

# **Australia's Right to Know The Review of Suppression Orders and Access to Court Documents**

## **EXECUTIVE SUMMARY**

Too many suppression orders are issued by courts in Australia, many of them unnecessary. And access by the media to court material – exhibits and files – is difficult, if not impossible in some jurisdictions.

These are the main findings of an update by Australia's Right to Know coalition of the state of restrictions on publication.

A year ago the coalition of 12 media organisations that comprise Australia's Right to Know (ARK) published the *Report of the Independent Audit into the State of Free Speech in Australia*. ARK has now updated the situation with respect to publication restrictions that arise from orders from the bench, and with respect to court practices, especially those that limit media access to court documents.

### **Suppression orders**

In the first half of this year 305 suppression orders were made (of which we are aware) across all courts in all Australian jurisdictions. Last year there were 678 and in 2006 there were 607. There were doubtless others made, but as statistics are not kept the picture is incomplete. It seems unlikely that NSW courts made only nine orders this year, for example, and only in the Supreme Court.

Since a breach of these orders can result in criminal prosecution, it is not good enough that courts do not keep adequate records or make them available to the media. However, as media access to suppression orders via a database has been proposed to the Standing Committee of Attorneys-General (SCAG) by the Victorian Attorney-General, Rob Hulls, this may not be an issue for long. On 7 November 2008, the federal Attorney-General announced the states and territories would further develop the framework for a national electronic register of suppression orders.

South Australia introduced a new system for suppression orders on 1 April 2007. We were interested to see how it worked and whether it would be a model for states that do not record and notify the media of orders, but were surprised and disappointed when the SA courts did not provide us with copies of their orders, especially as they are kept in a public register and are available for public inspection. We were told the orders could not be

provided because there was no provision in the legislation to photocopy them or provide copies to anyone not specified in the legislation. We failed, however, to find any provision in the SA legislation that prevented court officers from giving us copies of orders.

The SA rules provide that reasons for orders are to be given, but we found the reasons were not usually provided in a helpful way, too often relying on general statements such as “to prevent prejudice to the proper administration of justice”, or even just “interests of justice”. Some orders did give detailed reasons, but they were in the minority.

It could be that the system is still new and judges and magistrates are still becoming familiar with it. But this review notes that a lack of clear or adequate reasons is relevant from the media’s point of view in deciding whether to challenge an order.

One welcome aspect of the legislation is the automatic review of suppression orders at various milestones (s.69AB of the *Evidence Act*). Very few South Australian orders indicated their expiration date, and those that did tended to use the term “until further order”. Although s.69AB ensures that all orders will eventually be reviewed, it would be much better if the orders gave a fixed duration.

The system of recording and the notification of orders to the media were also welcome. However, we wondered why media organisations wishing to be placed on the distribution list were charged \$500. We believe that, as a matter of principle, courts should not charge for notifying the media of suppression orders, for two reasons: it is clearly in the courts’ interest that the media be aware of any orders affecting publication so they do not inadvertently interfere with pending or current trials; and for the practical reason that modern technology such as programmed fax machines or group email is cheap and quick.

The media must be promptly notified of orders, particularly since many news organisations have websites. Only Victoria and South Australia issue scanned copies of the orders. NSW has a good email system notifying the media of the terms of orders, and WA and the NT notify the media that orders have been made. Our conclusion was that the SA system, while having some good features, lacks the simplicity of the Victorian distribution system, which is an excellent model.

There have been other positive developments. We suspect the national database being discussed at SCAG would be welcomed by the media. Victoria, which dominated the figures of suppression orders in the audit, is reviewing how it words orders in the County and Supreme Courts. We believe the high number of Victorian orders is largely the result of many being made “until further order”. These orders, which could be years old, are rarely lifted, with the result that they linger forever and bloat the figures. The new approach in the County Court will emphasise the need to give the duration of orders or provide for a date of review.

We would have expected that in Victoria, where numbers exploded during the gangland murder trials and police corruption trials, the figures would drop once the trials were over. However, they remain high. One explanation given was that many orders involved

informers, in drug trials in particular. And some trials, e.g. the Benbrika terrorism trial, generated a high number of orders.

South Australia made the most orders per capita in the first half of this year, and considerably more in 2006 and 2007. Victoria, with more than three times the population, made about twice as many. Western Australia's ratio is not dissimilar from South Australia's. NSW figures are much lower than Victoria's or are unobtainable. Supreme Court orders appear comparable, but the NSW District Court figures seem to be much lower than those in the Victorian County Court. One reason may be that NSW judges issue reminders to the media when there are already legislative protections in place, such as in sexual assault cases, rather than make formal orders. This is a practice we support but would want to see any reminders notified to the media in the same way that formal orders are. Hardly any orders appear to be made in Queensland and Tasmania.

Our next interest was how well orders are drafted. There were many examples of helpfully worded orders specifying what could not be published, and specifying the duration of the order when possible. However, in the Victorian County Court, 25 per cent of orders in the first half of this year were blanket orders. An examination revealed that too often a standard order prohibiting any reporting of the proceedings until further order (which we regard as entirely inappropriate) is used without regard to what the judge actually ordered. In South Australia, the expiry of orders was rarely specified, which we would have expected given that the legislation provides for orders to be reviewed. In NSW we relied on emails of the details of orders distributed to the media by the Supreme Court's media office, rather than seeing the actual orders. The emails were helpful, and often included judges' reminders about not publishing certain matters. This practice ensures that the media are aware of statutory prohibitions, or that matters raised in the absence of the jury cannot be reported, and avoids the need for formal orders.

One question that might underlie the media's legitimate concern about the rising number of suppression orders is whether they are impeded in their ability to report what is happening in our courts. One well-known example is the fact that the media could not report the first conviction of Carl Williams for a gangland murder in Melbourne because he was facing other charges. When he pleaded guilty to further murder charges in 2007 the prohibition was immediately lifted, but for about 18 months the earlier conviction had been suppressed in the interest of fair trials of the remaining charges.

Finally, do we need suppression orders? Some states appear to get by with only a few. We do not argue that judges should not have discretion to ensure they can carry out their duty to run a fair trial, and there will be occasions when orders may be needed. On the other hand research strongly supports the view that juries are not as fragile as previously supposed and do not need to be cocooned from the media. In the internet age this will be increasingly difficult in any event, as the *Underbelly* saga shows. *Underbelly* also demonstrates that reasonable balances can be struck between the public's right to know and the public interest in fair and expeditious trials. The advent of the internet has done what some judges have in the past seemed reluctant to do, to trust a jury, properly instructed, to carry out its task conscientiously and disregard extraneous material wherever published.

Juries are now routinely receiving instructions of this kind.

We do not see a day when no orders should be made, but if the judiciary could avoid doubling up on statutory provisions that already protect identities and rely on reminders to the media instead – and give more credence to the robustness of juries – numbers of orders would drop. Specifying the duration of orders or reviewing them to ensure they remain necessary would also reduce the number of permanent orders.

## **Recommendations**

The review prefers a court-controlled approach to the making of suppression orders, rather than the legislative approach adopted in South Australia (s.69A and following of the *Evidence Act 1929*).

### **Wording**

- ❖ Orders should be made only when necessary to prevent a threat to the proper administration of justice.
- ❖ Orders should be clear and specific, and no wider than absolutely necessary. Some unnecessarily formal wording can be confusing and misleading, when simplicity makes it clear what is actually to be suppressed.
- ❖ Courts should be scrupulous to ensure that the orders issued reflect what was actually intended by the judge or magistrate.
- ❖ Whenever possible, orders should include a sunset clause so they expire automatically when no longer required (when an identified proceeding has concluded or on verdict). Alternatively they should give an expiry date.
- ❖ When a sunset clause may not be appropriate, for example because of continuing concerns about the identity of a police informer, the order should simply state, for example, that publication of the identity of X as a police informer is prohibited.
- ❖ Orders should not be worded to last “until further order” unless the court has an established protocol to review these orders and lift them when appropriate.
- ❖ Any orders that are worded to last “until further order” should be reviewed on verdict.
- ❖ If orders need to be posted on court doors where they can be read by the public, courts should consider a brief version to prevent the publication of sensitive information, for example that X is a police informer. We recommend that in this situation, there should be two orders:

- a neutral order for public display to the effect that a suppression order has been made and details are available from the judge's associate or the court registry or other appropriate officer; and
  - a detailed order stating what is prohibited, which should be prepared for the media.
- ❖ Orders should identify the power under which they are made.
  - ❖ Orders should say why they are being made if their terms do not adequately say so.

### **Model suppression orders**

- ❖ We recommend that if model orders are to be used their wording should be limited to identifying the proceedings, the court, the judge or magistrate, the date, the legislative or implied power under which the order is made and when it is to expire or be reviewed. The wording of the prohibition should be specifically drafted to reflect its purpose and go no further than necessary. If the wording does not sufficiently indicate the purpose of the order, that should also be stated.
- ❖ We recommend that the form used for orders in the Melbourne Magistrates' Court be modified to remove any ambiguity about whether the order covers the whole or part of the proceedings.

### **Notification**

- ❖ Courts that do not have a system of notifying orders to the media should establish one. We recommend that a court officer be identified (typically the media officer) to receive suppression orders as quickly as possible after they are made, for distribution to the media. Courts should be aware that publication is swift on websites and radio bulletins, and that delay in distributing orders should be avoided.
- ❖ All court reporters, media newsrooms and news websites should be on a distribution list, as should media legal advisers, the DPP and anyone with a relevant interest.
- ❖ Any revocation of orders should be notified promptly to the media.
- ❖ Orders should be distributed at no cost, and we recommend that the South Australian *Evidence Act* be amended to remove the fee of \$500 for media organisations.
- ❖ Courts should maintain a register of orders that can be inspected. They should also maintain an electronic database to simplify distribution and access.
- ❖ When an order is sought, particularly in cases of media interest, whenever possible the application should be stood down temporarily so the media can be notified and appear if they have an interest. If circumstances prevent this because of immediate urgency, orders should be interim and of short duration to give the media an opportunity to be heard as soon as possible.

- ❖ We do not believe there is any doubt that the media have standing to be heard, but any barriers that may exist should be removed.
- ❖ Copies of orders should be available to researchers. We doubt s.69 of the *SA Evidence Act* needs amendment to allow researchers to be helped but, if so, it should be amended.

### **A searchable database of orders for media use**

This issue was highlighted in the initial audit report, and was taken to SCAG by the Victorian Attorney-General, Rob Hulls. Further developments were announced by the federal Attorney-General, Robert McClelland at the 7 November 2008 meeting of SCAG. We commend this approach.

### **Alternative approaches to making formal orders**

There are many criticisms of orders that do no more than restate legislative prohibitions, e.g. on identifying complainants in sexual assault prosecutions, or prohibiting the reporting of matters raised in the absence of the jury, which would be contempt of court.

We recommend that in these situations judges remind the media of the statutory or legal prohibitions without formally making orders. This practice appears to be used often in New South Wales and Queensland and we regard it as helpful. Any reminder should be distributed to the media to ensure they are aware of the issues.

### **Courts need public information officers**

A clear view to emerge from our surveys was that employment of a public information officer (or similar) by a court was of substantial benefit to both the court and journalists reporting its proceedings. Should Treasuries need convincing in crude cost-benefit terms that the expense of such an officer is worthwhile, it is enough to point to the cost of aborting a major trial or of the need to run an expensive contempt prosecution.

### **Access to court documents and information**

The other part of our brief was to examine the ease – or lack of it – in journalists getting what they would regard as legitimate access to court files and exhibits. After all, they are regarded as public documents at law. Practices differ widely among the courts and journalists routinely report that there are too many barriers and too much dependence on court officials. In Victoria, for example, in the trial courts civil files are available for inspection on payment of a fee, but criminal files are regarded as confidential. In NSW, journalists have to get permission to search civil files as they are not parties. But some documents in criminal files are available. Even within the one jurisdiction there are inconsistent approaches.

We understand the frustration of journalists feeling that not having access to crucial material which is to be relied on in court will affect their ability to cover proceedings fully and fairly. If, for example, a committal relied entirely on a hand-up brief (documentary material given to the magistrate and not read aloud in court, and no evidence called), and journalists had no access to the hand-up brief, it would make a meaningful report of what had happened almost impossible. The public interest is not served if journalists do not have access to material on which judicial decisions are based.

We surveyed court reporters asking about their experiences of obtaining court information, and they generally painted an unsatisfactory picture.

We therefore welcome the NSW *Report on Access to Court Information* and its endorsement of an English protocol for giving reporters access to material that has been tendered in open court, that is, has become part of the formal evidence. Both these approaches start from a presumption of access, and that is a significant point.

We welcome the recognition in the NSW report that the media have to have much better access to court information as of right, and that the aim of access is to support the principle of open justice. But we share the concerns of others that the restrictions on some material are unnecessary because there are legislative provisions that protect privacy.

One feature of the English system for court exhibits that we like is that it assumes that the media will get same-day access, rather than having to wait until the end of the trial, which tends to be the approach in Australia.

Another approach already exists in some Australian courts, where reporters submit forms seeking particular material, mainly in criminal proceedings. Reporters said this generally worked well, but that it was not used in enough courts. We support the use by all courts of a protocol for the media to seek access.

We therefore recommend that courts adopt a procedure based on a presumption of access. Additionally, a protocol should be developed, perhaps through SCAG, for the Directors of Public Prosecutions to allow access to exhibits in criminal proceedings. Either approach should greatly reduce demands made on court officers, and eliminate inconsistent or capricious decisions on media access.

ARK was critical of transferring decisions on access to exhibits from the courts to prosecutors. It says this would do nothing to foster certainty or remove inconsistent exercises of discretion. It may be that prosecuting authorities would prefer that such a policy was decided at a court or government level. We note that the experience in England, described by a senior media lawyer and the press office for the Crown Prosecution Service, is generally positive, with comments that the quality of court reporting has improved since the system was introduced in 2005, especially for electronic news reports. We believe it is worth pursuing.

We think it's about time Australian judges bit the bullet and allowed television news cameras into courts more readily. Cameras have been in courts several times, of course, but almost exclusively in civil cases. However, the television coverage of the recent sentencing of a serial murderer, Peter Dupas, in Victoria, raised no concerns and we hope this will encourage other judges to do the same. New Zealand has allowed cameras into courts for years, and we are unaware of adverse results.

Another issue for journalists is accuracy. Two key issues are prompt access to transcripts and the ability to use a small tape recorder in court. Some courts are helpful on these issues. We strongly encourage others to embrace these simple tools. The experience in Victoria, and doubtless other states where transcripts are provided, is that there is a high correlation between providing a transcript and the accurate reporting of a trial.

### **Recommendations**

- ❖ Media access to court files should be a right in civil and criminal cases. Legitimate concerns about personal privacy, for example, the identity of victims of sexual assault, are already dealt with by legislation.
- ❖ Court exhibits, especially in criminal proceedings, should be available under a suitable protocol worked out with the media. There are two approaches: the English model using the prosecution rather than the courts, and a court-based model already in use in some Australian courts.
- ❖ Transcripts should be easily available to the media when requested, preferably at no cost.
- ❖ Courts that do not now allow the use of small tape recorders by the media should adopt helpful procedures to allow it.
- ❖ Judges should provide copies of sentencing remarks for the media, to be released immediately after sentence, as an aid to accuracy.
- ❖ In appropriate cases, judges should consider providing a summary of a controversial or complex sentence, or decision in a civil case.
- ❖ Copies of sentences and decisions should be posted on court websites as quickly as possible after delivery.