Press Freedom Policy Papers
Background Briefing 2/2021

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The University Of Queensland
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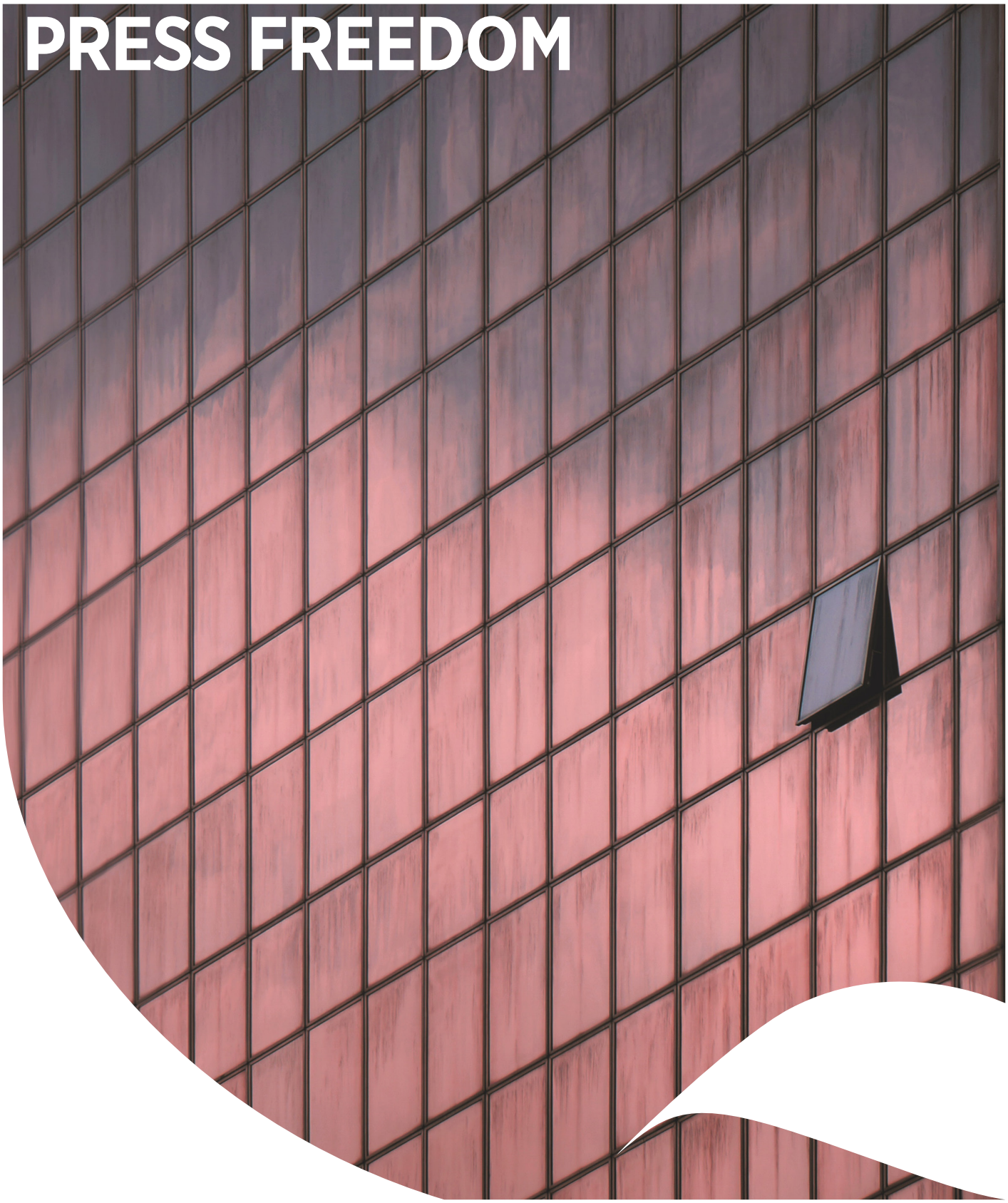
CLOSED JUSTICE & PRESS FREEDOM



SUMMARY

KEY POINTS

- Open Justice is fundamental to our common law system of justice.
- Open Justice is not unfettered. Exceptions exist which allow courts to close or introduce secrecy in the courtroom.
- The primary exceptions to open justice tend to be justified by a need to:
  - Protect persons;
  - Protect information; or
  - Protect national security.
- Journalists play a particularly important role in facilitating open justice and are significantly impacted by closed courts and secrecy.
- Not all secrecy is bad for press freedom. Sometimes press freedom requires secrecy in the courtroom.

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CLOSED JUSTICE AND PRESS FREEDOM

Background Briefing 2/2021

This policy paper examines why courts may be closed to the public. By this, we mean not only the complete closure of a court (i.e., not allowing anyone from the public or media to view the proceeding), but any degree of secrecy whereby some or all of the body of evidence or a proceeding is withheld from public view.

Our research revealed three overlapping justifications for secrecy in court:

1. To protect **people**;
2. To protect **information**; and
3. To protect **national security**.

This is not a comprehensive framework, but it is helpful in understanding and assessing why the media, and the public, may be excluded from the justice process.

Statutes and powers exist across Australia which allow for secrecy in court. The focus of the policy paper is on legislation at the Commonwealth level and in Queensland, New South Wales and Victoria. For a summary of key legislation, see Table 1.

'Press Freedom is integral to open justice. It enables "the public as a whole to be informed about important or interesting matters which are going on in the courts the press is crucial."'

- *Re Guardian Newspapers* [2005] 3 All ER 155 [162]

'It is therefore vital for the courts to recognise and appreciate that the media are precisely what the word connotes - namely, the medium by which the principle of open justice is communicated to the community which we serve.'

- The Hon Wayne Martin, 'Access to Justice The Media, the Courts and the Public Record' (Australian Press Council, March 2007)

The Media and Open Justice

Open Justice is a fundamental part of our common law system and the media plays an important role in facilitating it. There are three distinct characteristics of open justice:

1. Judicial proceedings should be conducted, and decisions pronounced, in **'open court'**.
2. **Evidence** should be **communicated publicly** to those present in the court.
3. Nothing should be done to discourage the making of **fair and accurate** reports of judicial proceedings, including **by the media**.[1]

Importantly, rules such as these which enable the effectiveness of open justice are **not absolute**.[2] They are subject to exceptions which qualify the principle of open justice and allow courts to operate with a degree of secrecy.

There are two main ways statutory restrictions impact open justice. Specific statutory restrictions may be imposed on information in proceedings. Broader discretionary powers also exist which allow courts to close or suppress the publication of evidence.[3] These latter powers may be exercised in the interests of avoiding unfairness or achieving the administration of justice.

Protecting People

The protection of individuals, including their privacy, justifies many of the existing legislative schemes which enable courts to close or to keep information secret. In particular, courts may close to protect victims, defendants, minors, and informants/witnesses.

Generally speaking, when certain criteria are met, a court may withhold information from public view which could be used to **identify a particular individual**.[5]

Victims

Legislation designed to protect victims of crime can be seen in cases of **domestic violence, sexual offences** and other **violent criminal offences**.[6] In such situations certain aspects of evidence – such as when the complainant gives evidence in the examination of witnesses during the trial – may be heard in closed court.[7]

Consequently, in some situations, the jury, the media, and the public may be excluded from the courtroom.

In addition, the starting assumption in these legislative schemes is that the complainant's name, address, school, or place of employment should not be revealed in the absence of a 'good and sufficient reason' to do so.[8]

HUMAN RIGHTS ACTS

Victoria, ACT and Queensland have enacted Human Rights legislation. These Acts protect fair trial rights and include 'public hearings' as an aspect of this. However, these Acts do not rule out secrecy or closed courts. For example, the Queensland legislation extends courts' power to remove persons if it is in the interests of justice or in the public interest.

Victoria has legislated for the 'primacy of open justice' in the *Open Courts Act 2013*. While some legislation appears to place weighty consideration on open justice, there remains a significant number of legislative schemes and powers that allow courts to close or keep information secret.[4]

Defendants

Whilst the identity of a defendant in a criminal trial is usually made public, there are certain situations in which the secrecy of that information will be maintained. For example, witness examinations concerning **sexual offences** must not reveal the name, address, school, or place of employment of a defendant, or any other identifying features, unless the court orders otherwise because of a 'good and sufficient reason'.[9]

Exemptions include reports for certain legal or educational purposes.[10] Limits on publicity regarding defendants is particularly relevant prior to the defendant being committed for trial or a sentence being handed-down regarding a prescribed sexual offences charge.[11]

Minors

The protection of children is a key, and relatively uncontroversial, area of court secrecy.

Children's courts are closed to the public and media access is not guaranteed. Moreover, strict rules exist to prohibit the publication of any **identifying features** of the child.[12] The protection of each child's identity and privacy is fundamental to 'the principle that rehabilitation and re-integration back into the community are a priority' for young persons.[13]

Young people who are involved in a case but may not be the complainant or defendant are also protected. For example, children involved in **Apprehended Violence Order** proceedings must not have any identifying features published at any point before, during or after the proceeding.[14] Similarly, **child witnesses** must not have any information which could lead to their identification made public.[15]

In a separate, but potentially related situation, a range of secrecy requirements may apply in **adoption proceedings**. Those involved may be subject to a confidentiality order to prohibit certain information regarding parties and evidence being presented in the tribunal;[16] and there are mandatory prohibitions on information identifying features of witnesses, parties or involved persons.[17]

Informants

There are particular laws relating to **police informers** which enable courts to close or information to be otherwise kept secret.[18] For instance, if a person is being sentenced but cooperated with the police, they will have their full sentence read out in open court but the court must then close to hear any reduced sentence.[19] Furthermore, in the absence of a witness identity protection certificate for operatives, the disclosure of an operative's identity must be heard in the absence of the jury.[20]

Shield laws are of particular relevance to press freedom. These laws exist in every jurisdiction but Queensland and provide that journalists and their employers are not compellable to provide information in court (or, in some jurisdictions other, non-curial contexts) which would identify a confidential source.[21] The court may, nonetheless, order that the information be disclosed if the public interest in disclosure outweighs the public interest in press freedom and source confidentiality (for further discussion of shield laws, see Reform Briefing 2/2021).[22]

Protecting Information

Information or documents relating to **matters of the state** may be excluded from a body of evidence if the public interest in keeping the information secret and confidential outweighs the public interest in their admission in court.[23] This resembles the common law doctrine of **'public interest immunity'** which was traditionally used to protect state secrets in court proceedings.

The statutory protection extends beyond matters of the state to any **'professional confidential relationship privilege'**, and the court may make any orders relating to the suppression of publication, or the publication, of all or part of the evidence, so long as the confider is protected from possible harm.[24]

Suppression Orders

Suppression orders may be issued by a court to prohibit the disclosure of information in **the interests of justice**. They may be ordered for various purposes discussed in this briefing, including: the protection of national security, to avoid an unfair trial, or to protect the safety of witnesses.[25]

Suppression orders may range from the prohibition of specific details such as a name, to the prohibition of all information about a trial. Such orders are available under Commonwealth, State and Territory legislation and may be subject to review and appeal. The relevant test required for suppression orders is **'necessity'**, and there are growing concerns that many suppression orders exceed what is necessary to protect the administration of justice.[26]

Protecting National Security

Traditionally, **state secrets** would be protected through the operation of public interest immunity, which allowed information to be excluded from the body of evidence on public interest grounds. Today, specific statutory provisions allow courts to close to the public on national security grounds.[27] In addition, discretionary powers such as suppression orders may be harnessed to limit the publication of any part of the proceeding or any court finding on the basis of potential prejudice to national security.[28]

In 2004, the federal government introduced the ***National Security Information (Criminal and Civil Proceedings) Act* 2004 (Cth)** (‘*NSI Act*’), which was intended to create a comprehensive scheme for the regulation and management of national security information in federal proceedings. This Act, together with the Australian *Protective Security Policy Framework* (‘PSPF’) which provides the system for formal classification of government documents, comprise the key federal frameworks on national security information.[29]

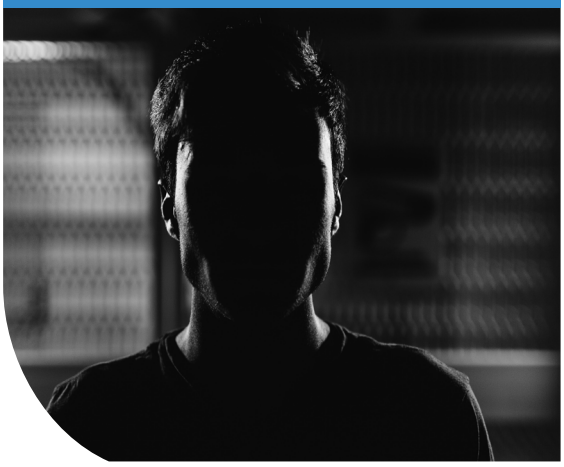
Through a complex process of formal notifications and closed hearings, any disclosure of information that would be **‘likely to prejudice national security’** may be kept secret in the context of a federal proceeding – not only from the public, but from the defendant, their lawyers and the jury.[30] The *NSI Act* has attracted significant controversy, including for its very broad approach to defining ‘national security’. For example, In *Thomas v Mowbray* (2007) 233 CLR 307 — a case concerning the constitutional validity of anti-terrorism control order legislation — Gummow and Crennan JJ queried whether by enacting such a broad definition ‘the Parliament has sought to over-reach the bounds of the understanding of “national security”’ (at [124]).

WITNESS J

In 2019, a man known as Witness J or by the pseudonym ‘Alan Johns’ was sentenced to two years and seven months imprisonment for multiple criminal offences. No one knew about the trial or sentencing. No decisions of the court were made public. The trial and sentencing of Witness J by the ACT Supreme Court took place under conditions of complete secrecy made possible by the *National Security (Criminal and Civil Proceedings) Act 2004* (Cth).

The existence of Witness J and the proceedings against him were only revealed after ABC Journalist, Andrew Probyn, raised queries about a ‘heavily guarded court room’ and, following an extended investigation, published an article questioning the completely secret legal proceeding.

The outcry over this ‘secret trial’ prompted an investigation by the Independent National Security Legislation Monitor, which attracted numerous calls for the *NSI Act* to be reformed.



A Threat to Press Freedom?

The principle of open justice must be recognised as fundamental to our common law system, and any departure from it ‘should be strictly limited to those necessary to protect the national interest’.[31]

The effective functioning of open justice is enabled by multiple groups in society including courts, legislators, and the media. It is fundamental to open justice that the media be able to report on the ‘workings of the court system to the broader public’, thus allowing fair, accurate, diverse and independent reports to be published for the broader public.[32]

On this basis it would be simple to think that any scenario which involves secrecy in courts is a **threat to the free flow of information**, to press freedom and, therefore, to open justice and democracy. But this is not necessarily the case.

In some scenarios, the **media *requires* secrecy**. The clearest example of this is shield laws, which allow journalists to avoid the usual rules of evidence in order to protect the identity of their confidential sources.

Other kinds of secrecy – for instance, regarding children and victims of crime – are **largely uncontroversial** and have a strong history of media compliance.

But that does not mean closed courts are always justified or should be uniformly accepted. The degree of secrecy present in the national security context has attracted considerable controversy and calls for reform. Likewise, the proper use and processes around suppression orders in Australia is hotly debated – such orders are **necessary, but also require constraint**.

In these contexts, the media plays a key role in **fighting for open justice** and pushing back against claims of secrecy, especially from government. This may happen in court, as media lawyers contest suppression order applications and other forms of secrecy and closed court orders. For this reason, the complete exclusion of media interests and representation from matters under the *NSI Act* or otherwise is particularly concerning.

There are many valid reasons why courts close. Open Justice is integral to the common law system and although the principle is not absolute, increasing statutory restrictions and use of suppression orders have the potential to adversely affect press freedom and democracy and should be approached with caution.

Area of Protection / Jurisdiction	Queensland	New South Wales	Victoria	Commonwealth
Protecting People	*Criminal Law (Sexual Offences) Act 1978* (Qld) pt 3, s 5-10; *Child Protection Act 1999* (Qld) ss 193-194; *Evidence Act 1977* (Qld) ss 21I, 21K; *Bail Act 1980* (Qld) s 12.	*Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 45(2); *Evidence (Audio and Audio Visual Links) Act 1998* (NSW) s 15(c); *Evidence Act 1995* (NSW) s 126E(b)	*Open Courts Act 2013* (Vic) s 30 (to facilitate administration of justice), s 18(c), (d), (e).	*Service and Execution of Process Act 1992* (Cth) s 96(3)(b).
Protecting Information	*Penalties and Sentences Act 1992* (Qld) s 13A; *Coroners Act 2003* (Qld) s 31; *Criminal Code 1899* (Qld) s 590AQ; *Human Rights Act 2019* (Qld) s 31(2).	*Surveillance Devices Act 2007* (NSW) s 42(5)–(6); *Lie Detectors Act 1983* (NSW) s 6(3); *Court Suppression and Non-Publication Orders Act 2010* (NSW) s 6.	*Charter of Human Rights and Responsibilities Act 2006* (Vic) s 24(2); *Open Courts Act 2013* (Vic) s 30 (to facilitate administration of justice), s 17-18.	*Director of Public Prosecutions Act 1983* (Cth) s 16A(1A)-(1B); *Service and Execution of Process Act 1992* (Cth) s 96(3); *Surveillance Devices Act 2004* (Cth) s 47; *Crimes Act 1914* (Cth) s 85B; *Criminal Code 1995* (Cth) Division 93.2.
Protecting National Security				*Service and Execution of Process Act 1992* (Cth) s 96(3)(f); *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 29.

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About the Series

Press Freedom Policy Papers offer short, evidence-based insights and recommendations informed by scholarship and consultation.

Background Briefings outline important events and context to inform policy development and law reform in the area of media freedom.

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4 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 24; *Human Rights Act 2019* (Qld) ss 21, 31; *Open Courts Act 2013* (Vic) pt 5, s 28(1).

5 See, eg, *Criminal Law (Sexual Offences) Act 1978* (Qld) pt 3, s 5-10; *Child Protection Act 1999* (Qld) ss 193-194.

6 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 45(2); *Criminal Law (Sexual Offences) Act 1978* (Qld) pt 3, ss 5-10.

7 *Criminal Law (Sexual Offences) Act 1978* (Qld) pt 3, s 5(1).

8 Ibid pt 3, s 6(1).

9 Ibid pt 3, s 7(1).

10 Ibid s 31(3).

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12 Young People and Crime – Hot Topics: Legal Issues in Plain Language 1 January 2010, 12; *Childrens Court Act 1992* (Qld) s 20; *Children (Criminal Proceedings) Act 1987* (NSW) div 3, ss 10, 11; *Children, Youth and Families Act 2005* (Vic) s 104(2)(e).

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