**Proceeding Suppression Order Presentation**

**Summary**

1. An accused who is subject to a criminal proceeding may make an application for a proceeding suppression order under the Open Courts Act 2013.[1]
2. There are a number of bases for making a proceeding suppression order, though it is most common for an Accused to seek an order because of the effect of media reporting on the fairness of an anticipated trial or risks to the Accused's mental health or physical safety.
3. Advice and action in relation to proceeding suppression orders must be timely. An order will be more effective (and more likely to be granted) when no media reporting has yet occurred. You need to act before the horse has bolted. The purpose of this paper is to:
    - Alert practitioners to the various grounds for seeking proceeding suppression orders;
    - Provide some practical guidance regarding the steps to be taken when preparing for, or making, a proceeding suppression order application;
    - Provide practitioners with a ready resource they can have regard to when the need to consider such an order arises.
4. This paper identifies:
    - the various bases for the making of a proceeding suppression order;
    - the nature of the test for the making of a proceeding suppression order;
    - practical considerations in preparing for such an order;
    - various other schemes, beyond the Open Courts Act 2013, which may limit reporting of criminal cases;
    - appeal rights, should your application fail.

**Grounds for Application**

5. Section 17 of the Open Courts Act 2013 provides that a Court, if satisfied of one of the grounds in section 18, may make a proceeding suppression order to prohibit or restrict the disclosure by publication of a report of the whole or any part of a proceeding or any information derived from a proceeding.
6. Relevant to a criminal proceeding[2], section 18(1) of the Open Courts Act 2013 provides that a Court may make a proceeding suppression order if satisfied the order is necessary to:

[1] Note that there are other types of suppression order which this paper does not seek to address.
[2] There are other bases identified that are relevant to VCAT and Coronial Proceedings, which are not relevant for these purposes.

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

*Making Good a Ground for a Suppression Order*

7. Relevant principles attending such an application were identified by Justice Elliott from [58] onwards in *Re WD (No 2)* [2023] VSC 790, including:
    - The grounds for the making of the suppression order must be on the basis of evidence or sufficient credible information that is satisfactory to the Court – section 14 of the Open Courts Act 2013;
    - The Court to be satisfied that a suppression order is "necessary" in the circumstances;
    - A suppression order will be necessary where, absent the order, "particular unacceptable consequences will flow".
    - Necessity in this context is a "stringent standard" requiring a high degree of satisfaction.
    - It is insufficient that the making of a suppression order is "convenient, reasonable or sensible". It is not enough that a failure to make a suppression order may result in embarrassment, shame or humiliation.
    - The applicant bears the onus of persuading the court that the suppression order sought is necessary.
8. This is a high bar, but once it has been established that the making of the order is necessary, there is no residual discretion to refuse the order[3].

*Section 18(1)(a) – To prevent the risk of prejudice to the proper administration of justice*

9. The application of s 18(1)(a) requires a balancing exercise between the administration of justice and the presumption of disclosure of information. A risk of serious interference with the

[3] *Council of the New South Wales Bar Association* (2021) 106 NSWLR 383, [218]

administration of justice must be demonstrated. A mere belief that an order is necessary will not be sufficient.[4]

10. In applying this test, the Court will have regard to alternate means of addressing the relevant concern, in determining whether an order is "necessary". In the case of section 18(1)(a) for example, the Court will have regard to whether jury directions will adequately address the risk of prejudice identified[5].
11. Suppression orders contemplated, or made, under 18(1)(a) typically arise in cases where there is a tension between a high degree of public interest and a significant risk of prejudice to the administration of justice.
12. Some well-known examples are:
    - In the matter of *Lynn*[6] – suppression of certain items of evidence in the hand up brief that would be the subject to challenge on admissibility grounds in the Supreme Court;
    - In the matter of *Bayley*[7] – suppression of the accused's prior convictions, the fact he was on parole at the time of offending, and other pending charges that would undermine the accused's right to a fair trial;
    - In the matter of *Basham*[8] – suppression of the accused's rape proceeding pending a decision as to whether it would be admissible in a separate trial for the murder of the complainant;
    - In the matter of *Clark*[9] – suppression of the accused's several related but separate trials until the conclusion of all trials;
    - In the matter of *AB v CD & EF*[10] – unsuccessful application to suppress Ms Gobbo's identity in the Royal Commission into the Management of Police Informants.
13. The restriction of media reporting of pre-trial criminal proceedings under the *Judicial Proceedings Reports Act*[11] makes the earlier stages of a criminal matter the most appropriate time to for the Court to consider suppression of material to protect the future fair trial of an accused. This will normally be at the time of committal (at which time evidence will be adduced that an Accused may seek to challenge at trial) but may be at the time of a bail application (e.g., when an Accused's prior history is likely to be ventilated).

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[4] Re WD (No 2) [2023] VSC 790, [59} (Elliot J) citing *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465, 476G-477B.
[5] This is an example given in the text of the Act itself.
[6] *R v Lynn* [2024] VSC 635.
[7] *R v Bayley* [2013] VSC 313.
[8] *R v Basham* [2023] VSC 655.
[9] *DPP v Clark* [2024] VCC 1901.
[10] *AB v CD & EF* [2019] VSCA 28.
[11] *Judicial Proceedings Reports Act 1958* (Vic), s 3(1)(c).

*Section 18(1)(b) – National and/or International Security*

14. The second statutory basis for making a proceeding suppression order under section 18(1) is where such an order 'is necessary to prevent prejudice to the interests of the Commonwealth or a State or Territory in relation to national or international security'.
15. These types of applications are commonly used to safeguard the sensitive operational information of law enforcement and intelligence agencies. It also extends to protecting the identities of their operatives.
16. While it may come up in practice, it is most likely to be the product of an application by persons *other than* the Accused.

*Section 18(1)(c) – To Protect the Safety of any person*

17. An Accused may obtain a proceeding suppression order to prevent a risk of harm to themselves. Safety to any person includes the Accused.
18. As per ***Re WD (No 2)*** [2023] VSC 790:
    - Insofar as the "necessity" test is directed towards the ground of safety of any person, it requires the establishment of a causal link between the absence of the order and some increased risk to the person concerned. Thus, if the level of danger faced by a person would not be materially advanced were a suppression order not to be made, it is unlikely that such an order could truly be considered "necessary".
    - safety is given a broad construction that encompasses risks to both physical and psychological safety.
    - section 18(1)(c) will not be enlivened unless the court is satisfied of the existence of a possibility of harm of such gravity and likelihood that the risk to the person would range above the level that could reasonably be regarded as acceptable if a suppression order were not made.
    - in determining whether the order is "necessary", the Court will have regard to the availability of treatment that would otherwise address the risk[12].
19. A risk to safety includes the 'aggravation of a pre-existing mental condition as well as the risk of physical harm, by suicide or other self-harm, consequent on the worsening of a psychiatric condition': *AB v The Queen (No 3)* (2019) 97 NSWLR 104, [56].

[12] *Re WD (No 2)* [2023] VSC 790

20. As to what is '*necessary*', a calculus of risk approach has been preferred: see, *AB v The Queen (No 3)* (2019) 97 NSWLR 104, [56] – [58]. According to that approach:

- the Court does not need to conclude that it is more probable than not that a person will suffer harm if the order is made; and,
- instead, if, 'the prospective harm is very severe, it may be more readily concluded that the order is necessary *even if the risk does not rise beyond a mere possibility*': *AB v The Queen (No 3*) (2019) 97 NSWLR 104, [56].

21. Ultimately, as Nettle J said in *AB (A Pseudonym) v CD (A Pseudonym)* [2019] HCA 6 at [15]:

> The criterion is not one of necessity to prevent harm to a person but of necessity to protect the safety of a person. And safety is a protean conception which is certainly informed by the nature and gravity of apprehended harm and the risk of its occurrence. To take but one, prosaic example, no one today rationally doubts that the wearing of seat belts while travelling in a motor car is necessary to protect the safety of drivers and passengers. At the same time, it is certainly not the case that, but for wearing a seat belt, it is more probable than not that an occupant of a moving motor car will suffer harm. That is not to suggest that just any risk of harm will suffice. To repeat, the provision is not concerned with trivialities. But what it is intended to convey is that, because the idea of safety invariably entails the assessment of risk, it should be regarded as sufficient to satisfy the test of 'necessary to protect the safety of any person' that, upon the evidence, the court is satisfied of the existence of a possibility of harm of such gravity and likelihood that, without the order sought, the risk of prejudice to the safety of the person would range above the level that can reasonably be regarded as acceptable.

*Section 18(d) – (e) – To prevent undue distress or embarrassment to certain witnesses*

22. While there are a number of automatic or self-executing suppression provisions for particular categories of offences[13], sub-sections (d) and (e) further empower the courts to make proceeding suppression orders where necessary '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
- A child who is a witness in any criminal proceeding

[13] E.g. section 4(1A) of the Judicial Proceedings Reports Act, which prohibits publication of the identification of a person against whom a sexual offence has allegedly been committed.

23. What is considered 'necessary' in such applications will often turn on what is deemed to be 'undue distress or embarrassment'.
24. Plainly, many criminal cases can generate some level of distress or embarrassment for those involved, including complainants and other witnesses. As such, the mere existence of some level of distress or embarrassment will not ordinarily be sufficient to attract the operation of section 18(1)(d) or (e).
25. The cases indicate that any expected distress or embarrassment must be excessive or in some way exceptional, although it should be noted that the wording of the statutory test is "undue".
26. In *Director of Public Prosecutions v HR* [2024] VSC 467, the DPP applied for a suppression order under sections 18(1)(d) and (e) to protect the identity of the alleged victim – the accused's disabled daughter.
27. The allegation was that the accused had poisoned her daughter and herself in a failed murder-suicide attempt, resulting in a charge of attempted murder
28. Justice Elliott determined that the daughter qualified as a 'witness' within the meaning of the section, despite her lack of capacity and the reality that she would not be called to testify at trial.
29. His Honour further concluded that any reporting capable of identifying her would cause undue distress and embarrassment, particularly given that the Crown's reliance on admissions made by the mother to police, in which she expressed a desire to end her daughter's suffering associated with her severe autism spectrum disorder.
30. It is worth noting that although these sections exist to benefit a witness, they may in some circumstances have the effect of benefiting the Accused. This will particularly be so where a familial or other close relationship exists between the Accused and the witness, as in the case of *DPP v HR* cited above.

**The Public Interest**

31. Weighing against any application for a suppression order is the principle of open justice. Section 4 of the Open Courts Act provides as follows:

> (1) A court or tribunal is to have regard to the primacy of the principle of open justice and the free communication and disclosure of information in determining whether to make a suppression order.
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> (2) A court or tribunal is only to make a suppression order if satisfied that the specific circumstances of a case make it necessary to override or displace the principle of open justice and the free communication and disclosure of information

32. Contrary to what some may think, the fundamental purpose of the open justice principle *is not* the provision of tantalising information and gossip to facilitate public discussion, satisfy public curiosity and fill tabloids. The principle is designed to ensure the integrity of the judicial process by allowing scrutiny of court processes[14].
33. This is not to say that there is not an important public interest in permitting the media to keep the public informed of what is occurring in the courts and to whom. There certainly is. But it is the role of the principle in ensuring the integrity of the judicial system that is primary.
34. Appreciating the nature of the open justice principle will assist in the making of suppression order applications. For example, it may be successfully argued in an appropriate case that suppressing the name of an Accused, but otherwise permitting the report of the proceeding, represents a minimal interference with the principle of open justice that strikes an appropriate balance between competing interests. As per *Hunter v AFL* [2015] VSC 112, a pseudonym order "'does not affect the capacity of the media or anybody who sits within the body of the court to appreciate what is taking place in the proceeding before the court… [so that] there is complete openness and accountability in the court's processes, save that an identity is not revealed."
35. The public interest in the report of a proceeding may fluctuate over the course of the proceeding. It has been observed that the public interest in the need to know what is happening in a committal proceeding is less than the public interest in knowing what is occurring during a trial[15].

**Ambit of Application**

36. Consideration must be given to the scope of any proceeding suppression order sought.
37. The order must specify the information to which the order applies with particularity. Thought should be given to drawing the application so that only that information which is necessary to be suppressed to give effect to the order is captured – see section 13.
38. The Court can make an order applying to the suppression of publication in a particular locality, Victoria or the entirety of Australia – see section 21.
39. The Court may make an order lasting to a particular date or an order expiring on the occurrence of a particular event (eg a jury verdict). Where the order will lapse upon the occurrence of a

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[14] *The Herald and Weekly Times Ltd & Ors v The Magistrates' Court of Victoria & Ors* [1999] VSC 136 per Justice Mandie; *Harman v Secretary of State for the Home Department* [1983] 1 AC 280 per Lord Diplock

[15] *David Syme & Co Ltd v Hill* (Supreme Court of Victoria, unreported, 10 March 1995); *The Herald and Weekly Times Ltd & Ors v The Magistrates' Court of Victoria & Ors* [1999] VSC 136 per Justice Mandie

particular event that may not eventuate, the Court should order that it will lapse after five years if the event does not occur within that period – Section 12.

**Interim Orders**

40. As already emphasised, these applications sometimes need to be made at short notice. You will often not have the evidence required to make the application at the time you need to make it.
41. The Court may make an Interim Proceeding Suppression Order under section 20 of the Open Courts Act. This can be made without notice and *ex parte*. It may be made without a determination of the merits of the application. Once an interim is made, the substantive application is to be listed for determination as a matter of urgency – see section 20.

**Filing Requirements and Notification to the Media**

42. Each of the jurisdictions have forms for the making of proceeding suppression orders that must be filed and served on the parties to the proceeding. The media liaison units of the courts take responsibility for service of the applications on the media.
43. Notice of an application must be made three business days prior to the hearing of the application. The Court may dispense with this requirement.

**Rights of Appeal or Judicial Review**

44. There exist a number of mechanisms for revisiting, reviewing or appealing decisions made in respect of suppression orders.

<u>Review</u>

45. Section 15 of the Open Courts Act 2013 gives the court which made a suppression order (including an interim order) the power to review it.
46. A review of a suppression order may be done on the court's own motion or on the application of various parties, including news media organisations.
47. On a review, the court or tribunal may confirm, vary or revoke the suppression order.

<u>Judicial Review</u>

48. Separate to the review procedure above, a party affected by a suppression order made in the Magistrates' Court or the County Court can bring an application for judicial review of the order.

Suppression orders made in the Supreme Court are not subject to judicial review. Instead, parties and affected persons may seek leave to appeal the order to the Court of Appeal (see below).

49. On judicial review, the court may revoke or quash a suppression order if the person affected can demonstrate that the decision to impose the order was infected by jurisdictional error or constituted an error of law on the face of the record.
50. It is important to bear in mind and provide comprehensive advice to any client regarding the potential cost consequences associated with an unsuccessful judicial review proceeding.

Appeal

51. Orders made in the Supreme Court are not subject to judicial review.
52. Under s 17 of the Supreme Court Act 1986 and subject to any Act, an appeal may be brought from a decision of a Trial Division judge to the Court of Appeal. Applications for orders under the Open Courts Act 2013 will usually be interlocutory and leave to appeal will be required.
53. The test is whether it was reasonably open for the original court or tribunal to reach the view that it did. In other words, the appellate court will leave orders undisturbed unless persuaded that the decision was clearly wrong.

**Other Restrictions on Publication**

54. There are various regimes that restrict publication of relevant material. A proceeding suppression order will not be granted to achieve the ends already achieved through these other means[16]. Examples of this include:
    - Publication of any matter that contains particulars which would likely identify a Complainant in a sexual offence case;[17]
    - Publication of proceedings under Part 5.5 and 5.6 of Chapter 5 of the *Criminal Procedure Act* (pre-trial and sentence indications);[18]
    - Publication of proceedings in the Children's Court;[19]
    - The power of the Court to restrict publication in any proceeding under the *Crimes (Mental Impairment and Unfitness to be Tried Act*);[20]
    - The power of the Court to restrict publication of the offender's location or identity in circumstances where a serious offender supervision order exists.[21]

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[16] *Open Courts Act 2013* (Vic), s 8.
[17] *Judicial Proceedings Reports Act 1958* (Vic), s 4.
[18] Ibid, s 3(1)(c).
[19] *Children Youth and Families Act 2005* (Vic), s 534.
[20] *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), s 75.
[21] *Serious Offender Act 2018*, (Vic), s 279.

- Publication of Family Violence Intervention Order Proceedings[22].

**Supreme Court Inherent Jurisdiction & Pseudonym Orders**

55. Despite the *Open Courts Act*, the Supreme Court retains inherent jurisdiction in relation to the restriction of publication.[23] Because the imposition of a pseudonym order is not provided for under the *Open Courts Act*, this power is exercised under the Court's inherent jurisdiction.
56. A common consideration in relation to a pseudonym order is whether there is a real risk that the person in question will suffer physical or psychological harm as a result of the publication of their name or the name of another party.[24]
57. A pseudonym order represents a less significant interference with the principle of open justice.[25] While a pseudonym order cannot be made under the Open Courts Act 2013 *per se*, an order can be crafted to have the same effect.

**Preparing for an Order – Some Practical Tips**

58. The need to make a proceeding suppression order can often arise with little notice. Planning should start ahead of the first mention in Court. You can, for example, refer a client for a psychiatric assessment that addresses the relevant criteria *prior to* charges being laid (for example, where your client has been interviewed and released pending enquiries). You can also consider obtaining material that will assist in making an interim suppression order application but would be deficient for the purpose of seeking a final order (eg quickly faxed through GP notes, mental health care plans, etc…).
59. Given the high bar for the making of such orders you should consider ensuring any expert your rely upon to attend Court (or at least be available by link) to give evidence if necessary.
60. If requesting a psychiatric report because of concerns about a risk of self-harm or a substantial deterioration in mental health, consider asking your psychiatrist to provide an opinion in relation to the following:

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[22] *Family Violence Protection Act 2008* (Vic), s 166.
[23] *Open Courts Act 2013* (Vic), s 5(1).
[24] *DPP v EN* [2023] VSC 724, [30].
[25] Ibid, [32].

a. What type of harm is likely to result to the clinet if no suppression order is made and the media reports upon your client's criminal proceeding;
b. As to this harm, what is:
    i. the nature and gravity of any possible harm (both in terms of shorter and longer term effects); and
    ii. the likelihood of such harm materialising.
c. The availability of care and treatment to address the risk of harm.
d. Whether available care and treatment would be a practical and efficacious alternative to the making of a suppression order in addressing the risk of harm. How burdensome would such care and treatment be and what would be the disadvantages of such a course.

61. A proceeding suppression order can only be made once there is a proceeding. If you're aware that police intend to file charges, consider speaking to the informant to advise that you are of the view that a suppression order should be applied for and put them on notice of the harm that may flow if one is not made. Tell them that in the circumstances it would be inappropriate for the media to be informed of the matter prior to you having an opportunity to make the application. Negotiate to attend the Court in company with the Informant so that the application for an interim order can be made at the time charges are filed. Volunteer to bring your client to the police station for the purpose of them being charged. These suggestions have the potential to make life easier for the Informant, and they will maximise the chance of you being able to obtain your order prior to publication by the media.
62. Strategies like this will not work in every case.
63. If you are acting in a high profile case where there is likely to be extensive reporting, consider whether there are very prejudicial aspects of the evidence that are unlikely to be admissible. Consider whether a targeted proceeding suppression order should be made to suppress those limited parts of the evidence only. This may require the assistance of experienced trial counsel early in the proceeding. Highly prejudicial evidence relating to notorious cases may stick in the minds of the public and compromise the fairness of a future trial where that evidence is ruled inadmissible.
64. Do not make an application that is bound to fail. A consequence of making an application for a proceeding suppression order is that media outlets will be notified of the application. They will likely oppose. It will instantly draw media attention to your client's case. The majority of cases are not reported on. It is often surprising the cases that escape media attention. If you make an application for a suppression order and fail you are almost guaranteeing that your client's case

will be reported on.  Of course, there are certain cases that will always be notorious and you have less to lose by drawing the media's attention to them.

James Anderson

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4 March 2025

***Disclosure**:*

*This guide is for informational and educational purposes only and should not be considered legal advice. The content is designed to provide general insights and strategies but does not replace professional legal consultation.*