

Open Justice & Closed Courts

(Presented by Ruth Champion, Natalie Simpson and Louis Andrews – 6 February 2025)

Five key questions to ask before making an application

1. What information should be kept confidential?
2. Where does the risk come from? Is it media publicity? Or disclosure of information to non-parties?
3. How can the risk be mitigated? What orders are available (see below)?
4. Is an order necessary? Will the application *increase* the risk? Is there another way of mitigating risk?
5. What evidence is required? Oral evidence? Documentary evidence? Subpoenas?

What orders can I seek?

Order	Power	Purpose
Proceeding suppression order	<i>Open Courts Act 2013</i> (Vic) s 17	Restrict or prohibit disclosure, or publication, of information derived from a proceeding or reports of a proceeding.
Broad suppression order	<i>Open Courts Act 2013</i> (Vic) s 25 (County Court) s 26 (Magistrates' Court) Inherent jurisdiction of the Supreme Court	Restrict or prohibit disclosure or publication of information relating to, but <u>not</u> derived from, the proceeding. Classic example – prejudicial information about an accused which will not be in evidence.
Closed court order	<i>Open Courts Act 2013</i> (Vic) s 30	Exclude persons from court.
Pseudonym order	Inherent jurisdiction of the Supreme Court Implied powers of the Magistrates' Court and County Court	Conceal the identity of a person by restricting the way they are referred to in open court and/or court documents.
'Takedown' order	Inherent jurisdiction of the Supreme Court <i>Open Courts Act 2013</i> (Vic) ss 17, 25, 26	Secure the removal of material which has already been published online. This is an exceptional order, not readily granted.

Useful cases

Topic	Cases
Open justice: means to an end	<i>Hogan v Hinch</i> (2011) 243 CLR 506, 530 [20] <i>Zhang v The Age Co Pty Ltd</i> [2023] ACTCA 10, [43]
What does 'necessary' mean?	<i>Hogan v Australian Crime Commission</i> (2010) 240 CLR 651, 664 [30]-[32] <i>Fairfax Digital Media v Ibrahim</i> (2012) 83 NSWLR 52, 65 [45]-[46]
Test for the 'safety' ground	<i>AB (a pseudonym) v CD (a pseudonym)</i> (2019) 364 ALR 202, [14]-[15]
Psychological safety	<i>Director of Public Prosecutions v EN</i> [2023] VSC 724, [30] <i>NSW Bar Association v EFA</i> (2021) 106 NSWLR 383, 422-3 [225]-[230]
Prejudicing jurors	<i>News Digital Media v Mokbel</i> (2010) 30 VR 248, 266 [68] <i>Chaarani v DPP (Cth)</i> [2018] VSCA 299, [43]-[49]
Back-to-back trials	<i>Nationwide News v Qaumi</i> (2016) 93 NSWLR 384, 397-400 [62]-[77]
Takedown orders	<i>News Digital Media v Mokbel</i> (2010) 30 VR 248, 264-73 [60]-[98] <i>R v Cerantonio (Ruling No 14)</i> [2018] VSC 84, [38]-[48] <i>Fairfax Digital Media v Ibrahim</i> (2012) 83 NSWLR 52, 64-5 [43]
Pseudonym orders	<i>PQR v Secretary, Department of Justice & Regulation</i> (2017) 53 VR 45
Tips for drafting orders	<i>Director of Public Prosecutions (Cth) v Brady</i> (2015) 252 A Crim R 50, 59 [53]-[54] <i>Hogan v Hinch</i> (2011) 243 CLR 506, 530 [19]