

Introduction to the *Open Courts Act 2013*

Table of Contents

INTRODUCTION	2
Background to Act	2
Purpose of this document	2
PART 1 - PRELIMINARY	3
Abrogation of common law and no implied jurisdiction	3
Presumption in favour of disclosure.....	3
Preservation of other statutory powers to make suppression orders	3
PART 2 – GENERAL PROVISIONS FOR SUPPRESSION ORDERS	4
Application of Part	4
Notice Requirements.....	4
Duration of orders.....	5
Scope, purpose and basis.....	5
Review.....	5
PART 3 – PROCEEDING SUPPRESSION ORDERS	6
Power	6
Grounds	6
Interim orders	7
Where the order applies	8
PART 4 – BROAD SUPPRESSION ORDERS	8
Operation of Part	8
County Court	8
Magistrates’ Court.....	9
PART 5 – CLOSED COURT ORDERS	10
Presumption in favour of open court	10
Power	10
Grounds	10

This document was prepared on 27 November 2013 by the Judicial College of Victoria based on the *Open Courts Act 2013* (Vic). It is necessarily an incomplete summary and users should refer to the *Open Courts Act*.

INTRODUCTION

Background to Act

1. The main purposes of the *Open Courts Act 2013* are to:
 - (a) consolidate each Victorian jurisdiction's statutory provision for making suppression orders; and
 - (b) make general provisions applicable to all suppression orders including, for example, limits on the duration of orders (*Open Courts Act* s 1).
2. Opening the second reading speech of the *Open Courts Act*, the Victorian Attorney-General introduced the Act in the following way:

The Open Courts Bill 2013 reinforces the primacy of open justice and the free communication of information in relation to proceedings in Victorian courts and tribunals.

The bill consolidates and reforms the general statutory powers for the Supreme, County, Magistrates and Coroners courts and VCAT to make suppression orders and closed-court orders.

It creates general presumptions in favour of disclosure of information and of holding hearings in open court; presumptions to which courts and tribunals must have regard when considering whether to make a suppression order or a closed-court order under the powers in the bill or in the exercise of the Supreme Court's inherent jurisdiction.

In addition to these presumptions, the bill provides that orders made under the powers in the bill can only be made in specified limited circumstances where there is a strong and valid reason for doing so.

Purpose of this document

3. The purpose of this document is to provide a high-level overview of the main provisions of the *Open Courts Act*. In particular, the document seeks to describe the general operation of the Act, and identify major changes effected by it.
4. This document is organised according to each Part of the *Open Courts Act*. Parts 6-8, however, which contain general and transitional provisions, and consequential amendments, are not separately considered in this document.

PART 1 - PRELIMINARY

Abrogation of common law and no implied jurisdiction

1. Key to the operation of the *Open Courts Act* is s 5. While not affecting the Supreme Court's inherent jurisdiction (s 5(1)) the section abrogates all common law powers and any implied jurisdiction to make orders prohibiting or restricting the publication of information (s 5(2)-(3)). This clears the way for the Act to set out consolidated powers and grounds under which courts and tribunals may make:
 - (a) proceeding suppression orders (pursuant to Part 3 of the Act); and
 - (b) broad suppression orders (pursuant to Part 4 of the Act).
2. While s 5 appears on its face to abrogate common law powers to make anonymity or pseudonym orders, s 7(d) of the Act preserves powers to make orders concealing the identity of persons by restricting the way the person is referred to in open court.

Presumption in favour of disclosure

3. Section 4 of the *Open Courts Act* reflects one tenet of the common law principle of open justice. It establishes a presumption in favour of disclosure of information in order to strengthen and promote the principles of open justice and free communication of information.
4. The presumption applies whenever a court is determining whether to make a suppression order as defined in the Act. 'Suppression order' is defined in s 3 to cover proceeding suppression orders (made under s 18), interim orders (made under s 20), and broad suppression orders (made under ss 25 and 26 or pursuant to the Supreme Court's inherent jurisdiction). Thus while the Supreme Court's inherent jurisdiction remains largely unaffected by the Act (s 5) it must nevertheless have regard to the presumption in s 4 when making suppression orders in the exercise of its inherent jurisdiction.

Preservation of other statutory powers to make suppression orders

5. Section 8 makes it clear that the *Open Courts Act* does not affect the operation of suppression order and closed-court provisions in other Acts. Without limiting the generality of that statement, the section makes it clear that the suppression order provisions of the following Acts are not affected:
 - (a) *Adoption Act 1984*;
 - (b) *Children, Youth and Families Act 2005*;
 - (c) *Confiscation Act 1997*;

- (d) *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*;
 - (e) *Criminal Organisations Control Act 2012*;
 - (f) *Evidence (Miscellaneous Provisions) Act 1958*;
 - (g) *Family Violence Protection Act 2008*;
 - (h) *Major Crime (Investigative Powers) Act 2004*;
 - (i) *Public Health and Wellbeing Act 2008*;
 - (j) *Serious Sex Offenders (Detention and Supervision) Act 2009*;
 - (k) *Terrorism (Community Protection) Act 2003*;
 - (l) *Victims of Crime Assistance Act 1996*; and
 - (m) *Victorian Civil and Administrative Tribunal Act 1998*.
6. Nor does it affect provisions which themselves prohibit publication of certain information e.g. provisions in the *Judicial Proceedings Reports Act 1958* and the *Witness Protection Act 1991*.

PART 2 – GENERAL PROVISIONS FOR SUPPRESSION ORDERS

Application of Part

1. Part 2 sets out general provisions that apply to any suppression order as defined in the *Open Courts Act*. 'Suppression order' is defined in s 3 to cover proceeding suppression orders (made under s 18), interim orders (made under s 20), and broad suppression orders (made under ss 25 and 26 or pursuant to the Supreme Court's inherent jurisdiction).
2. Part 2 does not, therefore, cover-closed court orders (made under s 30), common law pseudonym orders or orders made under other legislation.

Notice Requirements

3. Applicants for suppression orders are to give three business days' notice of the making of an application to the court and to the other parties (s 10) and the court is to notify media organisations (s 11). However, the court may hear an application despite the failure to give notice if satisfied there was a good reason for non-compliance or it is in the interests of justice that the court or tribunal hear the application without notice being given (s 10(3)).

Duration of orders

4. One of the more significant changes implemented by the *Open Courts Act* is the temporal limitation imposed on suppression orders (as defined). Orders must operate for a specified duration and operate for no longer than is reasonably necessary to achieve the purpose for which the order is made. Under s 12 this may be specified in one of three ways:
 - (a) the order operates for a specified period;
 - (b) the order operates until a future event which will occur; or
 - (c) the order operates until a future event which may not occur in which case it must also operate for a period not exceeding 5 years after which the order expires if not ceasing to operate sooner.
5. The practical effect of the section is that orders such as those that operate 'until further order' now require an additional term limiting their operation for a maximum of 5 years. This ensures that such orders will not remain operative indefinitely if the specified event does not occur (*Open Courts Act Explanatory Memorandum*, clause 10).

Scope, purpose and basis

6. Sections 13 and 14 set out a number of requirements that apply to suppression orders as defined in the *Open Courts Act*. The purpose of the sections is to ensure that suppression orders are clear in their terms, cast no wider than required to achieve their intended effect and made on a proper basis. Specifically, the sections require orders:
 - (a) to be limited to achieving their purpose and to not apply to more information than is necessary to achieve that purpose (s 13(a)-(b));
 - (b) to clearly state information to which they apply (s 13(c));
 - (c) to clearly state their purpose, and where a statutory ground in the Act is relied upon, that the ground be specified (s 13(2)); and
 - (d) only to be made on the basis of evidence or sufficient, credible information (s 14(1)).

Review

7. Section 15 provides for review of orders on the application of a party, the Attorney-General, a news media organisation or any other person with sufficient interest.

PART 3 – PROCEEDING SUPPRESSION ORDERS

Power

1. Proceeding suppression orders are one of four types of orders which can be made under the *Open Courts Act* (the others being interim orders, broad suppression orders and closed-court orders).
2. A proceeding suppression order is an order that prohibits or restricts disclosure of a report of the whole or any part of a proceeding, or any information derived from a proceeding (s 17). Proceeding suppression orders are available to the major Victorian courts and tribunals as set out in the definition of 'court or tribunal' in s 3.
3. The power to make proceeding suppression orders in s 17 reflects the following repealed, court-specific provisions:
 - (a) *Supreme Court Act 1986* 18(1)(c);
 - (b) *County Court Act 1958* s 80(1)(c); and
 - (c) *Magistrates' Court Act 1989* s 126(2)(c).
4. The *Open Courts Act* repealed the former equivalent provisions in the *Victorian Civil and Administrative Tribunal Act 1998* (s 101(3)) and the *Coroners Act 2008* (s 73(2)), and brought their language in line with the above Acts via s 17 of the *Open Courts Act*.

Grounds

5. Section 18 of the *Open Courts Act* sets out five statutory grounds, at least one of which must be satisfied in order to make a proceeding suppression order. A proceeding suppression order may only be made if the court or tribunal is satisfied that:
 - (a) the order 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;
 - (b) the order is necessary to prevent prejudice 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 complainant or witness in any criminal proceeding involving a sexual offence or a family violence offence; or
 - (e) the order is necessary to avoid causing undue distress or embarrassment to a child witness in any criminal proceeding (*Open Courts Act* s 18(1)(a)-(e)).
6. Each ground requires that the order be 'necessary' to achieve the particular purpose. Orders will not be necessary where for example publication is prohibited by another Act.

7. The grounds somewhat reflect the following repealed, court-specific provisions:
 - (a) *Magistrates' Court Act 1989* s 126(1);
 - (b) *County Court Act 1958* s 80AA; and
 - (c) *Supreme Court Act 1986* s 19.
8. Section 18(1)(a) (the administration of justice ground) differs from former provisions insofar that it requires a 'real and substantial risk of prejudice' rather than being necessary in order not to 'prejudice the administration of justice'. In addition, the judicial officer must consider how that risk may be addressed by other means, such as by giving a direction to the jury.
9. Section 18(1)(d) (one of the undue distress and embarrassment grounds) is a consolidation of the last two grounds in the repealed provisions above, as well as an extension beyond sexual offence cases to family violence cases as well.
10. The ground in s 18(1)(e), available where the order is necessary to avoid undue distress or embarrassment to a child in a criminal proceeding, is new.
11. The 'public decency or morality' ground in *Supreme Court Act 1986* s 19(d) and *County Court Act* s 80AA(d), both which were repealed, are not reproduced in the *Open Courts Act*.
12. Section 18(1)(f) sets out two additional grounds available to VCAT, which reflect the two repealed grounds in ss 101(4)(a)(v) and 101(4)(b) of the *Victorian Civil and Administrative Tribunal Act 1998*.
13. Section 18(2) sets out the only two grounds available to the Coroners Court when making proceeding suppression orders, which are identical in terms the former grounds that were available in s 73(2) of the *Coroners Act 2008* (which has been repealed).

Interim orders

14. Interim orders are the second type of order available under the *Open Courts Act*.
15. Where a party has applied for a proceeding suppression order, the court or tribunal hearing the application may make an interim order without determining the merits of the application under s 18 (*Open Courts Act* s 20(1) and (4)).
16. The court or tribunal must then hear the substantive application as a matter of urgency (*Open Courts Act* s 20(6)), and the interim order only has effect until the substantive application is determined or the court or tribunal revokes the order (*Open Courts Act* s 20(5)).

Where the order applies

17. Section 21 provides that proceeding suppression order apply only to the publication or disclosure of information in a place where the order applies, as specified in the order. The order should therefore specify where publication is prohibited (e.g. within Victoria)
18. Orders may be made to apply anywhere in Australia however they must not be made to apply outside Victoria unless the court or tribunal is satisfied it is necessary for achieving the purpose for which the order is made.

PART 4 – BROAD SUPPRESSION ORDERS

Operation of Part

1. Part 4 of the *Open Courts Act* provides for the making of ‘broad suppression orders’, the third type of order made available under the Act.
2. The term ‘broad suppression order’ is not defined or even used in the Act except in the heading to Part 4. A broad suppression order must not, however, be made in respect of any information which could be the subject of a proceeding suppression order (*Open Courts Act* s 24). It therefore does not encompass suppression of the proceeding itself or information derived from the proceeding.
3. Thus broad suppression orders may involve suppression of, for example, newspaper articles which would prejudice the fair trial of an accused, or publication of the criminal history of an accused; or broadcast of a documentary which would prejudice a fair trial.
4. Broad suppression orders are generally to be understood as ‘wide suppression orders’ or ‘general suppression orders’, or more specifically, orders:
 - (a) ‘restraining a person from publishing any material or doing any other thing’ (*Open Courts Act* s 25, applicable to the County Court); or
 - (b) ‘prohibiting the publication of any specified material of a specified kind (*Open Courts Act* s 26, applicable to the Magistrates’ Court).
5. The *Open Courts Act* does not empower VCAT or the Coroners Court to make broad suppression orders.

County Court

6. The mechanism by which the County Court may make ‘broad suppression orders’ under the *Open Courts Act* is via the grant of the Supreme Court’s inherent jurisdiction (*Open Courts Act* s 25(1)). Section 25(1) is in identical terms to *County Court Act 1958* s 36A(3) which was repealed by the *Open Courts Act*.
7. Attention should be paid to the precise terms of s 25(1), noting that the section:

- (a) grants the Supreme Court's jurisdiction, powers and authority in respect of a criminal proceeding in that Court, to criminal proceedings in the County Court (there being no corresponding grant of power to make broad suppression orders in relation to non-criminal proceedings);
 - (b) empowers the County Court to make injunctions restraining a person from 'publishing', and, because 'publishing' includes the provision of access (s 3), likely extends to the making of mandatory injunctions (such as internet 'take down' orders); and
 - (c) extends beyond restraining a person from 'publishing any material' to 'doing any other thing' and thus may extend to the making of orders that are not suppression orders.
8. Practically, the County Court will have to continue to look to common law authority in determining whether it has grounds to make an order under s 25.

Magistrates' Court

9. The Magistrates' Court may make broad suppression orders pursuant to *Open Courts Act* s 26. The section does not operate like s 25. Instead, it grants a specific statutory power to make broad suppression orders on two grounds, namely, where in the opinion of the Court it is necessary to do so in order not to:
- (a) prejudice the administration of justice; or
 - (b) endanger the safety of any person.
10. This power is in identical terms to the repealed power in s 126(2)(d) of the *Magistrates' Court Act 1989*, but unlike the former power, only the two grounds listed above can be relied on in making broad suppression orders.
11. The ground in subsection (a), unlike the equivalent grounds in ss 18 and 30, was not affected by the amendments passed by the Victorian Legislative Assembly on 22 August 2013. Thus, unlike those sections, it does not require 'real and substantial risk of' prejudice to the administration of justice, and the caveat 'that cannot be prevented by other reasonably available means' is not present.
12. Like s 25, attention should be paid to the precise terms of s 26(1), noting that the section:
- (a) empowers the Magistrates' Court to make orders 'prohibiting the publication of any specified material', and, because 'publish' includes the provision of access (s 3), likely extends to the making of mandatory orders (such as internet 'take-down' orders); and
 - (b) requires that the material suppressed is 'relevant to a proceeding that is pending in the Court', though that will generally be the case.
13. Orders made under s 26 may apply outside Victoria (s 26(3)) but only insofar as is necessary for achieving the order's purpose (s 26(4)).

PART 5 – CLOSED COURT ORDERS

Presumption in favour of open court

1. Similarly to the presumption in favour of disclosure of information in s 4 of the *Open Courts Act*, s 28 reflects another tenet of the common law principle of open justice, that hearings be held in open court.
2. The section establishes a presumption in favour of hearing a proceeding in open court. Courts and tribunals must have regard to that presumption in making any closed-court order, whether the order is made at common law, or pursuant to the *Open Courts Act*.

Power

3. Closed-court orders are the final type of order available under the *Open Courts Act*. Under the Act, courts and tribunals may order:
 - (a) that the whole or any part of a proceeding be heard in closed court or closed tribunal; or
 - (b) that only persons or classes of persons specified by the court or tribunal be present during the whole or any part of a proceeding (*Open Courts Act* s 30(1)).
4. Closed-court orders are available to the major Victorian courts and tribunals as set out in the definition of 'court or tribunal' in s 3.
5. The power to make closed-court orders in s 30 generally reflects the following repealed, court-specific provisions:
 - (a) *Supreme Court Act 1986* 18(1)(a)-(b).
 - (b) *County Court Act 1958* s 80(1)(a)-(b); and
 - (c) *Magistrates' Court Act 1989* s 126(2)(a)-(b);
6. The *Open Courts Act* repealed the former equivalent provisions in the *Victorian Civil and Administrative Tribunal Act 1998* (s 101(2)) and the *Coroners Act 2008* (s 55(2)(d)) and brought their language in line with the above Acts via s 30 of the *Open Courts Act*.

Grounds

7. The five main grounds available to Victorian courts and tribunals to make proceeding suppression orders are available in identical terms to the same courts and tribunals to close the court. That is, courts and tribunals other than the Coroners Court may make closed-court orders if satisfied that:
 - (a) the order 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;

- (b) the order is necessary to prevent prejudice 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 complainant or witness in any criminal proceeding involving a sexual offence or a family violence offence; or
 - (e) the order is necessary to avoid causing undue distress or embarrassment to a child witness in any criminal proceeding (*Open Courts Act* s 30(2)(a)-(e)).
8. See paragraphs 7-11 of Part 3 of this document [above](#) for commentary on these grounds.
9. Whereas, prior to the commencement of the *Open Courts Act*, the *Victorian Civil and Administrative Tribunal Act 1998* permitted VCAT to make closed-tribunal orders under s 101(2) in the absence of any ground, the *Open Courts Act* requires that at least one ground is made out before making such an order. It establishes the above grounds as well as two additional VCAT grounds in s 30(2)(f), which are in the same terms as the proceeding suppression orders grounds for VCAT in s 18(1)(f).
10. Under the *Open Courts Act* the Coroners Court may make closed-court orders where the Court reasonably believes that an order is necessary in the public interest, having regard to the matters specified in Part 2 of the *Coroners Act 2008* (*Open Courts Act* s 30(3)). This sole ground effectively replaced the two grounds in s 55(1) via the repeal of s 55(2)(d) which empowered the Coroners Court to exclude a person or class of persons from an inquest.