

# *An Empirical Analysis of Suppression Orders in the Victorian Courts: 2008–12*

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## *Abstract*

It is frequently bemoaned that Victorian courts make far too many suppression orders compared to courts in other Australian jurisdictions, and that the rate is on the increase. However, it is not only the frequency of suppression orders that has attracted concern: commentators also claim problems exist with the breadth, clarity and duration of such orders. In response to these concerns, this article undertakes an empirical study of suppression orders made by the Victorian courts between 2008 and 2012. The results show that the rate of suppression orders in Victoria is, indeed, high and appears to be increasing. It is also found, consistent with anecdotal claims, that there are significant problems with the breadth, clarity and duration of orders. Each of these problems is considered in detail and, in light of the empirical findings, an evaluation is undertaken of the model legislation on suppression orders endorsed by the Standing Committee of Attorneys-General and a modified version of that model, the Open Courts Bill 2013 (Vic), introduced into the Victorian Parliament on 26 June 2013.

## **I Introduction**

Judges in Victoria have repeatedly stressed that the making of a suppression order<sup>1</sup> — an order restricting publicity being given to particular legal proceedings — is a ‘wholly exceptional’ event.<sup>2</sup> But despite such firm judicial statements, it is often lamented that in practice the Victorian courts grant far too many suppression

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<sup>1</sup> Otherwise known as a ‘non-publication order’. These terms, however, are not always used synonymously: see *Court Suppression and Non-Publication Orders Act 2010* (NSW) s 3.

<sup>2</sup> See, eg, *Herald & Weekly Times Pty Ltd v DPP (Vic)* (2007) 170 A Crim R 313, 319 [23]; *Herald & Weekly Times Pty Ltd v County Court (Vic)* [2004] VSC 512 (13 December 2004) [20]; *Herald & Weekly Times Pty Ltd v Magistrates’ Court (Vic)* (2004) 21 VAR 117, 120 [15]; *R v Pomeroy* [2002] VSC 178 (20 May 2002) [11].

orders compared to courts in other Australian jurisdictions and that the number of such orders is increasing.<sup>3</sup> Indeed, these concerns appear to be played out in some of the reported figures. For example, a 2008 study chaired by Prue Innes and commissioned by Australia's Right to Know ('*Innes Study*') reported that between 2006 and 30 June 2008, 649 suppression orders had been issued by the Victorian courts;<sup>4</sup> by comparison, only 54 orders were made in New South Wales during the equivalent period.<sup>5</sup> Since then, figures produced by Andrea Petrie and Adrian Lowe for the Media, Entertainment and Arts Alliance suggest that the rate in Victoria has increased quite dramatically, with 644 such orders said to have been made in 2011 alone.<sup>6</sup> But not only are the Victorian courts said to grant too many suppression orders, they have also been criticised for making orders that are far too broad and imprecise in scope,<sup>7</sup> and often without sufficient temporal limitations.<sup>8</sup> The suggestion is that many of these orders would not stand up to scrutiny and that the fundamental common law principle of open justice is being eroded in Victoria.

In response to such claims, this article presents the results of an empirical study of all suppression orders distributed to the media by the Victorian courts over the period 2008–12. It is important to note, however, that this research does not merely update the earlier mentioned research undertaken by Innes. That study looked at the 'basic numbers' of suppression orders across multiple jurisdictions in Australia but did not, except for a relatively small sample of 141 orders made by the Victorian courts, analyse the orders themselves.<sup>9</sup> Thus, the present study is both broader and narrower. It is limited to orders made by the Victorian courts; however, in addition to reporting how many orders have been made by year and by court, it also provides comprehensive data on the orders themselves, including the 'types' of orders that have been made, their duration, clarity, subject matter and scope, and the powers relied upon by the courts in making them. It is from this data that a clear picture can be gleaned of the orders that are actually being made.

The present study is both important and timely for a number of related reasons. First, there is, of course, intrinsic value in simply providing a picture of what is happening in the courts. This can be used either to confirm or to deny many of the anecdotal concerns raised about the number of suppression orders coming

<sup>3</sup> See, eg, Peter Bartlett, 'A Minefield of Suppression Orders', *The Drum* (online), 4 May 2010 <<http://www.abc.net.au/unleashed/33928.html>>.

<sup>4</sup> Prue Innes, 'Report of the Review of Suppression Orders and the Media's Access to Court Documents and Information' (Report, Australia's Right to Know, 13 November 2008) 34–9.

<sup>5</sup> *Ibid* 28–9.

<sup>6</sup> Media, Entertainment and Arts Alliance ('MEAA'), 'Kicking at the Cornerstone of Democracy: The State of Press Freedom in Australia' (Report, May 2012) 58 <[http://issuu.com/meaa/docs/press\\_freedom\\_2012](http://issuu.com/meaa/docs/press_freedom_2012)>.

<sup>7</sup> Innes, above n 4, 35; Bartlett, above n 3; Andrew Kenyon, 'Not Seeing Justice Done: Suppression Orders in Australian Law and Practice' (2006) 27 *Adelaide Law Review* 279, 293; Justice Teague, 'The Courts, the Media and the Community — A Victorian Perspective' (1995) 5 *Journal of Judicial Administration* 22, 25–6.

<sup>8</sup> Innes, above n 4, 35. See also Peter Bartlett, 'Open Justice under Threat in Attempts to Suppress Reporting', *The Australian* (online), 19 November 2010 <<http://www.theaustralian.com.au/business/legal-affairs/open-justice-under-threat-in-attempts-to-suppress-reporting/story-e6fg97x-1225955964074>>; MEAA, above n 6, 61; Peter Gregory, 'State Courts Lead in Suppressions', *The Age* (online), 14 November 2008 <<http://www.theage.com.au/national/state-courts-lead-in-suppressions-20081113-66ah.html?skin=text-only>>; Kenyon, above n 7, 293; Teague, above n 7, 25.

<sup>9</sup> Innes, above n 4, 35.

out of Victoria. But, as pointed out by Andrew Kenyon, empirical and comparative research in this area also has a greater role to play in providing for a better understanding of suppression order law and practice, and in evaluating what reforms, if any, might be warranted.<sup>10</sup> In presenting an in-depth, comprehensive and objective analysis of the suppression orders that have been made by the Victorian courts over an extended period, this article makes a key contribution to such a body of research.

Second, the present empirical study is timely because of the current momentum for nationwide law reform in the area of suppression orders. In 2008, in an attempt to clarify the law, achieve greater uniformity across jurisdictions and respond to concerns that suppression orders were being made too often in some states,<sup>11</sup> the Standing Committee of Attorneys-General ('SCAG') established a working group to develop draft model legislation.<sup>12</sup> The draft legislation was endorsed by the SCAG in May 2010 and has since been implemented in New South Wales<sup>13</sup> and in modified form at the federal level.<sup>14</sup> The SCAG model has not yet been enacted in Victoria. However, on 26 June 2013, during the writing of this article, the Victorian Attorney-General introduced into the Victorian Parliament a Bill designed to 'strengthen and promote open justice in Victoria's courts'.<sup>15</sup> While the Open Courts Bill 2013 (Vic) ('Open Courts Bill') is based on the SCAG model, significant changes have been proposed to many of its provisions. The current research is, of course, directly relevant to decisions about whether the Bill should be passed in its current form and what, if any, modifications might be needed. An assessment of relevant aspects of the SCAG model and the Bill is undertaken in Part IV below. But even assuming the Open Courts Bill is passed, there remain at least two possible uses for the current research. First, it can be used as a 'baseline' to assess the effect of any legislative change that is introduced. Second, even if the legislation ultimately enacted mainly reinforces and clarifies existing law, the current research will be useful in providing guidance on what modifications might need to be made to matters of practice and procedure in applying that law.

The article proceeds as follows: Part II sets out the fundamental legal principles governing open justice and the making of suppression orders. This description of the law is necessary to understanding and evaluating the empirical data. Part III outlines the methodology used in the present study as well as the results. The results show that the rate of suppression orders in Victoria is, indeed,

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<sup>10</sup> Kenyon, above n 7, 305–10.

<sup>11</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 23 November 2011, 13553–4 (Brendan O'Connor).

<sup>12</sup> Standing Committee of Attorneys-General, 'Model Court Suppression and Non-publication Orders Bill 2010' (Draft Model Bill, 23 April 2010) <[http://www.sclj.gov.au/agdbasev7wr/sclj/documents/pdf/model\\_court\\_suppression\\_&\\_non\\_publication\\_orders\\_bill\\_2010.pdf](http://www.sclj.gov.au/agdbasev7wr/sclj/documents/pdf/model_court_suppression_&_non_publication_orders_bill_2010.pdf)>. The Standing Committee of Attorneys-General has now been replaced by the Standing Council on Law and Justice.

<sup>13</sup> See *Court Suppression and Non-Publication Orders Act 2010* (NSW). See generally Miiko Kumar, 'Keeping Mum: Suppression and Stays in the Rinehart Family Dispute' (2012) 10 *Macquarie Law Journal* 49.

<sup>14</sup> See *Access to Justice (Federal Jurisdiction) Amendment Act 2012* (Cth).

<sup>15</sup> Robert Clark, 'New Law to Strengthen Open Justice' (Media Release, 26 June 2013) <<http://www.premier.vic.gov.au/media-centre/media-releases/7168-new-law-to-strengthen-open-justice.html>>.

high and appears to be increasing. It is also found, consistent with anecdotal claims, that there are significant problems with the breadth, clarity and duration of orders. Part IV explores the possible reasons for each of the main findings and considers, in light of the findings, whether either the SCAG model or the Open Courts Bill provides a suitable solution. Part V concludes.

## II The Law of Open Justice and Suppression Orders

The important principle of open justice has been the subject of extensive treatment elsewhere.<sup>16</sup> For present purposes, it suffices to say that open justice is a fundamental aspect of the common law and the administration of justice<sup>17</sup> and is seen as concomitant with the right to a fair trial.<sup>18</sup> This longstanding common law principle manifests itself in three substantive ways:<sup>19</sup> first, proceedings are conducted in ‘open court’;<sup>20</sup> second, information and evidence presented in court is communicated publicly to those present in the court;<sup>21</sup> and, third, nothing is to be done to discourage the making of fair and accurate reports of judicial proceedings conducted in open court, including by the media.<sup>22</sup> This includes reporting the names of the parties as well as the evidence given during the course of proceedings.

The principle of open justice, however, is not absolute.<sup>23</sup> Common law and statutory exceptions exist that allow courts to depart from open justice in one or more of the following ways: conducting proceedings in camera; ordering that certain information be concealed from those present in court (concealment order); ordering that a person be identified in court by a pseudonym (pseudonym order); or — the focus of this article — prohibiting the publication of reports of the proceedings (suppression order). This section gives a brief outline of the law governing the making of suppression orders under the common law and under various statutory provisions in Victoria.

### A Common Law and Statutory Exceptions to Open Justice

At common law, the jurisdiction to suppress the publication of court proceedings is derived from a superior court’s inherent powers and an inferior court’s implied

<sup>16</sup> See, eg, P Wright, ‘The Open Court: The Hallmark of Judicial Proceedings’ (1947) 25 *Canadian Bar Review* 721; Garth Nettheim, ‘The Principle of Open Justice’ (1986) 8 *University of Tasmania Law Review* 25; Chief Justice J J Spigelman, ‘The Principle of Open Justice: A Comparative Perspective’ (2006) 29 *University of New South Wales Law Journal* 147; Chief Justice J J Spigelman, ‘Seen to be Done: The Principle of Open Justice (pt 1)’ (2000) 74 *Australian Law Journal* 290; Chief Justice JJ Spigelman, ‘Seen to be Done: The Principle of Open Justice (pt 2)’ (2000) 74 *Australian Law Journal* 378; Des Butler and Sharon Rodrick, *Australian Media Law* (Thomson Reuters, 4<sup>th</sup> ed, 2011) 205–8.

<sup>17</sup> See, eg, *Re Applications by Chief Commissioner of Police (Vic) for Leave to Appeal* (2004) 9 VR 275, 286 [25]; *John Fairfax Publications Pty Ltd v District Court (NSW)* (2004) 61 NSWLR 344, 352; *John Fairfax Publications Pty Ltd v A-G (NSW)* (2000) 181 ALR 694, 703–4 [52]–[57].

<sup>18</sup> *Russell v Russell* (1976) 134 CLR 495, 520.

<sup>19</sup> See generally Butler and Rodrick, above n 16, 212–14.

<sup>20</sup> *Scott v Scott* [1913] AC 417, 429; *Dickason v Dickason* (1913) 17 CLR 50, 51.

<sup>21</sup> *A-G v Leveller Magazine Ltd* [1979] AC 440, 450.

<sup>22</sup> *Ibid*; *Hogan v Hinch* (2011) 243 CLR 506, 532 [22]; *Rogers v Nationwide News Pty Ltd* (2003) 216 CLR 327, 335 [15].

<sup>23</sup> *Hogan v Hinch* (2011) 243 CLR 506, 530 [20] (French CJ).

powers.<sup>24</sup> The overarching principle, authoritatively stated by the House of Lords in *Scott v Scott*<sup>25</sup> and applicable to all forms of derogation, is that open justice can only be limited where it is really necessary to secure the proper administration of justice in the *proceedings before the court*.<sup>26</sup> This is because open justice must yield to the ‘more fundamental principle that the chief object of Courts of justice must be to secure that justice is done’.<sup>27</sup> Necessity, however, will not be established simply on the basis that the proceeding could be more expediently conducted if a suppression order were issued.<sup>28</sup> Likewise, potential embarrassment to parties or witnesses,<sup>29</sup> damage to reputation,<sup>30</sup> or the disclosure of private, dangerous or damaging facts will not provide sufficient reason.<sup>31</sup> There are, on the other hand, a number of established categories of cases where it is accepted that a court can impose restrictions on open justice under the common law: those involving confidential information and trade secrets,<sup>32</sup> blackmail,<sup>33</sup> police informers,<sup>34</sup> national security,<sup>35</sup> and wards of the state or the mentally ill.<sup>36</sup> While these categories are considered ‘few and strictly confined’,<sup>37</sup> the courts have accepted that they are not absolute and, in circumstances of close analogy, have been willing to expand upon them.<sup>38</sup> Importantly, the decision to make an order to limit open justice is a matter of principle and not one of discretion.<sup>39</sup> Nor does the decision involve a ‘balancing exercise’ between the public interest in open justice, on the one hand, and the competing interest in suppression, on the other;<sup>40</sup> rather, a suppression order will either be necessary —

<sup>24</sup> Ibid 531 [21]; *John Fairfax Publications Pty Ltd v District Court (NSW)* (2004) 61 NSWLR 344, 356–61 [38]–[66]; *Grassby v The Queen* (1989) 168 CLR 1, 15–17 (Dawson J).

<sup>25</sup> [1913] AC 417.

<sup>26</sup> Ibid 436–7; *John Fairfax & Sons Pty Ltd v Police Tribunal (NSW)* (1986) 5 NSWLR 465, 476–7 (McHugh JA), 467 (Glass JA agreeing). There is authority, however, that suppression orders may be made on the broader grounds of protecting the administration of justice more generally (*John Fairfax Group Pty Ltd (rec and mgr appld) v Local Court (NSW)* (1991) 26 NSWLR 131, 141 (Kirby P) (*‘Fairfax v Local Court (NSW)’*) or for avoiding ‘consequences [that] are unacceptable’: at 161 (Mahoney JA)). Certainly, not all of the accepted categories of cases where suppression orders can be granted under the common law (see below nn 32–6 and accompanying text) can be explained on the basis of protecting the administration of justice in the case at hand. For a useful discussion of the authorities, see Kenyon, above n 7, 282–6; Butler and Rodrick, above n 16, 230–4.

<sup>27</sup> *Scott v Scott* [1913] AC 417, 437.

<sup>28</sup> *John Fairfax & Sons Pty Ltd v Ryde Local Court* (2005) 62 NSWLR 512, 523.

<sup>29</sup> *Scott v Scott* [1913] AC 417, 435.

<sup>30</sup> *Herald & Weekly Times Ltd v Medical Practitioners Board of Victoria* [1999] 1 VR 267, 294–5 (Hedigan J).

<sup>31</sup> See, eg, *Fairfax v Local Court (NSW)* (1991) 26 NSWLR 131, 142–3 (Kirby P).

<sup>32</sup> *Australian Broadcasting Commission v Parish* (1980) 43 FLR 129, 132.

<sup>33</sup> *R v Socialist Worker Printers and Publishers Ltd; Ex parte A-G* [1975] QB 637, 649, 652; *Fairfax v Local Court (NSW)* (1991) 26 NSWLR 131 (extended to cases of extortion).

<sup>34</sup> *Cain v Glass (No 2)* (1985) 3 NSWLR 230.

<sup>35</sup> See, eg, *A v Hayden* (1984) 156 CLR 532, 599; *Fairfax v Local Court (NSW)* (1991) 26 NSWLR 131, 141.

<sup>36</sup> *Scott v Scott* [1913] AC 417, 437.

<sup>37</sup> *John Fairfax Publications Pty Ltd v District Court (NSW)* (2004) 61 NSWLR 344, 353; *A-G (NSW) v Nationwide News Pty Ltd* (2007) 73 NSWLR 635, 640.

<sup>38</sup> *R v Kwok* (2005) 64 NSWLR 335, 341.

<sup>39</sup> *Scott v Scott* [1913] AC 417, 435.

<sup>40</sup> *Hogan v Australian Crime Commission* (2010) 240 CLR 651, 664 [31]–[33]. The power to make an order under consideration in that case was statutory (*Federal Court Act 1976* (Cth) s 50 (now repealed)), but the authority cited by the High Court in support of its conclusion dealt with common law powers. See also Judith Bannister, ‘The Paradox of Public Disclosure: *Hogan v Australian Crime Commission*’ (2010) 32 *Sydney Law Review* 159, 167.

and therefore granted — or not.<sup>41</sup> An order cannot be made on the consent of the parties<sup>42</sup> and a court's 'mere belief' in the necessity of an order will be insufficient: there must be cogent evidence before the court that the order is necessary.<sup>43</sup> Finally, any resulting order 'must be clear in its terms and do no more than is necessary to achieve the due administration of justice'.<sup>44</sup>

These common law powers of suppression are supplemented by an array of broader statutory powers. Only those most frequently relied upon are outlined here. In Victoria, each of the Supreme, County and Magistrates' Courts have powers under their respective Acts to depart from open justice, including the power to grant suppression orders. These are considered the 'regular' statutory powers of the courts. Thus, under ss 18–19 of the *Supreme Court Act 1986* (Vic) ('*SC Act*'), a court may make an order 'prohibiting the publication of a report of the whole or any part of a proceeding or of any information derived from a proceeding' where it is *necessary* not to: (a) endanger national or international security; (b) prejudice the administration of justice; (c) endanger the physical safety of any person; (d) offend public decency or morality; (e) cause undue distress or embarrassment to a victim of certain sexual offences; or (f) cause undue distress or embarrassment to a witness under examination in proceedings relating to a sexual offence. Equivalent provisions are found under ss 80–80AA of the *County Court Act 1958* (Vic) ('*CC Act*') and s 126(2)(c) of the *Magistrates' Court Act 1989* (Vic) ('*MC Act*'), except that the latter does not contain an exception for public decency or morality. The common law principles discussed above are relevant to the interpretation of the requirement of 'necessity' under these statutory powers<sup>45</sup> — although, unlike the common law, the exception to avoid prejudice to the administration of justice in each of these Acts is not limited to prejudice to the actual proceeding before the court, but extends to the protection of *future* proceedings.<sup>46</sup>

Sitting alongside the 'regular' statutory powers are various powers of suppression under subject matter-specific legislation. Examples include: s 75 of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) ('*CMIUT Act*'), which provides the power to prohibit the publication of certain aspects of proceedings involving applications by an accused that he or she is unfit to be tried due to mental impairment; s 184 of the *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) ('*SSODS Act*'), which allows a court to suppress the publication of the identity of a sex offender or his or her whereabouts; and s 133 of the *Public Health and Wellbeing Act 2008* (Vic) ('*PHW Act*'), which gives a court the power to prohibit the publication of aspects of proceedings where evidence is given relating to HIV or some other prescribed disease.

It is important to note that the statutory powers of suppression operate in addition to the various 'automatic' statutory prohibitions on reporting of aspects of

<sup>41</sup> *Hogan v Australian Crime Commission* (2010) 240 CLR 651, 664 [31]–[33].

<sup>42</sup> *Scott v Scott* [1913] AC 417, 436.

<sup>43</sup> *John Fairfax & Sons Ltd v Police Tribunal (NSW)* (1986) 5 NSWLR 465, 477; *Re Applications by Chief Commissioner of Police (Vic) for Leave to Appeal* (2004) 9 VR 275, 286; *The Age Co Ltd v Magistrates' Court (Vic)* [2004] VSC 10 (28 January 2004) [12]–[14].

<sup>44</sup> *John Fairfax & Sons Ltd v Police Tribunal (NSW)* (1986) 5 NSWLR 465, 477.

<sup>45</sup> *Lew v Priester (No 2)* [2012] VSC 153 (24 April 2012) [12].

<sup>46</sup> *Re Applications by Chief Commissioner of Police (Vic) for Leave to Appeal* (2004) 9 VR 275, 286–7.

judicial proceedings. Under the *Judicial Proceedings Reports Act 1958* (Vic) s 4, for example, it is an offence to publish information likely to lead to the identification of a victim of a sexual offence. Other provisions exist in relation to proceedings involving children,<sup>47</sup> adoption<sup>48</sup> and matters of family law.<sup>49</sup>

## B 'Extraneous' Material: 'General' Suppression Orders

The focus so far has been on the various powers that enable courts to make orders prohibiting the publication of material arising *from* proceedings (called 'proceedings' suppression orders). Courts, however, also have the power to restrict the publication of material *extraneous*<sup>50</sup> to the proceeding where such publication would interfere with the administration of justice. These orders are called 'general' suppression orders. The distinction between 'proceedings' and 'general' suppression orders, recently recognised by the Victorian Court of Appeal in *News Digital Media v Mokbel*,<sup>51</sup> is an important one because each gives rise to 'very different issues of policy and jurisdiction'.<sup>52</sup> In particular, general suppression orders, unlike their proceedings counterparts, do not impact on the 'high principle' of open justice.<sup>53</sup> Open justice is not affected at all as such an order does not restrict the publication of proceedings. Instead, the 'countervailing principle' in making a general suppression order is freedom of speech.<sup>54</sup> The Supreme Court's power to make a general suppression order is based on its inherent jurisdiction to regulate its own processes<sup>55</sup> and is said to be 'akin' to a quia timet injunction to restrain a threatened sub judice contempt of court.<sup>56</sup> Examples include orders prohibiting the publication of prior convictions,<sup>57</sup> allegations of prior or subsequent criminal conduct,<sup>58</sup> and specified media such as newspaper articles<sup>59</sup> and television programs.<sup>60</sup>

While the County and Magistrates' Courts do not have the power at common law to make general suppression orders, they do have such powers under statute. Thus, under the *CC Act* s 36A(3), the County Court, in order to ensure the fair and proper conduct of any criminal proceeding, is deemed to have the same powers as the Supreme Court to make an order to restrain any person from

<sup>47</sup> *Children, Youth and Families Act 2005* (Vic) s 534.

<sup>48</sup> *Adoption Act 1984* (Vic) s 121.

<sup>49</sup> *Family Law Act 1975* (Cth) s 121.

<sup>50</sup> Thus, material suppressed under a general suppression order has 'no connection with court proceedings except its capacity to affect current or future proceedings': *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* (2012) 83 NSWLR 52, 66 [51].

<sup>51</sup> (2010) 30 VR 248.

<sup>52</sup> *Ibid* 258 [34].

<sup>53</sup> *Ibid* 259 [39].

<sup>54</sup> *Ibid* 259 [36].

<sup>55</sup> *R v Yau Kim Lam (No 1)* [2004] VSC 264 (27 July 2004) [9]–[10].

<sup>56</sup> *General Television Corporation Pty Ltd v DPP* (2008) 19 VR 68, 76 [28]; *Herald and Weekly Times Pty Ltd v A* (2005) 160 A Crim R 299, 306 [33]; *News Digital Media Pty Ltd v Mokbel* (2010) 30 VR 248, 263 [55].

<sup>57</sup> Such an order, for example, was made by Nettle J of the Victorian Supreme Court on 5 April 2013 to suppress the prior convictions of Adrian Ernest Bayley, Jillian Meagher's rapist and killer (copy on file).

<sup>58</sup> See, eg, *DPP v Williams* [2004] VSC 360 (9 September 2004).

<sup>59</sup> *Nationwide News Pty Ltd v Farquharson* (2010) 28 VR 473.

<sup>60</sup> *General Television Corporation Pty Ltd v DPP* (2008) 19 VR 68.

publishing any material.<sup>61</sup> The Magistrates' Court has a similar power to make suppression orders under the *MC Act* s 126(2)(d), which provides that 'the court may ... make an order prohibiting the publication of any specified material, or any material of a specified kind, relevant to a proceeding that is pending in the court'. This power can be used to make both 'proceedings' and 'general' suppression orders. It can also be exercised in a broader range of circumstances than permitted under the Supreme Court's inherent power and the County Court's statutory power to make general suppression orders; it extends beyond circumstances where such an order is necessary to restrain a threatened sub judice contempt to include all the purposes for which the Magistrates' Court could make a proceedings suppression order under s 126(2)(c).<sup>62</sup>

### III Suppression Orders in Victoria

#### A Methodology

The aim of the present study is to provide a detailed picture of how the common law and statutory powers to make suppression orders operate in practice in Victoria. The dataset comprises all suppression orders that have been made by the Victorian Supreme, County and Magistrates' courts between 25 February 2008 and the end of 2012 *and* have been notified to the media by the courts.<sup>63</sup> The authors read every order in the dataset and recorded certain information about those orders in a spreadsheet. This included basic 'court' information about each order, such as the court and judge that made the order and the court-assigned proceedings number. Information about the substance of each suppression order was also recorded, including: the power or powers relied upon by the court in making the order; the duration of the order; the type of order (that is, 'proceedings' order); the subject matter of the order;<sup>64</sup> the breadth and clarity of the order; and, finally, information about the language used in the text of the order. Revocation orders — orders that revoke earlier suppression orders — were analysed separately. Each order was also given a unique identification number for referencing.

A number of different types of orders were excluded from the dataset. First, in camera orders were excluded. This was because it was unclear how consistently copies of such orders were sent to the media and it was often the case that in camera orders were accompanied by separate suppression orders. Counting in camera orders would, therefore, have constituted 'double-counting'. Second, orders that vary or extend earlier orders were also excluded. This was largely for the same reason that in camera orders were excluded: it was difficult to know how

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<sup>61</sup> See, eg, *Bravehearts Inc v The County Court of Victoria* (2010) 29 VR 421.

<sup>62</sup> See *Magistrates' Court Act 1989* (Vic) s 126(1).

<sup>63</sup> The current practice in Victoria is that the courts notify mainstream media organisations by email of all suppression orders made by the Victorian courts. The present authors, however, have no way of knowing whether, in fact, *all* suppression orders are notified to the media in this way. It may be possible that some are notified only to the parties concerned in the proceeding. It is for this reason that the dataset is limited to all orders *notified* to the media by the courts.

<sup>64</sup> Suppressed information was not recorded in the spreadsheet. For example, if an order prohibited publication of the name of the defendant, X, then the subject matter was 'defendant's name'.

consistently they were sent to the media and including them would potentially skew the data. Orders, however, which completely *revoked* and *replaced* earlier orders were included. Third, the dataset only included orders that were made by the Supreme, County and Magistrates' Courts. Thus, orders made by the Children's Court and Coroners Court and orders made during the course of Royal Commission hearings were excluded. This was to ensure that the data could be readily compared with data from other jurisdictions in future studies.

There are certain aspects of the suppression orders we did *not* attempt to assess. In particular, we did not consider whether the court, in fact, had the power to make any of the individual orders or whether they were justified according to the legal test of necessity. The reason is that it was impossible to glean such information from the orders themselves. Forming a view on any of these matters would require analysis of either the court transcripts or court files and, for this reason, is beyond the scope of this article.

## B Results

### 1 Overall Suppression Orders: Basic Results

The obvious starting point for an empirical analysis of suppression orders in Victoria is to identify the overall number of orders that have been made by the courts. These data, by year and by court, are presented in Table 1.

**Table 1: Overall suppression orders in Victoria by court and year, 2008–12**

Court	2008 (from 25 February)	2009	2010	2011	2012	Total
Supreme Court	54	57	48	68	54	281
County Court	91	149	135	145	150	670
Magistrates' Court	72	110	115	147	106	550
<b>Total</b>	<b>217</b>	<b>316</b>	<b>298</b>	<b>360</b>	<b>310</b>	<b>1501</b>

The most notable feature of Table 1 is that, when compared to the earlier figures reported in the *Innes Study*, which used the same methodology as the present study in collecting the data, as well as figures presented by the Hon Phillip Cummins at a Melbourne Press Club address in 2010,<sup>65</sup> there appears to have been an increase in recent years in the overall number of suppression orders made by the Victorian courts. The *Innes Study* reported, for example, that there were 226 suppression orders made in 2006 and 284 in 2007;<sup>66</sup> the *Cummins Study* reported 206 and 251

<sup>65</sup> P D Cummins, 'Justice and the Media' (Speech delivered at the Melbourne Press Club, Melbourne, 17 August 2010) <<http://www.lawreform.vic.gov.au/sites/default/files/Justice%20and%20the%20Media%20-%20Melbourne%20Press%20Club%202010.pdf>> ('*Cummins Study*'). The methodology used by Cummins in collecting the data on the number of suppression orders was not reported. The data, however, did not include orders made by the Court of Appeal.

<sup>66</sup> Innes, above n 4, 35–9.

suppression orders respectively.<sup>67</sup> The finding substantiates concerns, outlined above, that the rate of suppression in Victoria has been steadily on the increase. The results, however, differ markedly from a 2011 study undertaken by Petrie and Lowe.<sup>68</sup> As mentioned above, their study found that 644 orders were made in 2011; the current study found only 360. Unfortunately, it is impossible to identify the cause of the discrepancy between these figures because the description of the methodology used by Petrie and Lowe was not sufficiently detailed.

Also consistent with the results in the *Innes* and *Cummins Studies*, Table 1 shows that the County Court was responsible for making the greatest number of orders (45 per cent), followed by the Magistrates' Court (36 per cent) and the Supreme Court (19 per cent).

Table 2 sets out the number of orders made according to the source of power relied upon by the court.

**Table 2: Overall suppression orders by power and year, 2008–12**

Power		2008	2009	2010	2011	2012	Total
Regular powers	<i>Supreme Court Act</i> ss 18 and 19	13	13	10	28	36	100
	<i>Supreme Court Act</i> ss 18 and 19 and inherent jurisdiction	17	33	10	16	6	82
	<i>County Court Act</i> s 80	58	81	82	97	108	426
	<i>County Court Act</i> s 36A	0	2	0	0	0	2
	<i>Magistrates' Court Act</i> s 126(2)	71	109	113	145	105	543
	Unspecified <sup>69</sup>	13	11	28	21	6	79
Subject matter specific powers	<i>SSODS Act</i> (and predecessor)	28	57	31	33	30	179
	<i>CMIUT Act</i>	11	8	22	19	16	76
	<i>PHW Act</i> (and predecessor)	3	2	1	2	4	12
	Other <sup>70</sup>	5	1	3	0	1	10

Overall, 1232 of the orders in the dataset relied upon the courts' regular powers or the power was unspecified; 277 orders, on the other hand, relied upon subject

<sup>67</sup> Cummins, above n 65, 3.

<sup>68</sup> Media, Entertainment and Arts Alliance, above n 6, 58.

<sup>69</sup> An order was assumed to have been made pursuant to a court's common law (inherent or implied) power where the power was unspecified.

<sup>70</sup> 'Other' powers include: *Bail Act 1977* (Vic) s 7 (three orders); *Confiscation Act 1997* (Vic) s 17(3) (one order); *Crimes Act 1914* (Cth) s 85B (one order); *Children, Youth and Families Act 2005* (Vic) s 534 (one order); *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 22 (one order); *Criminal Code Act 1995* (Cth) s 93.2 (one order); *Judicial Proceedings Reports Act 1958* (Vic) s 3(1)(c) (one order), s 4(1A) (one order).

matter-specific powers. A small number of orders relied upon more than one power. The most frequently relied upon source of power was the *MC Act* s 126(2). As to subject matter-specific powers, a significant number of orders were made under the *SSODS Act* and its predecessor, the *Serious Sex Offenders Monitoring Act 2005* (Vic) (179 orders), as well as under the *CMIUT Act* (76 orders).

The remainder of the data presented in this article focuses on orders made *exclusively* under the courts' common law and regular statutory powers ('regular suppression orders'). 'Subject matter-specific' orders have been excluded from the rest of the study for two reasons. First, doing so provides data that can readily be used in future research to compare any changes that have occurred over time as well as in comparisons with similar data from other jurisdictions. Second, such orders cannot be taken as a reliable representation of the courts' general approach to making suppression orders because the powers used to make them are not expressed in terms of the strict 'necessity' test.<sup>71</sup> While it would be useful to analyse the subject matter-specific orders separately, such an analysis is beyond the scope of this article.

## 2 Regular Suppression Orders

### (a) Basic Results

Having removed the subject matter-specific orders, the regular suppression orders by year and by court are presented in Table 3.

**Table 3: Regular suppression orders by court and year, 2008–12**

Court	2008	2009	2010	2011	2012	Total
Supreme Court	41	56	42	60	48	247
County Court	59	84	84	99	106	432
Magistrates' Court	72	109	114	147	105	547
<b>Total</b>	<b>172</b>	<b>249</b>	<b>240</b>	<b>306</b>	<b>259</b>	<b>1226</b>

Table 3 shows that over the period of the study there were 1226 suppression orders made pursuant *only* to the courts' regular common law and statutory powers, with the Magistrates' Court responsible for the greatest number (44.5 per cent), followed by the County Court (35.5 per cent) and the Supreme Court (20 per cent). This accords with the view expressed by some commentators that inferior courts make orders much more frequently than the Supreme Court.<sup>72</sup> However, when these figures are viewed in light of the average workload of each of the

<sup>71</sup> See, eg, *Hogan v Hinch* (2011) 243 CLR 506, 536–7 [31]–[32]; *Secretary to the Department of Justice v Fletcher (No 1)* [2009] VSC 501 (19 October 2009) [4].

<sup>72</sup> See, eg, Kenyon, above n 7, 294 quoting William Houghton, 'Suppression Orders' (Paper presented at the Law Institute of Victoria, Melbourne, September 2005) 4.5; Chris McLeod, 'Wrestling with Access: Journalists Covering Courts' (2004–5) 85 *Reform* 15, 18.

courts, a very different picture emerges.<sup>73</sup> Between 1 July 2007 and 31 June 2012, for example, an average of 174 304 criminal trials and pleas were finalised per year in the Magistrates' Court, compared to just 2345 in the County Court and 204 in the Supreme Court.<sup>74</sup> This means that, in proportion to caseload, the Supreme Court is making suppression orders at a much greater rate than both the County and Magistrates' courts. The likely reason for this is that the Supreme Court has the jurisdiction to conduct trials of the most serious of criminal offences. Naturally, such trials tend to attract much more public interest and media attention than criminal matters heard by the inferior courts, meaning that there might be a greater need — or perceived need — for orders preventing prejudicial publicity.

*(b) Types of Orders*

The suppression orders in the dataset were analysed according to 'type'. Following the distinction described in Part II above, each order was initially classified as either a 'proceedings' or a 'general' suppression order. Classifying the orders in this way, however, proved to be problematic. There were certain suppression orders that did not easily fit within either category. Thus, some orders related to 'proceedings information' — information likely to be presented at trial, such as a defendant's name or particular pieces of evidence — but extended to prohibiting publication of that information in *any* context (that is, in a context unconnected with the proceedings — for example, publication of the person's name in the telephone book or in relation to another matter) *and* to circumstances where the information was not derived from the proceedings. These orders, therefore, could not be described as 'proceedings' suppression orders. Nor was it possible, however, to characterise them as 'general' suppression orders: they clearly covered proceedings information (rather than information extraneous to the proceeding) and clearly prohibited the publication of the information in the reports context. It was apparent, therefore, that an additional 'hybrid' category was necessary. This resulted in the orders being classified according to the following three 'types' of suppression orders:

1. 'Proceedings-only' orders: orders *clearly* limited to prohibiting the publication of reports of proceedings or information derived from proceedings;
2. 'Proceedings-plus' orders: orders prohibiting the publication of 'proceedings information' but, unlike proceedings-only suppression orders, not limiting the prohibition on publication to either reports of proceedings or where the information is derived from proceedings; and
3. 'General' orders: orders *clearly* limited to prohibiting the publication of prejudicial material extraneous to the proceedings (that is, material not

<sup>73</sup> Due to a range of indeterminable variables, it is impossible to provide accurate information about the precise rate at which suppression orders are made in proportion to court workload. The main difficulty is in obtaining information about court workload by calendar year.

<sup>74</sup> These figures are based on the courts' annual reports. These are available at: <[http://www.supremecourt.vic.gov.au/find/publications/annual-reports+\(home\)>](http://www.supremecourt.vic.gov.au/find/publications/annual-reports+(home)>); <<http://www.countycourt.vic.gov.au/annual-reports>>; <<http://www.magistratescourt.vic.gov.au/practice-directions-publications/annual-reports>>.

presented in proceedings and not expected to be presented in proceedings).

It should be noted that the power to make a proceedings-plus suppression order is somewhat uncertain. What is clear, however, is that the Supreme Court could not rely solely on its statutory power under the *SC Act* s 18; because such orders go beyond the scope of s 18, they must *also* involve the use of the Court's inherent jurisdiction. The position of the County Court is even less certain: it may have the same 'extended' powers as the Supreme Court by virtue of the *CC Act* s 36A(3) or may be able to rely on its implied jurisdiction. The Magistrates' Court, on the other hand, clearly has the power to make proceedings-plus suppression orders pursuant to the *MC Act* s 126(2)(d), provided the necessity test is met.

In classifying each suppression order into one or more of these categories, reliance was placed on the natural and ordinary meaning of the words contained in the order. This was appropriate because it is the approach used by the courts in considering the validity of suppression orders.<sup>75</sup>

The frequency with which the courts have made these three 'types' of suppression orders is presented in Table 4.

**Table 4: Regular suppression orders by type and by court**<sup>76</sup>

Court	Proceedings-only	Proceedings-plus	General	Unclear
Supreme Court	128	118	29	0
County Court	295	150	8	0
Magistrates' Court	426	147	12	5
<b>Total</b>	<b>849</b>	<b>415</b>	<b>49</b>	<b>5</b>

Considering that the powers most often relied upon across all courts were the regular statutory powers to limit the publication of reports of proceedings and information derived from proceedings (see Table 2), it is not surprising that the vast majority of the orders made were proceedings-only orders (just under 70 per cent). What *is* surprising, however, is that 150 proceedings-plus and eight general suppression orders were made by the County Court. This was unexpected because almost all orders made by the County Court (426 out of 432) cited the *CC Act* s 80 as the *exclusive* power relied upon. However, a proceedings-plus order, as explained above, cannot be made by the County Court using only s 80, which is limited to the making of proceedings-only orders; the power to make such orders, if it exists at all, must rely upon the *CC Act* s 36A(3) or the court's implied jurisdiction. Similarly, the County Court can only make general suppression orders

<sup>75</sup> See, eg, *John Fairfax & Sons Ltd v Police Tribunal (NSW)* (1986) 5 NSWLR 465, 473.

<sup>76</sup> There were 89 instances where an order contained a combination of these types of orders. Such orders have been counted multiple times in Table 4.

pursuant to s 36A(3). These data, therefore, suggest that judges of the County Court frequently misconstrue the scope of the regular statutory power under s 80.

A similar picture emerges in relation to orders made by the Supreme Court. This can be seen from the data in Table 5, which sets out the relationship between the types of suppression orders made by the Supreme Court and the power(s) purportedly relied upon in making them.

**Table 5: Supreme Court suppression orders, relationship between type and power**

Court	Proceedings-only	Proceedings-plus	General
Section 18 only	60	47	7
Section 18 and inherent jurisdiction	33	37	14
No power cited	35	34	8

Table 5 shows that the Supreme Court failed to cite the power arising from its inherent jurisdiction in making 47 proceedings-plus orders and incorrectly cited s 18 in making 21 general suppression orders.

The Magistrates' Court, on the other hand, cited the *MC Act* ss 126(2)(c) and (d) in the header of 538 of the 547 suppression orders made by the Court. This citation automatically appears in the computer-generated template used by the Magistrates' Court. Of the remaining nine orders, five cited no power and four incorrectly relied upon ss 126(2)(a) and (b) (which give the Court the power to close the court rather than to make suppression orders).

### *(c) Proceedings-Only Orders*

In addition to providing basic data on the overall number of suppression orders, their type and the powers under which they were made, it is important to consider their content and scope further. Beginning with proceedings-only orders, the following three aspects of such orders require analysis: (1) the language used in the orders that meant they were classified as proceedings-only orders; (2) the extent to which the orders prohibited publication of the whole of proceedings or only part of the proceedings (including specific proceedings information); and (3) where orders prohibited the publication of part of the proceedings, the subject matter of that part. Data on the language used and the scope of the orders are presented in this section. Data on the subject matter are provided in section (e) below.

#### *Language*

An order was classified as a proceedings-only order where it was clear, based on the natural and ordinary meaning of the words used, that the order only prohibited the making of reports of proceedings and/or the publication of information derived from proceedings. This was clearly established where the order used language identical to, or almost identical to, the wording of the courts' respective regular

statutory powers to make proceedings-only orders. The following order is typical of an order worded in this fashion:

Order pursuant to section 80(1) of the *County Court Act 1958* (Vic), the prohibition of the publication of any report of the whole of the proceedings or of any information derived from the proceedings.<sup>77</sup>

Other orders, similarly drawing upon the terminology of the statute, were limited to the publication *either* of reports of proceedings *or* of information derived from proceedings. Some of the orders classified as proceedings-only orders, however, departed from such statutory language. Rather, they were classified as proceedings-only orders because there was some ‘link’ to the proceedings in the orders themselves that made it clear that they were proceedings-only orders. Thus, some orders, for example, prohibited ‘publication of the proceedings’<sup>78</sup> or used some other wording to indicate that only material *derived from* the proceedings was covered by the order. Alternatively, other orders were clearly limited to reports of proceedings, even though the language of ‘reports’ was not directly used. For example, some orders prohibited the publication of a person’s name or identity *as a participant* in the proceedings. The following are typical of orders with such a ‘link’ to proceedings (emphasis added):

The court orders that:

1. Publication be prohibited of any material whatsoever that may identify or tend to identify [X] *in relation to this trial*.<sup>79</sup>

And:

...Publish any material identifying X *as the accused*.<sup>80</sup>

These orders are proceedings-only orders because they are limited to disclosing the person’s identity in the context of discussions of the proceeding in question.

Table 6 presents data on the language used in the proceedings-only orders.

**Table 6: Proceedings-only orders according to language, 2008–12<sup>81</sup>**

Court	‘Report/ derived from proceedings’	‘Report’	‘Derived from proceedings’	Other link to proceedings
Supreme Court	22	35	17	61
County Court	221	33	14	31
Magistrates’ Court	390	4	28	4
<b>Total</b>	<b>633</b>	<b>72</b>	<b>59</b>	<b>96</b>

<sup>77</sup> Order 174/2010.

<sup>78</sup> See, eg, Order 137/2010.

<sup>79</sup> Order 211/2009.

<sup>80</sup> Order 297/2010.

<sup>81</sup> In 11 of the proceedings-only orders, a combination of wording was relied upon. These have been counted multiple times in Table 7.

A number of significant findings emerge from the data in Table 6. Looking at the overall results, 764 of the 849 (90 per cent) proceedings-only orders relied upon either the wording of the courts' regular statutory powers or a minor variant; only 96 (11 per cent) relied upon some other link to the proceedings. This indicates that the courts frequently 'cut and paste' the relevant statutory language into the wording of the orders themselves. However, when the results for each court are considered separately, it is clear that the County and Magistrates' courts much more frequently relied upon the wording of their statutory powers: 268 out of 295 (91 per cent) and 422 out of 426 (99 per cent), respectively. In comparison, the language of the *SC Act* s 18 was relied upon in only 74 of the 128 proceedings-only orders (58 per cent) made by the Supreme Court.

### *Scope*

In relation to the scope of the proceedings-only orders, courts can make orders prohibiting the publication of the *whole* of the proceedings — otherwise known as 'blanket' orders — or only *part* of the proceedings. However, considering that an order must do no more than is necessary to achieve its legitimate aim, it is only in the rarest of cases that a court will be justified in making a blanket order. Table 7 sets out the proceedings-only orders by scope.

**Table 7: Proceedings-only orders by scope**

Court	Proceedings-only	Whole of proceedings ('blanket' orders)	Part of proceedings
Supreme Court	128	61	67
County Court	295	236	59
Magistrates' Court	426	145	281
<b>Total</b>	<b>849</b>	<b>442</b>	<b>407</b>

Alarming, Table 7 shows that more than half (52 per cent) of proceedings-only orders (36 per cent of all regular orders) impose blanket bans on the publication of *any* aspect of the proceedings. The 'worst offender' in this regard was the County Court, where 80 per cent of proceedings-only orders (or 55 per cent of all 'regular' orders) prohibited the publication of the whole of proceedings. By comparison, despite still being disturbingly high, 34 and 48 per cent of the proceedings-only orders made, respectively, by the Magistrates' and Supreme Courts were blanket-orders.

In 15 of the 145 blanket orders made by the Magistrates' Court, specific information was also listed under the standard wording reproduced from the *MC Act* s 126(2)(c). The following is a typical example of such an order:

THE COURT HAS MADE AN ORDER:

— Prohibit publication of a report of the whole of the proceeding or any information derived from the proceeding.

THAT THE NAME, ADDRESS OR ANY IDENTIFYING FEATURES OF THE DEFENDANT ARE SUPPRESSED.<sup>82</sup>

These orders are ambiguous: it is unclear whether they relate to the whole of the proceeding or only the information specified.<sup>83</sup>

(d) *Proceedings-Plus Orders*

According to the definition set out above, proceedings-plus orders extend to prohibiting the publication of ‘proceedings information’ in the ‘non-reports’ context *and* in circumstances where such information is not derived from proceedings. The following are examples of orders that *clearly* satisfied this description, based on their natural and ordinary meaning:

Pursuant to section 80(1) of the *County Court Act 1958* (Vic), the prohibition of the publication of the names of [X], [Y] and [Z] until further order.<sup>84</sup>

...

Pursuant to s 18 of the *Supreme Court Act 1986* (Vic), the publication of any image of [X] be prohibited in any media outlet, or in any newspaper or television on the internet or any other publication until further order.<sup>85</sup>

Many orders classified as proceedings-plus orders, however, were ambiguous. That is, it was unclear, based on the natural and ordinary meaning of the words, whether they prohibited the publication of the material only in the context of *reports or discussions of proceedings* — and thus, were proceedings-only orders — or whether they went further and prohibited publication in the ‘proceedings-plus’ context. The following are examples of such ‘unclear’ orders:

Order pursuant to section 80(1) of the *County Court Act 1958* (Vic), the prohibition of the publication of the name of the accused.<sup>86</sup>

...

It is hereby ordered pursuant to section 80(1) of the *County Court Act* that no person shall publish ... any matter which might directly or indirectly refer to or enable identification of any of the victims in this proceeding until further order.<sup>87</sup>

The ambiguity in these orders stems from the fact that they could each be given one of two possible interpretations: they could be read as prohibiting the publication, in any context, of the name or identity of the person *who is* the accused or the victim (that is, proceedings-plus orders); alternatively, they might be read as limited to the publication of the name or identity of the person *as the* accused or victim in the proceedings (that is, proceedings-only orders). On the one hand, it is likely that in the context of contempt proceedings a court would ‘read down’ these orders as being limited to the ‘proceedings-only’ context, especially

<sup>82</sup> Order 91/2008.

<sup>83</sup> Innes, above n 4, 39; Kenyon, above n 7, 207–98.

<sup>84</sup> Order 18/2009.

<sup>85</sup> Order 26/2009.

<sup>86</sup> Order 192/2011.

<sup>87</sup> Order 239/2011.

where they were purported to have been made pursuant to the courts' regular statutory powers to make proceedings-only orders. On the other hand, based on a literal construction, interpreting such language as extending to prohibiting publication in the 'proceedings-plus' context is not without judicial support.<sup>88</sup> Either way, such orders are undoubtedly ambiguous.

Data on the number of 'clear' versus 'unclear' proceedings-plus orders are presented in Table 8.

**Table 8: Proceedings-plus orders by court and clarity**

Court	Proceedings-plus	Clear	Unclear
Supreme Court	118	18	100
County Court	150	26	124
Magistrates' Court	147	23	124
<b>Total</b>	<b>415</b>	<b>67</b>	<b>348</b>

The main observation about the data in Table 8 is the overwhelming number of 'unclear' (or ambiguous) proceedings-plus orders being made by the courts. Notably, each of the courts made a similar proportion of 'unclear' proceedings-plus orders — between 83 and 85 per cent. This result is of deep concern. This is not only for the obvious reason that publishers should be able to ascertain with confidence what they can and cannot publish based on an order itself, but also because, as explained above, the law requires that suppression orders, as a condition of their validity, be clear in their terms.<sup>89</sup>

Of the 147 proceedings-plus orders made by the Magistrates' Court, 145 directly reproduced the entire wording of s 126(2)(d) of the *MC Act*, which allows the court to make orders in relation to 'any specified material', and simply added the subject matter of the specified material in the line below.

Two further points should be made about proceedings-plus orders. First, it is likely that, in many instances, the court's intention was, in fact, to make a proceedings-only order. This is especially likely in relation to 'unclear' proceedings-plus orders. Second, based on existing authorities, almost all of the proceedings-plus orders in the dataset, by prohibiting the publication of the information in *any* context, would be invalid on the basis that they extend beyond what is necessary in the circumstances. In the case of *John Fairfax & Sons Pty Ltd v Police Tribunal (NSW)*, for example, Mahoney JA held that an order prohibiting the publication of the name of a police informer in any context was too broad.<sup>90</sup> This was because it did not have 'the necessary relationship to the proceedings in

<sup>88</sup> See, eg, *John Fairfax & Sons Ltd v Police Tribunal (NSW)* (1986) 5 NSWLR 465, 473. See also *DPP v Dale* (2010) 30 VR 282 involving the interpretation of similarly worded statutory terms.

<sup>89</sup> *John Fairfax & Sons Ltd v Police Tribunal (NSW)* (1986) 5 NSWLR 465, 477. See also *R v Nationwide News Pty Ltd* (2008) 22 VR 116, 129–30 (Mandie J).

<sup>90</sup> (1985) 5 NSWLR 465, 473.

the court to justify the making of it'.<sup>91</sup> Yet, by definition, all of the proceedings-plus orders in the dataset have, in effect, the same broad scope as the order struck down by Mahoney JA. One particularly absurd example is the following order made by the Magistrates' Court:

THE COURT HAS MADE AN ORDER:

— Prohibit publication of any specified material, or any material of a specified kind, relevant to proceeding pending in court for a period of 4 months.

THE COURT PROHIBITS THE PUBLICATION OF ANY REFERENCE TO [X] AND OR THE [Y] FOOTBALL CLUB.<sup>92</sup>

On a literal interpretation, this order prevents any reference to the well-known AFL football player and football club in *any* context, meaning that the mainstream media would have committed, almost daily, a *prima facie* breach of the order. Like most of the proceedings-plus orders in the dataset, this poorly drafted order would clearly fail the high-threshold necessity test. Such an order *should* have been made pursuant to the *MC Act* s 126(2)(c) and drafted in terms that prohibited the publication of the identity of the footballer and football club only in connection with the relevant proceeding.

*(e) Subject Matter: Proceedings-Only and Proceedings-Plus Orders*

Data on the subject matter of the information suppressed in the proceedings-only and the proceedings-plus orders are presented Tables 9 and 10, respectively. These data are useful in making a broad assessment as to whether the orders relate to matters of significance for the media reporting of court proceedings.

**Table 9: Proceedings-only suppression orders by subject matter**

Court	Identity of accused/defendant	Whereabouts of accused/defendant	Identity of victim/witness	Whereabouts of victim/witness	Evidence
Supreme Court	14	1	19	1	17
County Court	17	2	21	2	19
Magistrates' Court	74	95	89	7	56
<b>Total</b>	<b>105</b>	<b>98</b>	<b>129</b>	<b>10</b>	<b>92</b>

<sup>91</sup> Ibid.

<sup>92</sup> Order 108/2010. There are suppression orders in place that prohibit the naming of either the player or the football club in question.

**Table 10: Proceedings-plus suppression orders by subject matter**

Court	Identity of accused/defendant	Image of accused/defendant	Whereabouts of accused/defendant	Identity of victim/witness	Image of victim/witness	Whereabouts of victim/witness	Evidence
Supreme Court	39	9	13	49	14	5	66
County Court	77	32	15	86	22	2	44
Magistrates' Court	111	30	118	136	22	12	84
<b>Total</b>	<b>227</b>	<b>71</b>	<b>146</b>	<b>271</b>	<b>58</b>	<b>19</b>	<b>194</b>

When the data in Tables 9 and 10 are combined, the most frequently suppressed category of 'proceedings information' is the victim/witnesses' identity (400 orders), followed by the accused's identity (332 orders) and particular evidence (294 orders). These categories all comprise material that is of significance to media reporting and, of course, material that members of the public have a legitimate interest in knowing. Less important from the media or public interest perspective is the defendant or victim's address/whereabouts (244 orders and 29 orders, respectively). However, prohibiting the publication of such seemingly trivial information may nevertheless hamper some media reporting. Often the media will want to include an accused's address (usually suburb) to ensure that the accused is correctly identified. This is to reduce the possibility of defaming a third party who happens to share the accused's name.<sup>93</sup>

*(f) Regular Suppression Orders: Temporal Limitations and Revocation Orders*

One of the complaints most frequently made about suppression orders in Victoria is that they are often made to continue 'until further order' — that is, they do not contain any temporal limitation that would automatically bring the order to an end. This means that many orders, unless revoked by order of a court, will continue for longer than is strictly necessary. Table 11 sets out, according to court, the frequency with which orders in the dataset have express temporal limitations by reference to one of the following: an end date, a set period of duration or the occurrence of a particular event (for example, 'until verdict' in the proceedings, or 'until the conclusion of proceedings').

<sup>93</sup> The identification of a person by name has the capacity to identify, for the purpose of defamation law, each and every person with that same name: see, eg, *Lee v Wilson* (1934) 51 CLR 276.

**Table 11: Regular suppression orders: temporal limitations, 2008–12**

Court	No limit or 'until further order'	Date	Period	Event
Supreme Court	174	25	0	48
County Court	275	62	4	91
Magistrates' Court	398	18	110	21
<b>Total</b>	<b>847</b>	<b>105</b>	<b>114</b>	<b>160</b>

Remarkably, approximately 69 per cent of orders (847 of 1226) did not contain any temporal limitation or were said to operate 'until further order'. This was fairly consistent across all of the courts. Of note, however, is that the Magistrates' Court made 110 orders containing a prescribed 'period' of operation, compared to less than one per cent in the County Court and none in the Supreme Court. This is not necessarily surprising. A good portion of the orders made by the Magistrates' Court (147 out of 547) were made pursuant to the *MC Act* s 126(2)(d), for which s 126(5) requires the court to set a period of duration.<sup>94</sup> However, in 32 of the orders made under s 126(2)(d), the Magistrates' Court disregarded this statutory requirement by not setting any temporal limitation at all.

Orders made without limit as to duration should be revoked by order of a court when they are no longer necessary. Only in exceptional cases should an order operate in perpetuity. This means that, over time, it is expected that there would be a correlation between the rate at which courts make orders without temporal limitations and the rate at which such orders are revoked. Table 12 sets out data on the number of revocation orders made by the Victorian courts and, appearing in brackets, the number of orders revoked by those revocation orders. Only orders sent to the media have been included. Importantly, no attempt has been made to provide data on how many of the suppression orders *in the dataset* have been revoked; rather Table 12 is limited to providing data on the number of revocation orders made over the course of the period studied.

**Table 12: Revocation orders by court and by year, 2008–12**

Court	2008	2009	2010	2011	2012	Total
Supreme Court	2(2)	1(1)	6(7)	10(62)	13(13)	32(85)
County Court	20(27)	8(9)	22(25)	15(17)	20(27)	85(105)
Magistrates' Court	0	2(2)	5(5)	1(1)	3(4)	11(12)
<b>Total</b>	<b>22(29)</b>	<b>11(12)</b>	<b>33(37)</b>	<b>26(80)</b>	<b>36(44)</b>	<b>128(202)</b>

<sup>94</sup> Prior to 2010, this provision was limited to making orders for a maximum period of operation of seven days. This limitation, however, was removed by the *Criminal Procedure Amendment (Consequential and Transitional Provisions) Act 2009* (Vic) s 97 sch 82.41.

The most significant feature of Table 12 is that, relative to the number of orders made without any temporal limitation or ‘until further order’ (Table 11), very few revocation orders appear to have been made by the courts. Notably, the Magistrates’ Court, despite making the greatest number of orders without limitation, revoked the fewest number of orders (12). The upshot of these results is that many orders appear to remain active when they are no longer necessary. Indeed, it may be that the courts made more revocation orders than reported in Table 12 but that notice of such orders was not sent to the media. However, based on the current research methodology and the information available, it was impossible to ascertain the likelihood that this was, in fact, the case.

## IV Discussion

The results presented in the previous section demonstrate that there are four key problems with suppression orders in Victoria. First, the research confirms that the rate of suppression orders in Victoria is high and that there appears to have been an overall increase in recent years. Second, many orders are overly broad in their terms and lack sufficient clarity. Third, the majority of orders do not contain temporal limitations or ‘sunset’ clauses; moreover, such unlimited orders are, relatively speaking, rarely revoked. Finally, courts frequently misconstrue the scope of their statutory powers to make suppression orders and, in many cases, do not cite or rely upon the correct powers. This Part explores these findings. It suggests possible causes and considers whether the implementation of either the SCAG model or the Open Courts Bill currently before the Victorian Parliament would alleviate some of the problems identified in the data. It argues that the relevant provisions of the SCAG model are inadequate and that, in most respects, the Open Courts Bill is a much better model for addressing the issues raised by the present study. It is important to note that this section does not provide a comprehensive overview or analysis of either the SCAG model or the Open Courts Bill; rather, it discusses only aspects that are of relevance to the main findings of the current empirical research.

### A *The Rate of Orders in Victoria*

#### 1 *High Profile and Interrelated Cases*

Numerous possible explanations exist for the high number of suppression orders in Victoria. Increases in the past have been put down to orders made during the course of the Benbrika terrorism trial involving 12 co-defendants in 2008–09<sup>95</sup> as well as in the series of interrelated trials associated with Melbourne’s co-called ‘gangland war’ that occurred predominantly throughout the 2000s.<sup>96</sup> It is generally accepted that these cases would have justified an increase in the making of orders

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<sup>95</sup> Forty suppression orders are reported to have been made during the course of the Benbrika trial: Gregory, above n 8.

<sup>96</sup> Innes, above n 4, 86; Gregory, above n 8; Justice Geoffrey Eames, ‘The Media and the Judiciary’ (Speech delivered at the Melbourne Press Club Annual Conference, Melbourne, 25 August 2006) <<http://www.melbournepressclub.com/sites/melbournepressclub.com/files/docs/Events/eames.pdf>>.

given the circumstances.<sup>97</sup> Even so, with numbers remaining high and increases continuing well beyond the conclusion of these trials, reliance upon them as a valid explanation is no longer tenable.<sup>98</sup> It has been claimed, however, that the lingering effect of these trials has been the development of a ‘culture of suppression’ in Victoria, whereby requests for suppression orders are now being made as a matter of routine by counsel, often where both sides consent or where requests go unchallenged.<sup>99</sup> Moreover, as discussed in the following section, it has been suggested that judges all too often accede to such requests where orders are not strictly justified, and often in circumstances where there is little argument or evidence offered in support.<sup>100</sup> It is beyond the scope of this article to verify whether or not such a ‘culture’ of applying for suppression orders exists in Victoria; this can only be achieved through further interview-based empirical research.

## 2 *Unjustified Orders*

In support of the view that judges frequently make orders that cannot be justified according to the legal standard, Cummins has stated that ‘[s]ome orders are made on therapeutic, prophylactic or prudential grounds falling short of the true ground of necessity’.<sup>101</sup> Other orders fall short of the necessity test, according to Cummins, because they are made in circumstances where they are superfluous in light of existing common law or statutory restrictions on publication.<sup>102</sup> In particular, the concern is that orders are increasingly being made where the law of sub judice contempt or the *Judicial Proceedings Reports Act 1958* (Vic) (*JPR Act*) would make it an offence to publish material even in the absence of an order of the court. Two comments should be made about these apparently superfluous orders. First, it might be said that such orders, provided they continue for no longer than is necessary, do not further restrain media reporting of proceedings because they overlap with existing restraints on publication. This argument, perhaps, has greater weight in relation to orders overlapping with the *JPR Act* than it does with those overlapping with sub judice contempt. This is because liability for sub judice contempt, unlike liability for the breach of a suppression order, depends on the context of the publication as well as the nature of the prejudicial information that is published. Second, with fewer experienced and dedicated court reporters, it has been suggested that judges are using suppression orders as a way of reinforcing existing restraints to journalists who may not otherwise be familiar with them.<sup>103</sup>

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<sup>97</sup> Cummins, above n 65, 3; Bartlett, above n 3. For an analysis of the Benbrika case and trial judge’s approach to potential prejudicial publicity, see Innes, above n 4, 75–82 (ch 4).

<sup>98</sup> See, eg, similar observations by Innes, above n 4, 86.

<sup>99</sup> *Ibid* 38, 86.

<sup>100</sup> *Ibid* 37; Kenyon, above n 7, 296–7.

<sup>101</sup> Cummins, above 65, 5. See also Spigelman, ‘The Principle of Open Justice: A Comparative Perspective’, above n 16, 163; Kenyon, above n 7, 295.

<sup>102</sup> Cummins, above n 65, 5; see also Innes, above n 4, 38; Kenyon, above n 7, 295–6; Roxanne Burd, ‘Is There a Case for Suppression Orders in an Online World?’ (2012) 17 *Media & Arts Law Review* 107, 115.

<sup>103</sup> See, eg, comments by Justice Bongiorno reported in Innes, above n 4, 82. Others have advocated the reliance upon judicial warnings rather than suppression orders: see Innes, above n 4, 88–9.

Based on the current research, it is impossible to conclude whether the concerns about unjustified orders are well founded; as stated in the methodology section, it was not possible, based on the orders themselves, to make this assessment. Having said that, the results on the subject matter of orders in the current study (Tables 9 and 10) are at least *consistent* with some of the orders being superfluous. Thus, the category of information most often suppressed was the identity of a victim or a witness (400 instances). Determining whether these orders were made in sex offence cases would go a significant way to establishing whether, and to what extent, such orders overlapped with restraints already imposed by the *JPR Act*. For example, additional data provided by the County Court has shown that of 79 orders involving the suppression of a victim or witness's identity, 35 were made in the context of sex offence cases, meaning that such orders were likely to have been superfluous.<sup>104</sup>

The data on subject matter also suggests that some suppression orders in the dataset may be covering the same ground as the law of sub judice contempt. It has already been explained that general suppression orders can be made to restrain threatened sub judice contempts committed by the publication of *extraneous* material (for example, prior convictions). Such orders will only be necessary where the threat is imminent and, as the data shows, they are made relatively rarely (see Table 4). However, sub judice contempt may also be committed by the publication of *proceedings* information. While the publication of a fair and accurate report of proceedings will not constitute sub judice contempt of court, even if the material has the relevant tendency to interfere with the administration of justice,<sup>105</sup> it is nevertheless potential contempt to publish photographs of an accused<sup>106</sup> as well as evidence presented in open court in the absence of the jury (that is, a *voir dire*).<sup>107</sup> The data in Tables 9 and 10 show that 71 orders suppressed the image of an accused and 286 suppressed the publication of particular evidence. Although the present study has not reported on the circumstances surrounding the making of these orders and there are other legitimate reasons why photographs of an accused or particular evidence might be suppressed,<sup>108</sup> it is possible that some of these orders were made in circumstances where publication would likely have constituted an offence even in the absence of an order.

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<sup>104</sup> These results are not reported in the empirical findings of this study because, although undertaken at the authors' request, it was not undertaken by the authors themselves. A similar request made to the Magistrates' Court for further information was refused.

<sup>105</sup> See *Hinch v A-G (Vic)* (1987) 164 CLR 15, 25; *A-G v Leveller Magazine Ltd* [1979] AC 440, 450.

<sup>106</sup> See, eg, *R v Pacini* [1956] VLR 544, 549; *R v Australian Broadcasting Corporation* [1983] Tas R 161; *A-G (NSW) v Time Inc Magazine Company Pty Ltd* (Unreported, NSW Court of Appeal, Kirby P, Handley and Sheller JJA, 7 June 1994).

<sup>107</sup> See, eg, *Ex parte Terrill; Re Consolidated Press Ltd* (1937) 37 SR (NSW) 255, 259; *R v Day & Thompson* [1985] VR 261; *A-G v Leveller Magazine Ltd* [1979] AC 440, 450 (Lord Diplock).

<sup>108</sup> See, eg, *DPP v Rintoull* [2010] VSC 30 (17 February 2010), where an order prohibiting the publication of photographs of two defendants was made in order to protect their physical safety in prison.

### 3 *Curbing the Trend: SCAG Model Legislation and the Open Courts Bill 2013*

The SCAG model originated out of concern for the number of suppression orders being made in some jurisdictions, including in Victoria. One of the ways it seeks to curb the making of such orders is by reinforcing the importance of the principle of open justice. To this end, the SCAG model cl 6 provides that a court, in making a suppression order, must take into account that ‘a primary objective of the administration of justice is to safeguard the public interest in open justice’. This draft provision, which is based on South Australian provisions in force since 2007,<sup>109</sup> has been criticised by various commentators for not being expressed in sufficiently strong terms. They argue that open justice should be defined as *the* primary objective of the administration of justice.<sup>110</sup> These criticisms, however, overlook the fundamental flaw of cl 6: open justice has never been regarded as a primary objective — or even *the* primary objective — of the administration of justice. The primary objective of the administration of justice is the *doing of justice*. Thus, revisiting *Scott v Scott*, open justice is simply one of the ways that the common law safeguards the overriding goal of administering justice.<sup>111</sup> The Open Courts Bill avoids the absurd language of cl 6 of the SCAG model. It also puts open justice on a stronger footing. Thus, cl 4 of the Bill provides:

To strengthen and promote the principles of open justice and free communication of information, there is a presumption in favour of disclosure of information to which a court or tribunal must have regard in determining whether to make a suppression order.

This is a vast improvement on the SCAG model. However, there is scope for cl 4 being reworded in even stronger and more direct terms, as follows:

In deciding whether to make a suppression order, a court must adhere to the presumption that open justice is the primary means of safeguarding the public interest in the proper administration of justice and can only depart from that presumption in exceptional circumstances.

It is likely that a provision so worded would go further than cl 4 in curbing the number of suppression orders in Victoria by explicitly reminding judges, especially in the lower courts, of the importance of open justice *to the* administration of justice as well as the exceptional nature of suppression orders.

Also of relevance to whether the implementation of the SCAG model would address the high number of suppression orders in Victoria is the range of available grounds under the model for the making of suppression orders. Ironically, despite having the aim of reducing the number of orders being made by the Victorian courts, the introduction of the SCAG model would substantially broaden the available grounds upon which suppression orders could be made. It would do so in two ways. First, it would expand the power to make suppression orders in relation

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<sup>109</sup> See *Evidence Act 1929* (SA) s 69A(2)(a), as inserted by *Evidence (Suppression Orders) Amendment Act 2006* s 4 (in force 1 April 2007).

<sup>110</sup> John Hartigan, ‘Without Open Justice, the Public is Denied’, *The Australian* (Australia), 14 February 2011; Bartlett, above n 8.

<sup>111</sup> *Scott v Scott* [1913] AC 417, 437.

to proceedings involving sex offences to include where it is necessary to prevent distress or embarrassment to *any* party or witness to such proceedings.<sup>112</sup> This, in theory, could mean that a person facing a sex offence trial could have his or her identity suppressed on the basis that he or she will suffer distress or embarrassment if an order is not made. Conceivably, this would be irrespective of the potential effect of publicity on the victim.<sup>113</sup> The authors are not aware, however, of any instances where this has occurred in New South Wales since the SCAG model came into force in that state; nevertheless, it is an unjustified expansion on the courts' powers to make suppression orders and should not be implemented in Victoria. Unfortunately, it has been included in the available grounds for making suppression orders in the Open Courts Bill.

Second, and of most concern, the SCAG model includes the wide power to make an order where 'it is otherwise necessary in the public interest for the order to be made and that public interest significantly outweighs the interest in open justice'.<sup>114</sup> A power of such broad and potentially open-ended application is unprecedented in Victoria and represents too great an incursion upon the open justice principle. As pointed out by Peter Bartlett, '[a] competent barrister will easily argue it is in the public interest to suppress a report of the case or the accused's name'.<sup>115</sup> In fact, since coming into force in New South Wales, this broad 'public interest' ground is said to have been responsible for a significant increase in the number of orders made by the New South Wales courts.<sup>116</sup> One report suggests that 241 orders were made in New South Wales in 2011,<sup>117</sup> up from 54 in the two and a half years covered by the *Innes Study*.<sup>118</sup> On the current authors' calculations, this is an increase of approximately 1000 per cent. If the enactment of a broad 'public interest' basis for the making of suppression orders has had such a significant impact in a jurisdiction traditionally resistant to the making such orders, its encroachment upon the open justice principle is potentially even greater in a 'suppression-friendly' jurisdiction like Victoria. As a direct result of the experience in New South Wales, the 'public interest' ground has been omitted from the legislation implemented at the federal level in 2012<sup>119</sup> and, fortunately, is also omitted from the Open Courts Bill.

As well as omitting the broader public interest ground, the Open Courts Bill has, as least ostensibly, a further advantage over the SCAG model in potentially reducing the number of orders in Victoria: it eliminates the power of the

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<sup>112</sup> SCAG, above n 12, cl 8(1)(d).

<sup>113</sup> See, eg, Bartlett, above n 8.

<sup>114</sup> SCAG, above n 12, cl 8(1)(e).

<sup>115</sup> Bartlett, above n 8.

<sup>116</sup> Media, Entertainment and Arts Alliance, above n 6, 59.

<sup>117</sup> *Ibid* 62.

<sup>118</sup> Innes, above n 4, 28–9.

<sup>119</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 23 November 2011, 13553–4 (Brendan O'Connor); Chris Merritt, 'Push for Suppression Orders Wound Back by Robert McClelland', *The Australian* (online), 25 November 2011 <<http://www.theaustralian.com.au/business/legal-affairs/push-for-suppression-orders-wound-back-by-robert-mcclelland/story-e6frg97x-1226205379263#mm-premium>>.

Magistrates' and County Courts to make proceedings-plus suppression orders.<sup>120</sup> While the SCAG model provides a single broad power that, presumably, can be used to make each of the three types of orders identified in this study,<sup>121</sup> the Open Courts Bill adopts a different approach. It gives the County and the Magistrates' Courts the power to make two types of orders in mutually exclusive circumstances — 'proceeding suppression orders' and 'broad suppression orders'. Proceeding suppression orders are the equivalent of the proceedings-only orders in this study and the power under the Bill to make such orders is worded in terms almost identical to the existing regular statutory powers of the courts (that is, 'reports of proceedings or information derived from proceedings').<sup>122</sup> The power to make broad suppression orders,<sup>123</sup> equivalent to general suppression orders, on the other hand, can only be exercised in relation to extraneous material.<sup>124</sup> Given the Open Courts Bill also abrogates the implied powers of the County and Magistrates' Courts,<sup>125</sup> the effect is that there is no power available under the Bill for either Court to make proceedings-plus orders.

Whether these more defined and limited powers would have the effect of reducing the rate of orders being made by the Victorian courts is unclear. On the one hand, the Open Courts Bill significantly reduces, in particular, the scope of the existing powers of the Magistrates' Court and clarifies that the County Court does not have the power to make proceedings-plus orders. On the other, the results in this study suggest two reasons why defining and limiting the powers in the way proposed in the Bill may have only minimal impact on the overall number of suppression orders. First, the data show that judges of the County Court frequently misconstrue the scope of their existing statutory power under the *CC Act* s 80; that is, despite being limited to the making of proceedings-only orders, judges frequently use that power to make proceedings-plus orders. There is no reason to believe that the power in the Open Courts Bill to make proceedings-only suppression orders, which is expressed in substantially the same terms as the *CC Act* s 80, would be treated any differently. This suggests that any legislative response might need to be bolstered by a greater commitment to judicial education. Second, even assuming the scope of the power is correctly understood, given that the unclear proceedings-plus orders in the dataset were most likely *meant* to be proceedings-only orders, it is foreseeable that under the Bill the 'unclear' (as well as 'clear') proceedings-plus orders will simply be replaced by proceedings-only orders. In other words, merely making it clear that proceedings-plus orders cannot be made may not result in a reduction of the overall number of suppression orders.

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<sup>120</sup> The Bill also substantially reduces the scope of the Magistrates' Court to make general suppression orders. Currently, the Magistrates' Court has the power to make such orders in a wide range of circumstances under *MC Act* s 126(2)(d). Under the Bill, such an order can only be made in relation to extraneous material where it is necessary to ensure the proper administration of justice or so as not to endanger the safety of any person: Open Courts Bill cl 26.

<sup>121</sup> In New South Wales, this has led to some judicial contortion by the appellate courts to 'rein in' the scope of the New South Wales Act: see, eg, *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* (2012) 83 NSWLR 52.

<sup>122</sup> Open Courts Bill 2013 (Vic) cl 17.

<sup>123</sup> *Ibid* cll 25–6.

<sup>124</sup> This is because cl 24 of the Open Courts Bill provides that a broad suppression order 'must not be made in respect of any information which could be the subject of a proceeding suppression order'.

<sup>125</sup> Open Courts Bill cl 5.

However, a feature of the Open Courts Bill that is likely to assist in reducing the rate of suppression orders in Victoria is cl 14, which places on a legislative footing the existing common law requirement for cogent evidence as to the necessity of a suppression order. It provides that a court ‘must be satisfied on the basis of evidence, or sufficient credible information ... that the grounds for making the orders are established’. This clause makes an important addition to the SCAG model and, if enacted, will help put to rest the anecdotal concerns raised earlier regarding judges making suppression orders on the basis of little or no evidence or on the consent of the parties.

## **B Breadth and Clarity of Orders**

### *1 The Use of Statutory Language*

Despite the well-established requirement that the terms of a suppression order must extend no further than necessary for the order to achieve its legitimate aim, the *Innes Study* found that 25 per cent of 66 County Court orders were overly broad blanket orders prohibiting the publication of any aspect of proceedings. This was considered to be a ‘very high number’.<sup>126</sup> The present study, however, has found that such blanket orders are being made at a much greater rate than that, with 36 per cent of all ‘regular’ orders prohibiting the publication of the whole or of any aspect of the proceeding in question. The rate is particularly high in the County Court (55 per cent of all regular orders<sup>127</sup> or 80 per cent of proceedings-only orders), although it is also high in the Supreme and Magistrates’ courts. Considering the breadth of blanket orders, it is inconceivable that such a large number of such orders would be justified. Indeed, it will only be in extreme cases that no reporting of any aspect of a proceeding will be considered necessary. The *Innes Study* found, upon examining court transcripts, that such orders were, at least in part, the result of judges and their associates relying upon ‘pro forma’ or ‘standard form’ orders, usually worded in the same terms as the statutory provision relied upon. These usually go far beyond what is warranted in the circumstances of the individual case.<sup>128</sup> The current research reinforces these conclusions by finding that the use of ‘pro forma’ statutory language in suppression orders is widespread across all courts in Victoria.

The results of the present study, however, suggest that it is not the use of statutory language per se that is problematic. Indeed, in many instances, such a practice can be *beneficial* in terms of an order’s clarity and breadth. Much will depend on the terms of the statutory provision itself. Relying upon the language of ‘reports’ and ‘information derived from proceedings’ when making a proceedings-only order, for example, will aid clarity by making it obvious that the prohibition is limited to publication in the proceedings-only context. In fact, the data show that it

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<sup>126</sup> Innes, above n 4, 36.

<sup>127</sup> Note, a similar figure is cited in Kenyon, above n 7, 297–8, where ‘approximately half’ of County Court orders in 2005 were blanket orders. These figures were provided to Kenyon by Prue Innes during her time as the Victorian Courts Information Officer.

<sup>128</sup> Innes, above 4, 38. Moreover, it was found that around half of the orders did not reflect what the judge had actually ordered.

was in circumstances where the Supreme and County Courts used language that *departed from* such statutory language that problems arose as to clarity and breadth.<sup>129</sup> That is, many of the ‘unclear’ proceeding-plus orders made by the Supreme and County Courts analysed in this study — where it is likely that the courts intended to make proceeding-only orders — would have been avoided if the courts had remained faithful to the statutory terms of the *SC Act* s 18 and the *CC Act* s 80 respectively. Similarly, adopting the statutory language of these provisions would have ensured that the overly broad proceedings-plus orders made by Supreme and County Courts were drafted in narrower, and more suitable, proceedings-only terms.

It is the *blind* duplication of the courts’ regular statutory powers to make proceeding-only orders, rather than the language itself, that can give rise to problems of breadth and clarity.<sup>130</sup> Instances of overly broad orders will be caused, for example, by the use of statutory language where insufficient attention is directed to the *scope* of the subject matter that ought to be covered by an order, with a court (or a judge’s associate) simply drafting a blanket order by default. Breadth and clarity are also a problem when a court, even where subject matter has been adequately considered, fails to make that subject matter clear in the order itself. This frequently occurs, for example, where the court uses the statutory language of the ‘whole of the proceedings or any information derived from proceedings’ and simply adds the specified information.<sup>131</sup> Such orders lack clarity because, on a literal construction, it is unclear whether they apply to all information in the proceeding or only to the specified information.<sup>132</sup>

While the duplication of the statutory language to make proceedings-only orders tended to enhance their clarity and, except in the case of blanket orders, limit their breadth, the use of the language of the broader statutory power under the *MC Act* s 126(2)(d) of the Magistrates’ Court to prohibit the publication of ‘specified material’ had the opposite effect. Of the 147 orders made pursuant to this provision, 145 directly reproduced its language. Table 8 shows, however, that 124 of those orders were ‘unclear’; that is, it was unclear whether they were proceedings-only or proceedings-plus orders. Further, being drafted in proceedings-plus terms, all of the orders made under this provision were also likely to have been far too broad for the circumstances of the case. Such problems with breadth and clarity were the direct result of the Magistrates’ Court employing the open-ended language of the *MC Act* s 126(2)(d) in drafting the orders.

## 2 *Breadth and Clarity under the SCAG Model Legislation*

The rate of overly broad and unclear orders can be rectified, to a certain extent, through statutory reform. Clause 9(5) of the SCAG model legislation attempts to deal with breadth and clarity by providing that ‘[a] suppression order or non-publication order must specify the information to which the order applies with

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<sup>129</sup> The Magistrates’ Court in all but four of 547 regular suppression orders relied upon the wording of either *MC Act* ss 126(2)(c) or (d).

<sup>130</sup> Innes, above n 4, 38.

<sup>131</sup> This problem has been noted by others: see Kenyon, above n 7, 297; Innes, above n 4, 39.

<sup>132</sup> Kenyon, above n 7, 297–8; Australia’s Right to Know, above n 4, 39.

sufficient particularity to ensure that the order is limited to achieving the purpose for which the order is made.’ This provision, however, is inadequate to deal with the breadth of orders. This is because it does not *directly* address the requirement that the *terms* of an order must do no more than is necessary. Rather, it does so only in an indirect way by requiring that the subject matter of the order be identified. It is suggested, therefore, that cl 9(5) be replaced by a much more direct provision, as follows:

A court, in making an order, must ensure that the terms of the order, including the information to which it applies and the circumstances in which such information is prohibited from publication, are no wider than is necessary to achieve the purpose for which the order is made.

Such a provision would reinforce that the necessity test applies equally to the purpose *and* the scope of an order.

Nor, however, does cl 9(5) of the SCAG model go far enough to ensure the clarity of orders. While it requires that the subject matter of an order be specified with ‘sufficient particularity’, it fails to address fully the precise issues of clarity that have been identified in the present study. As the results have shown, it is not just the subject matter of orders which has given rise to issues of clarity but whether orders prohibit publication in the context of discussion of proceedings (proceedings-only orders) or extend to publication in any context (proceedings-plus orders). To reflect this finding, cl 9(5) should be further replaced by a provision to the following effect:

A court, in making an order, must ensure that the following matters are specified with sufficient particularity in the order:

- (a) the precise information to which the order applies; and
- (b) the precise circumstances in which such information is prohibited from publication.

### 3 *Breadth and Clarity under the Open Courts Bill 2013*

Clause 13 of the Open Courts Bill is in substantially the same terms as cl 9(5) of SCAG — although the requirement of specifying the information with sufficient particularity has two additional purposes of ensuring that ‘the order does not apply to any more information than is necessary to achieve the purpose for which the order is made’ and that ‘it is readily apparent from the terms of the order what information is subject to the order’. While these additional purposes are, indeed, an improvement on the SCAG model, the criticisms just described apply equally to cl 13 of the Bill. Compared to the SCAG model, however, the precise issue highlighted in this study regarding the frequent ambiguity as to whether an order is a proceedings-only or a proceedings-plus order may be less likely to arise in orders made under the Open Courts Bill, if passed. This is because, as already outlined, it removes the legal capacity of the County and Magistrates’ Courts to make proceedings-plus orders. Even so, this change may have little impact if judges, especially judges of the County Court, continue to misconstrue the scope of their statutory powers by drafting orders in terms far broader than permitted by those powers. On the other hand, the removal of the Magistrates’ Court’s statutory

powers under the *MC Act* s 126(2)(d) to make proceedings-plus orders — the Magistrates' Court being the only court with such powers — will clearly eliminate the issues of clarity and breadth prevalent in the orders made under that provision.

### C *Temporal Limitations*

The duration of suppression orders has been an ongoing concern in Victoria.<sup>133</sup> This is despite attempts by the Judicial College of Victoria to educate judges on the importance of including temporal limitations to ensure that orders do not operate for longer than is necessary.<sup>134</sup> The data have shown, however, that judges continue to make orders of unlimited duration or 'until further order' at an alarming rate (Table 11). Clause 12 of the SCAG model legislation attempts to deal with this problem. It requires that the court 'ensure that the order operates for no longer than is reasonably necessary to achieve the purpose for which it is made'. This provision, however, is inadequate and may not have a significant impact on current practice if enacted in Victoria. This is because judges can comply with the provision by continuing to make orders 'until further order' provided the order is revoked by another order at the time when it ceases to be necessary. This is, in substance, no different from the existing law. What we know from the current study, however, is that judges, in most cases, do not revoke orders when they are no longer necessary — or, if they are revoked, such revocation is relatively rarely communicated to the media.

The Open Courts Bill remedies this deficiency in the SCAG model. Clause 12, in effect, *requires* that the court set an end date by reference to 'a fixed or ascertainable period' or 'the occurrence of a specified future event'. The Explanatory Memorandum explains that such an event may include, for example, 'the conclusion of proceedings, the exhaustion of appeal rights or the death of an individual involved in proceedings'.<sup>135</sup> Where the event that is specified may not occur, the court must also specify an expiry period of no longer than five years from the date of the order. This means that an order cannot be granted 'until further order' unless it also includes a set period of operation. One potential problem with the approach in the Bill, however, is that it does not account for exceptional circumstances where a specified event might not be readily and objectively ascertainable and a five-year period of operation might not be sufficient. It might be difficult, for example, for the court to specify a particular event that would appropriately trigger the end of an order made to protect the identity of a police informer. Indeed, the Supreme Court of Victoria has said that it may be necessary to suppress the identity of police informers even after their death and possibly even after their identity has been published in the mass media.<sup>136</sup> In such circumstances, it might be considered too burdensome and possibly too risky to be required to return to court every five years to obtain a fresh order. Perpetual orders, however, should be rare. Even in confidential information cases, where suppression orders are made almost as a matter of routine to protect secrets from public disclosure,

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<sup>133</sup> Innes, above n 4, 35; Kenyon, above 7, 298; Cummins, above n 65, 2; Bartlett, above n 8.

<sup>134</sup> Cummins, above n 65, 2.

<sup>135</sup> Explanatory Memorandum, Open Courts Bill 2013 (Vic) 4.

<sup>136</sup> *Herald & Weekly Times Pty Ltd v Magistrates' Court (Vic)* (2004) 21 VAR 117, 122 [28].

orders can be limited by reference to the point at which such secrets enter the public domain. A similar approach might be taken in relation to information suppressed in the interests of national security. While the requirement in the Bill for an end date is appropriate in most cases, it is nevertheless recommended that there be included in the Bill a high threshold exception for circumstances where a specified event cannot be readily ascertained.

## V Conclusion

The empirical research presented in this article has confirmed many of the problems that have been said to plague the making of suppression orders in Victoria: the overall numbers are high (and appear to be increasing) and there are significant and widespread problems with the duration, scope and clarity of orders. It is argued, however, that the SCAG model is unsuited to addressing the precise problems that have emerged from the data. The Open Courts Bill provides a much more apt legislative response — although slight modifications are needed in some respects. The results of this study also suggest, however, that many of the problems with suppression orders are not the result of deficiencies in the relevant law but arise from the *application* of that law. It was found, for example, that judges of the Supreme and County Courts, in drafting orders, frequently misinterpret the scope of their regular statutory powers to make proceedings-only orders. This problem, of course, cannot be fixed entirely by legislative intervention. Instead, it suggests a need for a concurrent focus on increased and ongoing judicial education. There is also need for further empirical research. While this study has highlighted the existence of problems in the orders themselves, there is scope for future work in obtaining a better understanding of the application of the law in practice and, to complement this study, a more detailed insight into the circumstances surrounding the making of suppression orders.