

Submission

**SUPPRESSION AND NON-PUBLICATION ORDERS -
Draft *Court Suppression and Non-Publication Orders*
*Bill 2009***

to Department of the Attorney General

4 March 2010

Submission

SUPPRESSION AND NON-PUBLICATION ORDERS - Draft *Court Suppression and Non-Publication Orders Bill 2009*

This submission is in response to a request for comment received from the Acting Executive Director, Court and Tribunal Services, Department of the Attorney General and dated 6 January 2010.

The Society has noted the advice of the Acting Executive Director that:

- Feedback on the draft *Court Suppression and Non-Publication Orders Bill 2009* received from stakeholders in Western Australia will be collated and forwarded to the Commonwealth which will collate feedback from all States and Territories for presentation to a meeting of the National Justice Chief Executive Officers (NJCEOs) scheduled for April 2010.
- The Attorney General the Hon Christian Porter MLA has advised the NJCEOs that Western Australia does not intend to participate in any proposed national register although its position may be reviewed if a national register is established and proves to be effective.

The Law Society of Western Australia supports the establishment of a national suppression register and endorses the draft *Court Suppression and Non-publication Orders Bill 2009* (Bill) prepared by the New South Wales Parliamentary Counsel's Office at the request of the Standing Committee of Attorneys General.

The Society's position was reached after careful consideration of the content of the Bill, the background to the Bill and relevant law as set out below.

1. BACKGROUND

- 1.1 In November 2008 the Standing Committee of Attorneys General (SCAG) resolved to consider the harmonisation of the laws regarding suppression orders and the possible creation of a Federal Court administered National Registry of Suppression Orders¹. In their November 2008 meeting under the 'Developing Court Excellence' heading, the SCAG agreed to develop draft model provisions and agreed to further work being undertaken on a legal and administrative framework for a national electronic register of suppression/non-publication orders.²
- 1.2 To date the Western Australian Attorney-General has indicated that at this stage Western Australia will not be participating in a Register.
- 1.3 The NSW Law Reform Commission in 2000 reviewed the topic in a discussion paper³. The Law Reform Commission's recommendations were aimed to overcome that there is no general statutory power to restrict publication of proceedings where the publication may be prejudicial to a trial or to the administration of justice in general. At the time, the then s 578 of the *Crimes Act 1900* (NSW) was perceived to be limited in scope and applied to criminal and not civil cases.⁴ The Commission recommended that a new provision should be introduced in the *Evidence Act 1995* (NSW) which provides that any court, in any proceedings, has the power to suppress the publication of reports of any part or all of the proceedings (including documentary material), where such publication would create a substantial risk of prejudice to the administration of justice, either generally, or in relation to specific proceedings (including the proceedings in which the order is made). The power should apply in both civil and criminal proceedings and should extend to suppression of publication of evidence as well as material which would lead to the identification of parties and witnesses involved in proceedings before the court.

¹ **SCAG Summary of Decisions - July 2008:**

[http://www.scag.gov.au/lawlink/SCAG/ll_scag.nsf/vwFiles/SCAG_Summary_of_Decisions_July_08.doc/\\$file/SCAG_Summary_of_Decisions_July_08.doc](http://www.scag.gov.au/lawlink/SCAG/ll_scag.nsf/vwFiles/SCAG_Summary_of_Decisions_July_08.doc/$file/SCAG_Summary_of_Decisions_July_08.doc). Accessed 3 Feb 2010.

² Communiqué Standing Committee of Attorneys General November 2008:

[http://www.scag.gov.au/lawlink/SCAG/ll_scag.nsf/vwFiles/SCAG_Communique_6-7_November_2008_FINAL.DOC/\\$file/SCAG_Communique_6-7_November_2008_FINAL.DOC](http://www.scag.gov.au/lawlink/SCAG/ll_scag.nsf/vwFiles/SCAG_Communique_6-7_November_2008_FINAL.DOC/$file/SCAG_Communique_6-7_November_2008_FINAL.DOC). Accessed 3 Feb 2010.

³ Discussion Paper 43 (2000) – "Contempt by publication. Part 10. Suppression orders".

<http://www.lawlink.nsw.gov.au/lrc.nsf/pages/dp43chp10>. Accessed 5 Feb 2010.

⁴ Ibid.

- 1.4 S578 was effectively re-enacted in s292 of the *Criminal Procedure Act 1986* (NSW).

The Common Law

- 1.5 At common law the rule is that proceedings should take place in open court, this being especially so in criminal proceedings⁵. An exception has been where openness would interfere with the administration of justice and the ability of the Court to ensure that justice is done. Whether a suppression or other order that restricts openness is granted is determined by balancing the principle of open justice with the harm that would be suffered to the administration of justice should openness occur. The occasions where such a balance would fall in favour of a closed court would be few and exceptional. Openness is a characteristic of being a court, and is one of the indicia that distinguishes a court from an administrative procedure.

- 1.6 Open justice is said to be necessary because:

- It allows public and professional scrutiny to prevent abuse of power⁶
- It maintains public confidence in the integrity, fairness and efficiency of the courts⁷

- 1.7 Open court necessarily implies public attendance, reporting and publication of its proceedings. Exceptions to the open court rule, for example a suppression order, should as mentioned above be limited and exceptional and would only be made where the following factors are satisfied⁸:

- An order would assist in the administration of justice where closure would hinder it (that is the attainment of justice⁹) or where public policy requires closure (such as the interest of national security¹⁰) or a person being placed in jeopardy (such as protecting informers, who otherwise might not come forward)¹¹
- A statute authorizes the closure of the court;

⁵ *Scott v Scott* [1913] AC 417

⁶ *Russell v Russell* (1976) 134 CLR 495 at 520 per Gibbs J

⁷ *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47 at 61 per Samuels JA

⁸ *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465 at 476-477 McHugh JA. See also *Re: Her Honour Chief Judge Kennedy; Ex Parte West Australian Newspapers Limited* [2006] WASCA 172. Unreported.

⁹ *John Fairfax Group Pty Ltd (Receivers and Managers Appointed) v Local Court of New South Wales* (1991) 26 NSWLR 131 at 141 per Kirby P

¹⁰ *Ibid.*

¹¹ *Ibid.*

- Closure or suppression must be reasonably necessary;
- Sufficient material must be before the court to make such an order.

1.8 At common law courts do not have the power to bind people outside of the court room¹². This means that Courts cannot order the prohibition of publication by third parties such as newspaper publishers, though indirectly the court has the power to conduct proceedings in closed court, order the use of pseudonyms and to make orders binding on the parties, witnesses, and others connected with the proceedings. At common law the power to bind those outside of the court is a legislative function than a judicial one¹³.

1.9 Where a suppression order has been made indirectly under common law, the media has standing for prerogative, injunctive or declaratory relief. If such orders are made under a statute then the media whilst not a party to the proceedings will be a party to the "matter" and according to the relevant statutory provisions¹⁴ will have standing to appeal any order made¹⁵.

Public Policy Issues

1.10 The Press Council of Australia generally support the concept of a national register and model suppression laws¹⁶, though there is concern at the increase in number of orders issued¹⁷.

¹² *John Fairfax & Sons Pty Ltd v Police Tribunal of NSW* (1986) 5 NSWLR at 477

¹³ Judicial Commission of NSW: 'Closed courts and suppression orders'..

http://www.judcom.nsw.gov.au/publications/benchbks/civil/closed_courts_and_suppression_orders.html. Accessed 4 February 2010

¹⁴ For example s79 *District Court of Western Australia Act 1969* (WA)

¹⁵ *Re: Her Honour Chief Judge Kennedy; Ex Parte West Australian Newspapers Limited* [2006] WASCA 172. Unreported. Per Steytler P at [24] and [25].

¹⁶ Press Council of Australia News Vol 21 No. 3., 2009:

<http://www.presscouncil.org.au/pcsite/apcnews/nov09/news.html#suppress>. Accessed 5 Feb 2010.

¹⁷ Martin, W. "Access to Justice -The Media, the Courts and the Public Record" Presentation to the Press Council by Wayne Martin, 22 March 2007. Australian Press Council.http://www.supremecourt.wa.gov.au/publications/pdf/Australian_Press_Council_220307.pdf. Accessed 5 Feb 2010.

Western Australia Law

- 1.11 The statute law regarding suppression orders for cases which would ordinarily be held in open court is found in s171 *Criminal Procedure Act 2004* (WA), for convenience a copy of this section is annexed to this document.

2. DRAFT COURT SUPPRESSION AND NON-PUBLICATION BILL 2009 (Bill)

Part 1: Preliminary

Definitions

- 2.1 The Bill would seek to have a more expansive operation than current WA legislation as it would apply to all Courts and in both criminal and civil proceedings but not to other adjudicative tribunals.¹⁸
- 2.2 A news publisher is restricted to one whose *business* is publishing. This definition is used to identify a class of persons (amongst others, see below) who can make written submissions (but not applications for an order unless they have sufficient connection with the case) or with the leave of the court to appear and be heard by the court¹⁹ or appeal a decision regarding a decision on either order made by a court²⁰. This definition would seem to exclude others whose predominate interest or activity (but not business) is the dissemination of news, public affairs information and commentary. An example being private web sites that host blogs and articles conducted by not for profits or private but interested individuals and groups.
- 2.3 Publishing is defined to include the traditional means of publication plus the "internet" (this seemingly would cover most and perhaps all electronic communications by those in the business of publishing) to the public or sections of the public.
- 2.4 There is distinction between a *non-publication order* and *suppression order*. Suppression orders are wider seeking to restrict any disclosure of information while non-publication seeks to restrict or prohibit dissemination of information that is only published, but not restricting other forms of information dissemination such as private discussion by individuals to other individuals.

¹⁸ *Court Suppression and Non-publication Orders Bill 2009 (NSW)* s3(1)

¹⁹ *Ibid.* s4 (3) (d)

²⁰ *Ibid.* s12 (3) (d)

Part 2: Suppression and non-publication orders

2.5 Section 4 empowers the court to make either order, with any exceptions or conditions that it seems fit to make either during or at the end of the proceedings²¹ that would prohibit the disclosure of information that would:

- Reveal the identity of any party or witness or any person who is related or associated with any party to the proceedings²².
- Information about evidence given in the proceedings²³.

2.6 The Court can only make an order if it is satisfied that:

- The order is necessary to prevent prejudice to the proper administration of justice;
- To prevent prejudice to defence, security or law enforcement of the Commonwealth, State or Territory or international relations of the Commonwealth;
- Otherwise in the public interest for the order to be made and that the public interest significantly outweighs the public interest in open justice.

2.7 When deciding to make an order the court must take into account that the primary objective of the administrative of justice is to safeguard the public interest in open justice.²⁴ This reflects the common law.

2.8 Application for either order can only be made by any party to the proceedings or a person with sufficient connections to the proceedings or on the courts own motion. A person with "sufficient connections" is an additional class of person who can make an application than current WA legislation allows²⁵.

²¹ Ibid. s4 (2)

²² Ibid. s4 (1) (a)

²³ Ibid. s4 (1) (b)

²⁴ Ibid. s5(2)

²⁵ *Criminal Procedure Act 2004 (WA)* s171 (3) and (4)

2.9 However, a wider class of persons can make written submissions and with leave of the court appear and be heard on an application for an order. In addition to applicants, such classes of persons include²⁶:

- Any party to the proceedings;
- A representative of any government of Australia (or agency of that government) provided that the order being sought is connected to defence, security or law enforcement of the Commonwealth, State or Territory or international relations of the Commonwealth;
- A representative of a news publisher;
- Any person provided in the court's opinion that person has a sufficient interest in whether the order is issued or not.

2.10 Orders can be made on an interim basis but must be substantively determined on an urgent basis or within 72 hours if practicable²⁷.

2.11 Unless specified otherwise, orders will apply to the jurisdiction in which they are made but can apply to another jurisdiction or Australia wide. Duration of orders will be defined in the order but will be for no longer than necessary to achieve its purpose but even if made "indefinitely" will lapse in civil case after 30 years and criminal proceedings after 75 years.

3. SUMMARY OF BILL AND POSITION ADOPTED

3.1 The Bill is more comprehensive statement of proposed law than current Western Australian legislation. It reflects common law principles of open justice and defines the circumstances of who can be parties and importantly allows most media organisations ("news publishers" those in the *business* of publishing, see comments above) to make submissions and with leave to be heard on applications for suppression orders.

3.2 The Bill defines the circumstances where governments can be parties to such orders and these are typically for international or national security reasons. The Bill allows for interim orders and places a finite time limit (though long) on the duration of orders, even on those orders that are "indefinite". The Bill

²⁶ *Court Suppression and Non-publication Orders Bill 2009 (NSW)* s6(3)

²⁷ *Ibid.* s7

applies to all courts for both civil and criminal proceedings which is more expansive than current legislation.

- 3.3 For the reasons set out above the Law Society of Western Australia endorses the Bill.

A handwritten signature in blue ink, appearing to read 'H. Quail', written in a cursive style.

Hylton Quail
President

March 2010

Annexure 1

Section 171 *Criminal Procedure Act 2004* (WA).

171. Court to be open, publicity

- (1) In this section, unless the contrary intention appears —
proceedings means proceedings on or in relation to a case.
- (2) Subject to this section, all proceedings in a court are to be in open court and the courtroom where the court sits is to be open to the public unless this Act or the rules of court or another written law provides otherwise.
- (3) On an application by a party to the case, or on its own initiative, a court may order a person who may be called as a witness in proceedings, other than the accused —
 - (a) to leave the courtroom and to remain out of hearing of the courtroom until called to give evidence;
 - (b) not to discuss his or her evidence with a person or persons specified by the court.
- (4) On an application by a party to the case, or on its own initiative, a court may, if satisfied it is in the interests of justice to do so —
 - (a) order any or all persons, or any class of persons, to leave or be excluded from the courtroom during the whole of the proceedings, or a part of them specified by the court;
 - (b) make an order that prohibits the publication outside the courtroom of the whole of the proceedings, or a part or particular of them specified by the court;
 - (c) make an order that prohibits or restricts the publication outside the courtroom of any matter that is likely to lead members of the public to identify a victim of an offence.
- (5) The powers in subsection (4) may be exercised by a court at any time after an accused is charged with an offence and before or after the accused first appears in the court on the charge.
- (6) An order made under subsection (4) may be made subject to conditions specified by the court.
- (7) If a court of summary jurisdiction makes an order under subsection (4)(b) or (c) in a case that involves an indictable charge in respect of which the accused is committed to another court for trial or sentence, the court to which the accused is committed may set aside the order, whether or not it also makes an order under this section.
- (8) A person who, under section 172(3), is entitled to act on behalf of a party to the proceedings must not be excluded from the courtroom under this section.
- (9) If a person contravenes an order to leave the courtroom, the court may order the person to be removed from the courtroom.

- (10) A person who contravenes an order made under this section commits an offence.

Penalty:

- (a) for an individual, a fine of \$12 000 or imprisonment for 12 months;
- (b) for a corporation, a fine of \$60 000.

- (11) In proceedings for a contravention of an order made under subsection (4)(c) it is a defence to prove —

- (a) that prior to the publication of the matter the victim, in writing, authorised the publication; and
- (b) that at the time the victim authorised the publication, the victim had reached 18 years of age and was not a person who, because of mental impairment (as defined in *The Criminal Code*), was incapable of making reasonable judgments in respect of the publication of such matter.