ACCESS TO JUSTICE (FEDERAL JURISDICTION) AMENDMENT BILL SENATE COMMITTEE HEARING: QUESTIONS ON NOTICE

Senator Humphries: (Page 14 of Hansard)

[Question 1] I note the comment from the Right to Know group that there has been a 100 per cent increase in suppression orders in New South Wales as a result of the making of the equivalent legislation at the state level. I want to know whether you agree with that analysis and whether you can explain that and, if you accept that there has been a dramatic increase in the number of suppression orders, do you believe that it is a likely intended consequence of this legislation passing the federal level as well?

The Department is not able to comment on the causes of an apparent increase in suppression orders made by courts in NSW.

The Department does not anticipate an increase in the number of suppression orders made by Federal Courts as a result of this Bill. This is because the new suppression order provisions in this Bill largely reflect the current grounds upon which federal courts can currently make suppression orders.

The Federal Court and the Federal Magistrates Court have existing express statutory power to make orders restricting or prohibiting the publication of information.[1] The Federal Court, the Federal Magistrates Court and the Family Court also have general powers to make orders of such kinds as the Court considers appropriate.[2] Federal Courts also have such implied powers as are incidental and necessary to exercise the jurisdiction or express powers conferred on them by statute,[3] including the power to make suppression orders.[4]

There are several additional factors which would also suggest that the Bill would operate differently in the Commonwealth context than in NSW, including the number and type of courts empowered to make suppression orders, the jurisdiction of these courts and the grounds on which suppression orders may be made.

Type of courts empowered to make suppression orders

Australia's Right to Know emphasises that their concerns with the experience of the SCAG Model Bill in NSW primarily relate to the making of suppression orders by inferior courts.[5]

In large part, the Commonwealth Bill is directed to superior courts. It would affect the powers to make suppression and non-publication orders of the High Court of Australia, the Federal Court of Australia, the Family Court of Australia and the Federal Magistrates Court.

[1] See s50 *Federal Court of Australia Act 1976* and s61*Federal Magistrates Act 1999*.
[2] See s15, *Federal Magistrates Act 1999*, s23 *Federal Court of Australia Act 1976* and s34 *Family Law Act 1975*.
[3] *DJL v The Central Authority* (2000) 201 CLR 226 at 240–241.
[4] *Central Equity Ltd v Chua* [1999] FCA 1067 (29 July 1999).
[5] Right to Know, Submission on Access to Justice (Federal Jurisdiction) Amendment Bill, 1 February 2011, 2-4.

Differences in jurisdiction

Many of the concerns with suppression orders arise in the context of a court exercising criminal jurisdiction.[6] Criminal trials are rarely heard in the federal courts.

Grounds on which suppression orders may be made

The Bill omits subclause 8(e) of the SCAG Model Bill, which would enable a court to make a suppression or non-publication order where 'it is otherwise necessary in the public interest for the order to be made and that public interest significantly outweighs the public interest in open justice.' That is, the Commonwealth Bill leaves no general discretion to grant a suppression order.

[Question 2] The same group raised the question of putting clearly into legislation some sort of clear articulation of a presumption of openness or transparency. Can you give us good reasons why such a presumption shouldn't be built into the legislation?

The common law position on the open justice principle was recently set out in the High Court decision of *Hogan v Hinch*,[7] where his Honour Chief Justice French stated that:

[at 21] It has long been accepted at common law that the application of the open justice principle may be limited in the exercise of a superior court's inherent jurisdiction or an inferior court's implied powers. This may be done where it is necessary to secure the proper administration of justice.

[at 22] It is a common law corollary of the open court principle that, absent any restriction ordered by the court, anybody may publish a fair and accurate report of the proceedings.....

His Honour Chief Justice French further stated that:

[at 27] *{A} statute which affects the open-court principle... should generally be construed ... so as to minimise its intrusion upon that principle.*

The Bill is intended to reflect this common law balancing test, while tightening the scope of suppression orders by requiring the court to specifically consider whether the order is justified (with regard to the particular grounds set out in clause 102PF), and to craft the order in as narrow terms as possible to achieve its objectives (subclause 102PG and clause 102PI).

The grounds on which suppression orders can be made also state that they can only be made where the order is necessary. The High Court has recently stressed[8] that the test that such an order must be 'necessary' has a high threshold, so that it is insufficient if the making of a suppression order is convenient, reasonable or sensible.

The Explanatory Memorandum to the Bill makes clear that these provisions must be read with this jurisprudence in mind. This reinforces that such orders cannot be made lightly, and must bear in mind the interest in open justice.

[6] The testimony of the Right to Know before the Committee illustrates this – each of the examples given relates to the criminal context. See *Hansard* transcript pages 6-9.
[7] [2011] HCA 4
[8] *Hogan v Australian Crime Commission* [2010] HCA 21

[Question 3] The Law Council proposes to add a couple more clauses to the new section 102PF, giving a mopping-up jurisdiction to the Family Court—and it might be to other courts as well, I cannot recall—with respect to the circumstances where suppression or non-publication orders could be made. I would be interested in your response to that argument.

The Law Council has suggested including additional grounds for making suppression orders in clause 102PF, specifically, 'where the best interests of a child of a party to the proceedings requires it' and 'in any other circumstances the court considers just.'

The existing grounds for making suppression or non-publication orders in clause 102PF are sufficiently broad to cover these circumstances.

The best interests of a child of a party

The interests of children of parties to proceedings would currently be protected by:

- section 121 of the Family Law Act 1975, which prevents publication of identifying information in relation to people associated with proceedings under the Act
- the Court's practice of de-identification of published judgments, which ensures that no sensitive information is published in a way that would allow a person associated with the proceedings to be identified, and
- the Family Court's power to make an order closing the Court, where this is appropriate, under subsection 97(2) of the *Family Law Act 1975*.

Several of the grounds set out in the Bill for making a suppression order would also be relevant to protecting the best interests of the child:

- ground (a) (where it is 'necessary to prevent prejudice to the proper administration of justice') mirrors the existing power in section 50 of the *Federal Court of Australia Act 1976* and is similar to the common law ground for making suppression orders. This ground covers a wide range of circumstances
- ground (c) (where it is 'necessary to protect the safety of any person') would provide an express ground upon which harm to a child or another person associated with family law proceedings could be prevented, including psychological harm, and
- ground (d) (where it is 'necessary to avoid causing undue distress or embarrassment to a party or witness in criminal proceedings involving an offence of a sexual nature, including an act of indecency') would apply if criminal proceedings were on foot in relation to sexual abuse.

In any other circumstances the Court considers just

This proposed clause is phrased quite broadly. The Bill as currently framed is designed to confine the scope to issue a suppression order.

[Question 4] This is a bit of a tricky one, but I was wondering if you could explain to us whether there is any interaction between these laws and the present common-law rules regarding maintenance and champerty, whether that is affected at all by the changes which are made here....

This Bill is not intended to affect and does not affect the law regarding maintenance and champerty.

Both maintenance (supporting litigation, regardless of the reason) and champerty (supporting litigation in exchange for a share of the proceeds of that litigation) were traditionally prohibited in Australia. Such practices were considered to be contrary to public policy, justified in part by a concern that the judicial system should not be the site of speculative business ventures, and in part by the concern to prevent abuses of court process for personal gain.[9]

The crimes and torts of maintenance and champerty have now been abolished in most Australian jurisdictions (ACT, NSW, SA, Vic).[10] Beginning in 1995, a statutory exception to the rule against champerty has also developed in relation to insolvency practitioners. Under their statutory powers of sale, insolvency professionals may contract for the funding of lawsuits, if these are characterised as company property.[11] The High Court decision in *Campbell's Cash & Carry Pty Ltd v Fostif Pty Ltd*[12]confirmed that commercial funding of litigation is not, of itself, an abuse of process or contrary to public policy.

[Question 5] There is this issue of certificates which the Law Council raises, and the potential for the issuing of certificates itself to be vexatious. I would be interested in your response to that.

The request for a certificate will be made to the appropriate court official. It is expected that court officials will be able to resolve any issues with repeated or unjustified requests for certificates if these arise. None of the federal courts has raised concerns with this process.

Senator Crossin: (Page 18 of Hansard)

Can you outline how section 121 of the Family Law Act operates in protecting the best interests of children and prohibiting the disclosure of sensitive information relating to children? Why should the grounds for making a suppression or non-publication order not be expanded to include 'where such an order is in the best interests of a child', as recommended by the Law Council?

Section 121 of the Family Law Act creates an offence for publishing information which reveals the identity of a party or witness in the proceedings, or of a person who is related to or associated with a party to the proceedings or concerned in the matter. This provision ensures that any information relating to a child of a party must be de-identified before publication.

Additional measures which are available to protect the best interests of children of parties to family law proceedings and reasons for not including the best interest of a child as a specific ground are set out in the answer to Senator Humphries' question 3 above.

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[9] SCAG, Litigation Funding in Australia: Discussion Paper (May 2006), 4.
[10] Ibid, 5.
[11] Ibid.
[12] [2006] HCA 41.

Senator Wright: (Page 19 of Hansard)

The Bill imposes a requirement that Courts must be satisfied that a person has 'frequently' instituted or conducted vexatious proceedings before being able to make a vexatious proceedings order. Can you inform the committee of any jurisprudence relating to the term 'frequently'? How is this term likely to be interpreted?

The test of 'frequency', in the context of vexatious litigants, has been considered in relation to the previous O.63 r.6(1) of the High Court Rules, the *Suppression and Non-Publication Orders Act 2010* (NSW) and the *Vexatious Proceedings Act 2005* (Qld).

In relation to the High Court Rules and the *Vexatious Proceedings Act 2005* (Qld), it has been held that 'frequently' in this context is a relative term which must be considered in the context of the particular litigation in question.[13]

In *Attorney General of New South Wales v Croker*,[14] Fullerton J accepted that the test of 'frequency' was lower than the test of 'habitually and persistently' which was previously contained in s84 of the *Supreme Court Act 1970* (NSW).

In *Attorney General of NSW v Wilson*,[15] Davies J had regard to existing jurisprudence on the test of 'persistently'. His Honour cited *Brogden v Attorney-General*:

> A litigant may be said to be persisting in litigating though the number of separate proceedings he or she brings is quite small if those proceedings clearly represent an attempt to re-litigate an issue already conclusively determined against that person, particularly if this is accompanied by extravagant or scandalous allegations which the litigant has no prospect of substantiating or justifying. The Court may also take into account the development of a pattern of behaviour involving a failure to accept an inability in law to further challenge decisions in respect of which the appeal process has been exhausted, or attacking a range of defendants drawn into the widening circle of litigation solely because of an association with a defendant against whom a prior proceeding has failed.[16]

His Honour went on to state, at [14]:

> The important thing to note is that the individual number of proceedings can be quite small but still satisfy the word "persistently" if the proceedings are an attempt to re-litigate an issue already determined against the person. There is no reason to think that such an approach should not be taken in relation to the word "frequently".

[13] See *Jones v Cusack* (1992) 109 ALR 313 at [14]; *National Australia Bank Limited v Freeman* [2006] QSC 086 at [30]; *Hambleton v Labaj* [2010] QSC 124 at [56].
[14] [2010] NSWSC 942 (26 August 2010) **.**
[15] [2010] NSWSC 1008.
[16] [2001] NZCA 208, [2001] NZAR 809 at [21].

Additional information in response to the question from Senator Crossin: (Page 17 of Hansard)

In schedule 3 of the bill a person who is the subject of a vexatious proceedings order may apply for leave to institute proceedings. That application for leave may be dismissed without an oral hearing, which is the proposed new subsection 37AS(3). My question to you is: how does such a provision accord procedural fairness to the applicant?

This provision was requested by the Courts as an efficiency measure and is similar to existing section 20A of the *Federal Court of Australia Act 1976*, which allows the Court or a Judge to deal with frivolous or vexatious matters in Chambers without an oral hearing.

The Bill will provide the court with an efficient way of dealing with unmeritorious litigation sought to be brought by persons already subject to vexatious proceedings orders. An oral hearing will only be dispensed with where the Court considers this the appropriate course of action. The court can still afford procedural fairness to such persons in these circumstances by providing them with the opportunity to make written submissions. These provisions will give the court the flexibility to determine applications by a person subject to a vexatious proceedings order on the papers alone in chambers, while not mandating this as a course of action.

Clause 37AR of the Bill allows an applicant to apply to the court for leave to institute proceedings that are subject to the vexatious proceedings order. Subclause 37AR(3) lists the information that an applicant must include in an affidavit that must be filed with the application, being:

a) all the occasions on which the applicant has applied for leave under this section; and

b) all other proceedings the applicant has instituted in any Australian court or tribunal, including proceedings instituted before the commencement of this section; and

c) all relevant facts about the application, whether supporting or adverse to the application, that are known to the applicant.

This information is designed to ensure that the applicant makes full disclosure of relevant information to assist the court in reaching a decision as to whether to grant leave to the applicant to institute the proceedings. Pursuant to its general case management powers, a court could also request such further evidence or make such other directions as it considered appropriate before reaching its decision.

Subclause 37AS(3) provides that the court may dismiss an application without an oral hearing (either with or without the consent of the applicant). This subsection will preserve the court's discretion to conduct an oral hearing if it chooses to do so. Section 4 of the *Federal Court of Australia Act 1976* makes it clear that a reference to a Judge when used in the phrase a "Court or a Judge" means a Judge sitting in Chambers.