

Open Justice, Closed Courts

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Foley's List

Open Justice

- *Open Courts Act 2013* (Vic) ss 1, 4 and 28
- Lieutenant-Colonel Lilburne's plea (1649) 4 How St Tr 1269, 1273
- *Scott v Scott* [1913] AC 417, 476-77
- *Zhang v The Age Company Pty Ltd* [2023] ACTCA 10, [43]-[46]
- Blackstone, *Commentaries on the Laws of England*, Vol 3 (1768) 373, Book the Fourth: Of Public Wrongs; Chapter the First, Of the Nature of Crimes, and Their Punishment, 2

Five questions

- What am I trying to keep confidential?
- What's the risk I'm trying to avoid?
- What kind of orders might I get?
- Do I really need an order?
- What evidence do I need?

What do I want to keep confidential?

- Name of an accused, or a witness?
 - Names are important
 - *PQR v Secretary, DOJR* (2017) 53 VR 45 [70]-[71]
 - But can the media still report 'salient facts' without names?
 - *Council of NSW Bar Association v EFA* (2021) 106 NSWLR 383 [229]
- Particular pieces of evidence (record of interview, photograph)
- Do I want a 'blanket' suppression order?
 - This is a big ask. Make sure you've got a good reason.
- Start drafting your order early. What does it look like on paper?
 - Precision is very important.

What's the risk?

- Am I worried about media coverage?
- Am I worried about disclosure from one person to another (ie word of mouth)?
 - Consider the difference between *disclosure* and *publication*.
 - *KF v Parramatta Children's Court* [2008] NSWSC 1131 [11]-[17]
 - *Nasr v New South Wales* (2007) 179 A Crim R 78 [127]
- Am I worried about access to the court file?
 - Should I ask the Court to keep documents 'sealed'?
- Am I worried about access to the recording or a transcript?
 - Should I write to the Court and ask for the right to be heard?

What kind of order?

- Proceeding suppression order
- Broad suppression order
 - Not to be confused with a 'blanket' proceeding suppression order.
- Pseudonym order
- Closed court order
- 'Takedown' order
 - This is a big ask. Courts may consider whether jury directions can cure the prejudice.

Do I really need an order?

- Pause and reflect.
- Will my application attract media attention?
 - Bear in mind notice provisions: *Open Courts Act* ss 10-11
- Can I achieve my objective another way?
 - Do I have to refer to certain facts in open court?
 - Can I use confidential documents or submissions?

What evidence do I need?

Starting point – Section 14 *Open Courts Act 2013* (Vic)

- (1) In making a suppression order, a court or tribunal must be satisfied *on the basis of evidence, or sufficient credible information* that is satisfactory to the court or tribunal, that the grounds for making the order are established.
- (2) This does not apply to an interim order.

“sufficient credible information” – see *P Q R v Secretary, Department of Justice and Regulation (No 1)* [2017] VSC 513, [53] – [54]

- The information must be sufficient to make out the case “strictly” and “to the standard which the underlying principle requires”.
- In some cases, this requirement may be satisfied by the court acting on its own experience and drawing inferences where justified.

What evidence do I need?

The onus is on the Applicant to establish that the order is necessary.

Consider:

- What supporting evidence do I have/need to support my application?
- How can I best present that evidence?
 - Affidavit
 - *Viva voce* evidence
- Do I need to conference my expert/witness prior to the hearing?

TIPS AND TRICKS FOR A SUCCESSFUL HEARING

1. Give as much notice as possible of the application and evidence relied on (note also – section 10). There are benefits to early engagement.
2. Don't rush - consider whether there is sufficient time to make the application. If not, be prepared to seek an interim order.
3. Consider your decision maker – will oral or written submissions will be most effective.
4. Focus submissions on why the orders sought are the *least* interference with the principles of open justice in the circumstances of the case.
5. Be prepared and on top of the authorities – your opposition will be.
6. Have a draft order ready to hand up.

**Okay, so I got my
order...**

- Get a copy from the registry
- Check it!
- Variations
 - See s 15 of the *Open Courts Act 2013*, or inherent jurisdiction of the Supreme Court
- Orders post-committal
 - Unsettled area
 - Proceeding suppression order relates to a 'proceeding'
 - Filing of an indictment doesn't commence a new proceeding (*CPA s 162*)
 - Prudent course – review the continuation of the order post-committal

**Okay, so I didn't
get my order...**

- Interim order?
- Stay
- Magistrates' Court and County Court
 - Judicial review
- Supreme Court
 - Appeal to Court of Appeal, requiring leave
 - *Supreme Court Act 1986* ss 17, 17A(4)(b)
- Fresh applications
 - No express constraint on further applications
 - But consider whether you can rely on new facts

Questions?

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