

AUSTRALIA'S RIGHT TO KNOW

Suppression and non-publication orders – proposal for national register

Introduction

Australia's Right to Know welcomes the opportunity to comment on the SCAG discussion paper for a proposal to create a national register of suppression orders.

ARTK has raised a number of concerns with the government relating to the issuing of suppression orders by Australian courts. These concerns are outlined in the ARTK's Moss Report¹ and Prue Innes's specific Report on Suppression Orders.²

The majority of these concerns relate to the quality, quantity and consistency of the suppression orders themselves. The urgent need to comprehensively review and overhaul the making and content of orders is the subject of separate discussion at SCAG.

ARTK's concern surrounding process, has been the ability of journalists to accurately know what suppression orders are in place at a particular time. There are a large number of orders effective at any one time across the Australian jurisdictions. Added to the volume, in a number of cases the coverage of orders is complex and it is not uncommon for multiple orders to be effective for a single trial with orders being removed, added and altered during the course of the trial.

To ensure journalists are able to keep themselves informed of orders there needs to be an up to date national register of orders. Without this register it is extremely difficult for journalists to keep track of orders and their application particularly with variances from State to State.

ARTK welcomes the SCAG proposal to establish a national electronic register of suppression orders. It would be a positive step to have a national register that enables journalists regardless of their location to be aware of suppression orders across all jurisdictions.

However, we do have some issues with the form of the register that has been proposed.

ARTK comments on the discussion paper

ARTK would like to make a number of comments in relation to the proposed model of the register.

The register must do more than provide a one-stop shop for a list of suppression orders. It must be comprehensive and it must be accurate. A register will not fulfil its potential if a journalist must make additional inquiries to the relevant court because all needed information is not in the register.

¹ Chapter 8 THE JUSTICE SYSTEM Report of the Independent audit into the State of Free Speech in Australia 31 October 2007.

² Report of the Review of Suppression Orders and Media Access to Courts, 13 November 2008.

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4.4 Possible models – publicly accessible register and restricted access register

ARTK strongly advocates for a restricted access register.

The paper discusses a publicly available register and a restricted access register and recommends adoption of a publicly available register. The discussion paper notes that without giving information that goes beyond merely giving contact details, a publicly available register would offer minimal benefit than that available now.

It is precisely on this basis that ARTK does not support a publicly accessible register and supports and argues for a restricted access register.

We note in 4.4.2 of the discussion paper, there is a reference to the courts possibly ceasing their existing internal practices after the introduction of a publicly available register. This would mean that in many cases, there would be less information available than currently where an individual court would cease providing detailed notices to the media and only provide the limited information to the public register.

As noted in the discussion paper, there are concerns that orders may be inadvertently breached because of uncertainty about both the existence and terms of a suppression order. The objective of the register must be to rectify this problem and a publicly accessible register as outlined in 4.4 would not achieve this.

The fields listed in 4.4.3 would all be essential to a workable register but the element that is vital and can only be made available in a restricted access register is the precise information that cannot be reported. It is this element that will enable a journalist to report accurately without breaching the order.

Without this element the register becomes largely meaningless.

In addition, it would be advisable to include the reasons for the order.

ARTK also believes it is the register should also be accompanied by an alerting system of new orders and revocations. This could be done either centrally or from each court. Technology would make it relatively simple to provide an email alert to those authorised to receive the information at the time the information is logged. An alerting service is in place in a number of jurisdictions including Victoria and the Northern Territory.

The most effective and practical system would be a publicly accessible register containing information that does not breach the order with additional information that is only accessible by authorised media representatives. As stated in the discussion paper, this authorisation system is already in place in South Australia.

Section 4.4 of the paper sets out a number of additional features of a restricted access register which would be useful to the users of the register including other terms and phrases, legislative provisions and relevant case law. ARTK supports the inclusion of these in a register.

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It would be quite illogical to argue that a restricted access system is inimical to the principles of open justice.

This misses the central nature of the suppression orders themselves. The nature and purpose of suppression orders is to restrict public access to certain information where a court decides the information should not be made available. The correct use of suppression orders is an integral and necessary part of the open justice system. But suppression orders cannot be complied with by those that report to the public unless they know the information to which the suppression order relates. To create a restricted access register would not in any way further suppress information that is not otherwise available to the public: it would merely ensure journalists are able to avoid breaching the order.

ARTK strongly disagrees with the statement that the complexity and costs attached to a restricted access model make the proposal unattractive and impractical.

It is quite clear why a register that does not actually provide the precise information that the relevant journalist needs is not useful to the administration of or the reporting of the courts, so we can only assume the recommendation is based on an attempt to avoid additional cost. We would submit that the proper functioning of the courts and effective operation of suppression orders should be the priority here. It would be disappointing if the register is not an effective tool to assist judicial process merely because there is a concern about costs.

It is worth noting that a comprehensive and effective register will lead to efficiencies and cost savings in the courts by reducing breaches and inquiries to the courts.

4.3 What would the register look like

4.4.3 Fields

Section 4.4.3 of the paper refers to a number of possible fields in the register.

As discussed above ARTK submits each of these are essential but they must be supplemented with an additional field containing the precise information that cannot be reported.

However, we would like to comment in relation to the issue of names of the parties to the case. The paper says they would only be included to the extent allowed by the terms of the order. In many cases this may be problematic, particularly where it is the name of a party which is the subject of the order. Although the use of letters to ensure the anonymity of a party is an exception, in instances this can be problematic as there may be no way of knowing the names of the parties to prevent referring to them in a report of the case.

ARTK submits that the field should refer to the parties and the fact that the persons cannot be identified.

