://www.researchgate.net/publication/275037791_Juries_and_Social_Media_A_report_prepared_for_the_Victorian_Department_of_Justice> ; Cave and Albeck-Ripka (n 55); Birmingham and Bennett (n 46).

72 ABC Radio National, 'Cardinal George Pell found guilty of child sex offences' (n 27); Cave and Albeck-Ripka (n 55).

III Social Media "Confronting" Users With Information

Twitter data obtained following the *Pell* verdict suggests that information being 'confined to social media'[73] does not safeguard against such publicity reaching 'saturation level'[74] and denying the efficacy of suppression attempts. Courts cannot dismiss the capacity for internet users to be 'confronted' by restricted news from overseas sources via social media, even when they do not conduct an 'active level of investigation' to obtain suppressed information.[75]

Media company Kinship Digital's analysis of Australian tweets revealed that following the verdict, the *Pell* decision was mentioned in 4,977 tweets, retweeted 4,723 times (with 3,734 retweets containing a link to an article on the topic).[76] The relevant tweets were "liked" 8,605 times.[77] The report's authors believe 'the actual number [of Australians who tweeted] is likely to be much higher', as the data was based on tweeters whose bio or tweet location revealed they were Australian and 'up to 80 per cent of tweets are often not identified with any form of location data'.[78] The expansive spread of this Twitter ripple effect is evidenced in the report's statement that 'the tweets…had a potential reach in the tens of thousands, and six of the top twenty had a potential reach of over a million users each.'[79]

This essay therefore argues that Kidd CJ's distinction between mainstream media and social media in their ability to confront viewers with information is outdated and artificial. As acknowledged in the Tasmanian Law Reform Institute 2019 Paper *Juries, Social Media and the Right to a Fair Trial,* 'social media…has changed the way the majority of Australians now consume news and current affairs' and 'the role and impact of traditional media outlets have diminished.'[80] The Paper explains how an 'active level of inquiry'[81] is not required to find news online, with 'passive news consumption now considered to be a by-product of social media use. By merely logging on and gaining access to many social media platforms, the user is exposed to "incidental news".'[82]

Evidencing 'just how little control a juror has over avoiding prejudicial material on social media,' the Paper cites an Ohio case where the sister of an empanelled juror 'liked' a Facebook page which supported the conviction of an accused murderer.[83] This caused prejudicial material to appear on the juror's Facebook page 'without the juror doing anything',[84] demonstrating how information 'may simply appear because of the activity of a user's friend'.[85] The Victorian Law Reform Commission's 2019 *Contempt of Court Consultation Paper* also discussed jurors being 'unwittingly exposed to prejudicial material' online and the 'struggle' of courts to 'shield jurors from material that is now so easy to access and share'.[86]

According to the University of Canberra's *Digital News Report*, in 2019, 58% of Australian consumers used mobile phones to access news.[87] Eighteen percent of Australians used social media as their main source of news.[88] Unsurprisingly, 'social media is increasingly becoming the main source of news for Gen Z and Y,' with 47% and 33% respectively using it as their main news source.[89] The Report did record a drop in consumers "sharing" news stories via social media or email.[90] It maintains, however, that 'the rapid growth in the use of social media platforms for accessing news is continually creating an environment where social endorsements or so-called social signals such as comments, "likes", or shares play a key role in the sharing and consumption of online news.'[91] This accords with academic Pamela D Schulz's observations that 'the concept of mass media, where a passive audience would receive and respond to messages whether from news or from marketers, has been overshadowed by the interactive form.'[92]

73 *Pell Review of Suppression Order* (n 38) 10 [43]; 11 [46].
74 Ibid 10 [43].
75 Ibid 11 [45]-[46].
76 Email from Which 50 editor Tess Bennett to author, 30 January 2020 attaching Kingship Digital report *George Pell Twitter Retweets from Australia containing Link*.
77 Ibid.
78 Ibid.
79 Ibid.
80 Tasmania Law Reform Institute, *Social Media, Jurors and the Right of an Accused to a Fair Trial* (Issues Paper No 30, August 2019) 16 [1.3.9].
81 *Pell Review of Suppression Order* (n 38) 11 [45].
82 TLRI (n 80) 29 [2.2.2]; see also Jemma Holt, 'Updated and improved juror education recommended to address juror's use of social media and the internet' (2020) 1 *Bulletin (Law Society of South Australia)* 14, 14.
83 TLRI (n 80) 32 [2.2.12] citing Eric Robinson, 'The Wired Jury: An Early Examination of Courts' Reactance to Jurors' Use of Electronic Extrinsic Evidence' (2013) 14 *Florida Coastal Law Review* 131, 180-1.
84 Ibid.
85 Ibid 32 [2.2.24].
86 Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 63, 5.25 ('VLRC Contempt of Court Consultation Paper').
87 Caroline Fisher, Sora Park, Jee Young Lee et al. (n 40) 8.
88 Ibid 13.
89 Ibid 96.
90 Ibid 97.
91 Ibid 100.
92 Pamela D Schultz, 'Trial by Tweet? Social media innovation or degradation? The future and challenge for courts' (2012) 22, *Journal of Judicial Administration* 29, 31.

This essay therefore argues that its frequent use and 'interactive'[93] nature makes social media more likely to confront users with potentially prejudicial material than was conceded in *Pell.* Characterising social media platforms as a news source which requires 'investigation or enquiry'[94] creates a risk that critical threats to suppression orders' efficacy and necessity will be overlooked purely because they do not arise from traditional media sources.

The 2019 case of *AB v CD & EF*[95] appreciated how the ease of access to online information can render orders futile, when dealing with online material revealing the identity of Victoria's 'Lawyer X'.[96] Victoria's Court of Appeal revoked a suppression order which had been considered necessary to protect the safety of a former police informant.[97] In doing so it reinforced how a 'high standard of satisfaction' is required to grant orders under the *OCA*.[98]

This court held that due to knowledge in the legal profession and the wider community about EF's role, 'anyone with an interest in knowing EF's real name, or obtaining an image of her, [could], by the rudimentary use of a computer, do so with very little effort.'[99] Following the orders' revocation, Victorian media commented how 'the true identity of…Lawyer X was arguably the worst kept secret in Melbourne' and 'a quick internet search would reveal it – a fact Ms Gobbo [EF] herself was acutely aware of'.[100] This essay endorses the case's suggestion that the ability to easily locate suppressed information, where it is already in the online public domain, should constitute grounds for finding an order futile and lacking necessity.

IV Conclusion

The 2017 *OCA* Review described suppression orders as being 'of substantially reduced value' due to accessibility of information online, stating this issue should be addressed 'if the system of suppression orders is to maintain credibility'.[101] Internet and social media data documented since *Pell* exemplifies just how an order's value can become 'substantially reduced'[102] and suggests differentiation in risk between publicity arising through mainstream or social media is unjustified. Following *Brady,*[103] where overseas publications make information widely available through social media in a suppressed jurisdiction, this futility should deny an order's necessity. Courts must also recognise that exposure to suppressed material through social media has the potential to influence any internet user, not solely those who pursue an 'active level of enquiry'.[104]

Alternative mechanisms for protecting fair trials must therefore be considered, to prevent curtailment of open justice in high profile cases where the internet renders suppression orders ineffective. While it is beyond the scope of this essay to consider such options, consideration should be given to questioning potential jurors before a case commences[105] to test their awareness of prejudicial, pre-trial information.[106] Judge-alone trials, which have recently been permitted in Victoria,[107] should also be available where cases are so high profile they are likely to attract international media coverage and negate the utility of nation-wide suppression orders.[108] Without such recognition and action, the 'credibility of suppression orders' will be undermined even further.[109]

93 Ibid.

94 *Pell Review of Suppression Order* (n 38) 10 [43].

95 *AB v CD & EF* (n 4).

96 Natalie Hickey and Matt Collins 'What does the "Barrister X" saga mean for us' 2019 165 *Victorian Bar News* 40, 41.

97 *Open Courts Act* (n 5) s 18(1)(c).

98 *AB v CD & EF* (n 4) 68. See also *Brady* (n 15) 60 [59]; *John Fairfax & Sons Ltd v Police Tribunal* (n 22) 465.

99 *AB v CD & EF* (n 4) 73.

100 Sarah Farnsworth, 'Lawyer X identified as Nicola Gobbo after court lifts suppression order on Informer 3838', *ABC News* (online) 1 March 2019 <https://www.abc.net.au/news/2019-03-01/lawyer-x-informer-3838-identity-revealed-nicola-gobbo/10826958>.

101 Vincent (n 16) 112, 451.

102 Ibid.

103 *Brady* (n 15).

104 *Pell Review of Suppression Order* (n 38) 11 [45].

105 Rachel Hews and Nicholas Suzor, '"Scum of the Earth": An analysis of prejudicial Twitter conversations during the Bayden-Clay murder trial' (2017) 40(4) *UNSW Law Journal* 1604, 1606 citing *R v Patel [No 4]* (2013) 2 Qd R 544; *R v Baden-Clay* [2014] QSC 156.

106 For further discussion see, for example: VLRC Contempt of Court Consultation Paper (n 86) 108; *R v Patel [No 4]* (2013) 2 Qd R 544, 547 [51] – 551[20]; Jane Johnston et al (n 71) 23 [4.30] ; Victorian Law Reform Commission, *Contempt of Court* (Report, February 2020) 142 [10.36]; TLRI (n 80) 56 [3.6.6].

107 Adam Cooper, 'Victoria's first judge-only trial ends in not-guilty verdicts', *The Age* (online) 17 July 2020 <https://www.theage.com.au/national/victoria/victoria-s-first-judge-only-trial-ends-in-not-guilty-verdicts-20200717-p55d49.html>.

108 For further discussion see, for example: Elizabeth Greene and Jodie O'Leary, "Ensuring a Fair Trial for an Accused in a Digital Era: Lessons for Australia" in Patrick Keyzer, Jane Johnston and Mark Pearson (ed), *The Courts and the Media: Challenges in the Era of Digital and Social Media* (Halstead Press, 2007) 101, 109-119; Jodie O'Leary, 'Twelve angry peers or one angry judge: An analysis of judge alone trials in Australia' (2011) 35 Crim LJ 154; 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 Crim LJ 103; R v Ferguson [2008] QCA 227; R v Fardon [2010] QCA 317, 13 [45]; Criminal Code and Jury and Another Act Amendment Bill 2008 (Qld).

109 Vincent (n 16) 112, 451.