AUSTRALIA'S RIGHT TO KNOW

Access to Justice (Federal Jurisdiction) Amendment Bill 2011

1 February 2011

Introduction

In 2009 and 2010, a SCAG working group developed model provisions on suppression and non-publication orders following a consultation process with stakeholders.

ARTK participated in this process through discussions and written submissions.

While we appreciate the objective of developing uniform suppression and non-publication orders across jurisdictions, the primary objective of any legislation must be to achieve a sound and workable framework for the courts, media and the public.

Uniformity should minimise the tendency for decision makers to make inconsistent decisions on similar issues but the fundamental problem with suppression and non-publication orders in Australia, is that there are too many unjustifiable and unnecessary orders which act as a gag on the media's ability to report on the justice system.

This Bill does not address this problem.

It is essential that the pursuit of consistency does over-ride the pursuit of good law.

As we commented at the time the model provisions were being developed and again when they were made law in NSW, these provisions risked broadening the power to make suppression orders by failing to encourage "open justice".

Unfortunately this has been borne out.

The introduction of the NSW Act gives sound guidance to the pitfalls of the model provisions. It appears the new laws have been seen by members of the judiciary as a licence to make orders, rather than them being exceptional in nature with there being at least a 100% increase in making of orders in a six month period since introduction of the new Act.

Open Justice

As we have previously argued, any law in this area needs to:

- recognize the need for the administration of an 'open' justice system in recognition of the citizen's democratic right to information; and

- improve the inefficiency and inconsistencies of the current process of issuing suppression and non-publication orders.

We continue to believe the legislation must establish a *presumption* in favour of a right to publication, except in cases of exceptional circumstances, referring to those proposed under the Bill in the "grounds" section (37AG).

The Bill does not do this.

37AG as it is currently drafted merely requires a court to take into account that **a** primary objective of the administration of justice is the need to safeguard the public interest in open justice.

In our submission, 37AG should be amended as set out below.
In contrast, a presumption of access is in line with the common law position and would promote public understanding of and confidence in the justice system.

Wordy and ambiguous

It has been our experience that suppression and non-publication orders issued in the past can be wordy and ambiguous. An emphasis should be placed on the scripting of clear and concise orders to ensure clarity. While legislation may not be able to mandate the use of clear language by the judiciary, perhaps any introduction of legislation can be a platform to introduce standard templates or other tools to assist.

Additional layer of legislation

The Bill does not replace any existing legislation that currently deals with suppression and non-publication orders but merely adds another layer to the existing legislation.

For example there are extensive pieces of legislation dealing with sexual offences and witnesses in those proceedings.

Duplication of this type is undesirable as it does not promote consistency. Since the introduction of the NSW Act we have seen numerous orders being made despite an existing Act prohibiting the publication[1]. However those orders are not only unnecessary (given the existence of a statutory prohibition) but also tend to place a gloss on the statutory prohibition which can create confusion for publishers.

NSW experience – *Court Suppression and Non-publication Orders Act 2010 (NSW)*

The model provisions were implemented in NSW though the *Court Suppression and Non-publication Orders Act 2010 (NSW)* (NSW Act).

The introduction of the NSW Act gives sound guidance to the pitfalls of the model provisions, how it is being applied in practice and how it being extended to inferior courts and tribunals.

[1] 12 July 2012 Order by Justice Rothman and 9 December 2012 Order by Justice Adams both prohibiting identification of children.

Unfortunately, the introduction of the NSW Act has seen an explosion in the making of suppression orders in that State. Over the six month period since its introduction, there has been an increase in orders from 54 in the prior six months to 114 (excluding the trial of a Police officer in which numerous undercover police and other witnesses were called). But we firmly believe this figure is actually higher, given we are aware, that on a number of occasions, the orders are not distributed by the court information officer.

It is inconceivable that all of these orders meet the criteria set out in the legislation including the fundamental criteria that the order is "necessary" (discussed below) indeed at least one was found not to be and several were noted by the Judicial Officer as being made out of an abundance of caution as a statutory prohibition already existed.

The following table contains a breakdown of the orders made in 2011.

State / Territory	Total number of orders	Subject matter that the order related to				
		Identification of Accused/ Witness/ Victim	Personal details other than identity	Evidence/ Submissions/ Documents	Criminal history of the accused	Sex Offenders legislation
New South Wales	**241**	46%	7%	43%	3%	-
Victoria	**644**	41%	11%	71%	2%	5%
South Australia	**157**	64%	5%	31%	4%	-
Northern Territory	**31**	74%	3%	22%	-	-
Western Australia	**3**	100%	-	30%	-	-
Queensland	**1**	100%	-	100%	-	-
Tasmania	No notification process	-	-	-	-	-
Australian Capital Territory	No notification process	-	-	-	-	-
Total	**1077**	50%	9%	58%	2%	3%

Far from being merely anecdotal evidence it is clear that the introduction of the Act has been seen by members of the judiciary as a licence to make orders rather than them being

exceptional in nature with there being a 100% increase in making of orders in a six month period.

Experience also shows that when appealed often the orders are overturned by Appeals Court however few have the resources to embark on an appeal and increasingly economic pressures make it harder for the media to justify an appeal.

At present, judges, especially at trial level, do not necessarily appear to protect or value the open justice principle against the considerable pressures brought upon them by the trial process. It is one thing to say that one accepts and supports open justice, it is another to makes one's decisions supportive of that principle. Judges need to place more weight on the importance of open justice and have a greater reluctance to make a suppression order. Failing that the section which contains the power to make the order should make specific reference to the importance of open justice.

It is apparent that the introduction of the NSW Act has had exactly the opposite effect signalling that making such orders is acceptable.

For this reason alone the extension of power to inferior courts is not supported.

In addition, defence barristers, and unfortunately prosecutors (who ultimately are representing the public's interests) routinely 'push' for suppression orders. Although it might be said that barristers are only acting in their clients' interests and on their instructions, realistically if the culture at the bar was that suppression orders should only be suggested to clients in extreme cases – when they are really necessary - then that would have a significant impact on the number of suppression orders made.

The application of the Act has led to examples in which unworkable orders have been made.

The key triggers for the application of the Act to date appear to have been:

- Prior convictions
- Material perceived by the Judicial officer or Barrister to be Inflammatory
- Vulnerable witnesses
- Publications that appear to be contemptuous

It is important to note that each of these are already the subject of restrictions on publication which are well known by news publishers.

An example of the possible interpretation of the Act was in R v Perish[2] where His Honour Justice Price stated that:

[2] R v Perish; R v Lawton; R v Perish [2011] NSWSC 1101 (11 July 2011)

"Necessary does not have the meaning of "essential" rather it is to be subjected to the touchstone of reasonableness".

This type of approach has seen the use of the Act for orders requiring the removal of material from the internet which as referred to as King Canute Orders given the practical impossibility of enforcing them outside the jurisdiction in relation to material accessible within the jurisdiction. Indeed it appears the practical application of the Act has led to the making of orders that seem convenient, reasonable or sensible to the particular Judicial Officer.

Of course the correct interpretation of "necessary" is that found in the High Court judgement of Hogan v ACC[3] (adopted by the NSW Court of Appeal in Rinehart v Walker[4]) namely:
"As it appears in s.5o necessary is a strong word…(it is) insufficient it be convenient, reasonable or sensible or the result of some balancing exercise."

Specific elements of the Bill

Definitions

To remove any doubt, the definition of “news publisher” should include a reference to wire services.

Section 37 AF Power to make a suppression and non-publication orders

Section 37 AF(1) (b) confers power to suppress or otherwise restrict publication of “information about evidence”. This is a somewhat vague and ambiguous term. It infers that some information other than evidence itself may be suppressed or restricted from publication.

If the intention is that it applies only to evidence then, in our submission, the word “evidence” ought to be sufficient.

In that regard we also note, given the words “disclosure of any of the following information”, that repetition of the word “information” in sub paragraphs (a) and (b) would seem to be redundant.

Section 37 AG Grounds for making orders

Section 37AG needs to be reconsidered carefully given there are a considerable number of problems with this clause.

Our primary concern is that the principle of the public interest in open justice is not given primary position in the court decision making process.

[3] [2010] HCA 21

[4] [2011] NSWCA 403

Section 37AG (1) should be reworded as follows:
(1) A court may make a suppression order or non-publication order on one or more of the following grounds if that ground significantly outweighs the public interest in open justice.

Section 37AG (1) (a) provides that a court may make an order if "necessary to prevent prejudice to the administration of justice". This is different to the usual common law expressions which are "necessary in the interests of the administration of justice" or "necessary for the proper administration of justice." Unless the legislation is attempting to modify or broaden the common law test (which we submit it ought not) then it would be preferable to retain that well known common law wording.

Sub paragraphs 37AG (1)(b) and (c) are very broad and potentially contrary to the fundamental principle that limitations on the open administration of justice are only justifiable if necessary in the interests of/for the proper administration of justice. They should be deleted entirely.

In respect of sub paragraph 37AG (1) (b) it is acknowledged that national security can be relevant to a consideration of what is necessary in the interests of/for the proper administration of justice and hence ground at common law for suppressing or restricting publication of certain information.

We are concerned, however, that the terms of sub paragraph 37AG (1) (b) are not otherwise limited to what is necessary in the interests of/for the proper administration of justice. The legislation therefore seems to represent a significant, unnecessary and unwarranted, expansion of the court's power.

There are two additional issues which we believe should be addressed:

- In deciding whether or not to issue and order, a court ought to be required to consider the availability of alternative solutions, as a means of safeguarding the principle of "open justice.
- The proposed section 37AG does not require the judicial officer to give reasons for imposing a suppression or non-publication order. We are strongly of the view this requirement should be added.

- Although our primary submission is that subsections (b) to (d) of 37AG should be removed from the Bill, if they are to remain, 37AG should be reworded as follows:

1) A court may only make a suppression order or non-publication order on one or more of the grounds specified in subsection (2) if:

   a) that ground significantly outweighs the public interest in open justice; and

   b) there is no alternative to the suppression or non-publication order.

2) Subject to subsection (1), a court may make a suppression order or non-publication order on or more of the following grounds:

a) the order is necessary for the proper administration of justice;

b) the order is necessary to prevent significant prejudice to the national or international security interests of the Commonwealth or a State or Territory;

c) the order is necessary to protect any person from serious harm;

d) the order is necessary to protect a party or witness in criminal proceedings involving an offence of a sexual nature (including an act of indecency) from undue distress or embarrassment.

3) A suppression order or non-publication order must specify the ground or grounds on which the order is made.

4) The court must give reasons for making a suppression or non-publication order at the time of making the order.

Section 37AH Procedure for making of orders

It is positive that section 37AH (3) gives the media standing to be heard on a suppression or non-publication matter.

Sub-section (2) enables an order to be made after the conclusion of proceedings. This would open the possibility of the suppression of information already publicly known at some later date requiring the media to redact any internet publications or library material. This is clearly an impractical proposition. Further evidence to support an application is usually more readily available at the time of trial and any application should be made at that time rather than after the event. Sub-section (2) should be removed.

Section 37AI Interim orders

Section 37AI enables the court to make a suppression or non-publication order without any enquiry into the merits of the application and that those orders remain in place until the application is determined.

This is not the current position. Courts to date have been reluctant to proceed on this basis.

We do not consider there is any justification for a court making an interim order. There is no justification for the making of the interim order. If it is the intention of party to make a suppression or non-publication order it should do so with available evidence as soon as practicable.

In particular there is no time limit placed on the interim order, just that the application must be made as a matter of urgency. This will encourage parties to make the application in the hope it will delay information reaching the public. Further, the arrest of a person wanted for a well-known crime (such as a serial killer) should not be subject to an interim non-publication order until the matter can be heard. The public would be entitled to know that such a person has been arrested as soon as practicable. In the circumstances

the interim orders should not last for any longer than 24 hours. The words “as a matter of urgency” should be removed and replaced with “within 24 hours of the application being made”.

Section 37AJ Duration of orders

In the interests of maximising access to documents for the sake of open justice, we do not support the ability of courts to issue suppression and non-publication orders indefinitely. Orders should be capped with the ability of parties to apply for an extension at the expiration of the order.

Similarly we are of the view there should be the ability for parties to apply for the revocation of a suppression or non-publication order where the circumstances upon which the original order was made have changed or no longer exist.

The proposed legislation omits the sections in the NSW Act which enable either a review or an appeal from the order. These should be included in the Bill.

They are as follows:

> 13 Review of orders
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> (1) The court that made a suppression order or non-publication order may review the order on the court’s own initiative or on the application of a person who is entitled to apply for the review.
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> (2) Each of the following persons is entitled to apply for and to appear and be heard by the court on the review of an order under this section:
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> (a) the applicant for the order,
>
> (b) a party to the proceedings in connection with which the order was made,
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> (c) the Government (or an agency of the Government) of the Commonwealth or of a State or Territory,
>
> (d) a news media organisation,
>
> (e) any other person who, in the court’s opinion, has a sufficient interest in the question of whether a suppression order or non-publication order should have been made or should continue to operate.
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> (3) On a review, the court may confirm, vary or revoke the order and may in addition make any other order that the court may make under this Act.
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> 14 Appeals
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> (1) With leave of the appellate court, an appeal lies against:
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> (a) a decision of a court (the original court) to make or not to make a suppression order or non-publication order, or

(b) a decision by the original court on the review of, or a decision by the original court not to review, a suppression order or non-publication order made by the court.

(2) The appellate court for an appeal under this section is the court to which appeals lie against final judgments or orders of the original court or, if there is no such court, the Supreme Court.

(3) Each of the following persons is entitled to appear and be heard on an appeal under this section:

(a) the applicant for the suppression order or non-publication order,

(b) a party to the proceedings in which the order or decision subject to appeal was made,

(c) the Government (or an agency of the Government) of the Commonwealth or of a State or Territory,

(d) a news media organisation,

(e) any other person who, in the appellate court's opinion, has a sufficient interest in the decision that is the subject of appeal.

(4) On an appeal under this section, the appellate court may confirm, vary or revoke the order or decision subject to the appeal and may make any order or decision under this Act that could have been made in the first instance.

(5) An appeal under this section is to be by way of rehearing, and fresh evidence or evidence in addition to, or in substitution for, the evidence given on the making of the decision may be given on the appeal.

(6) If judgments or orders of the original court are subject to review by another court (rather than appeal to another court), this section provides for a review of the original court's decisions instead of an appeal and in such a case references in this section to an appeal are to be read as references to a review.

Section 37AL Criminalisation of the Breach of the order

This section creates an offence for the contravention of a suppression and non-publication order.

This is a considerable shift from the current law where the breach of a suppression or non-publication order was a contempt and therefore punishable as a contempt rather than as a separate offence.

The effect of the section would be to introduce a new criminal element that is not now available.

We are of the view that a breach should continue to be punishable as a contempt rather than a separate offence.

However, should this section be pursued, we submit that the legislation ought to recognise as a defence to a prosecution for contravention of a suppression or non-

publication order that the person, despite having taking reasonable steps to ascertain whether any relevant order existed, was unaware of the order.

It is acknowledged that the media has a responsibility to ensure it makes reasonable inquiries to ascertain whether any suppression or non-publication orders apply in particular proceedings. Equally, however, the courts have an obligation to ensure that they have appropriate systems in place to ensure that such orders are appropriately communicated to the media.

In addition, we are of the view the proposed maximum penalty for corporations is excessive.

This section is disturbing as it imposes a potential criminal sanction far in excess of the normal penalties usually imposed for contempt of Court. In recent times Courts have not imprisoned persons for contempt other than in the most unusual circumstances where involving repeated and wilful offences. The existing law of contempt is thus sufficient for these purposes. We would support the punishment of a breach as if it were a contempt that would enable a custodial sentence in the most extreme cases but otherwise see this section as being out of step with the norms of sentencing for such offences.

Section 37AL should be reworded as follows:

Where a person does an act or omits to do an act and the act or omission contravenes an order made by the Court under section 37AF, the act or omission may be punished as a contempt of court.