THE UNIVERSITY of ADELAIDE

South Australian Law Reform Institute

Evaluation of the Role and Operation of Suppression Orders in South Australia

Fact Sheet & Consultation Questions

Suppression orders affect accused persons, victims, witnesses, litigants, the courts, the legal profession, the media, and the community - but are we all on the same page when it comes to suppression orders?

Suppression Orders in South Australia

Suppression orders (non-publication orders) are exceptions to the usual 'open court' or 'open justice' principle in that court proceedings are generally held in public, and fair and accurate reporting of proceedings is valued and encouraged. There is a strong public interest in open justice. But it is not an absolute rule and there are exceptions. There will always be tension between the premise of open justice and the use of suppression orders. What is vital is to strike the right balance.

Suppression orders are said to be prevalent in South Australia. Whilst suppression orders are, in many cases, necessary to ensure the right to a fair trial and the proper administration of justice, this must be weighed against the impact on open justice and, in turn, public confidence in the administration of justice.

Whether, and to what extent, are the South Australian Parliament and courts achieving a satisfactory balance between open justice and other competing interests?

Discretionary vs Automatic

Did you know that not all suppression orders are discretionary orders made by the court? That there is a wide range of automatic subject specific suppression orders legislated by Parliament?

Suppression orders in South Australia fall into two broad categories: discretionary orders made by a court and 'automatic' orders which operate by virtue of the particular subject-matter of the proceedings. Discretionary suppression orders are governed by s 69A of the *Evidence Act 1929* (SA) as well as the common law inherent powers of the court. For example, to prevent prejudice to the proper administration of justice. Automatic subject specific suppression orders are governed by statutory provisions across a broad range of different Acts, as specified by Parliament. For example, there are laws to prohibit automatically the publication of the identity of an alleged accused or victim of a sexual offence, and the identity of a child or youth alleged to have committed an offence or the identity of the victim or any other person involved in the proceedings.

Whether or not a particular suppression order is the product of a discretionary order of the court or by virtue of the automatic operation of a statute triggered by the subject-matter of the proceedings is not necessarily apparent without further inquiry into the relevant case.

Looking behind the numbers

In 2020-21, 268 suppression orders were made in South Australia. It was a 20-year high in South Australia and a 2021 tally surpassed only by Victoria. The prevalence of suppression orders in South Australia has previously prompted legislative change in 2007. The 2007 amendments to the *Evidence Act 1929* (SA) had the express purpose of changing the use of suppression orders; Parliament sought to send a strong signal to the courts that they must give more weight to the public interest in open justice and publication. Notwithstanding these amendments, the number of suppression orders in South Australia has returned to, and indeed exceeded, pre-amendment levels. Of particular note is the fact that the 2020-21 tally represents an increase of more than double the suppression orders granted in the preceding year. This trend has continued, with 351 suppression orders made in 2021-22. Significantly, 225 of those orders were made just in the Magistrates Court.

South Australia has many positive features when it comes to suppression orders: an apparent high statutory threshold for the making of discretionary orders; an in-built automatic review mechanism; the power to make interim orders; record keeping requirements; courts-media liaison; notification of the media; standing for the media in applications and appeals; reporting requirements; and automatic subject specific suppression orders. However, the number of suppression orders made in South Australia, notably by lower courts, continues to arouse concerns and is a prevailing and contentious feature of suppression orders in South Australia.

Whilst a higher number of suppression orders itself is not necessarily problematic, it is difficult to assess without a comprehensive inquiry. Other Australian jurisdictions that currently record a similarly high level of suppression orders, namely Victoria and New South Wales, have acted with the respective Attorneys-General initiating comprehensive independent reviews of the suppression order schemes within those States.

Novel challenges posed by the digital age on suppression orders

The digital age poses new and complex challenges for the role and efficacy of suppression orders. The issue of the utility, or rather, futility, of suppression orders is gaining increasing attention and remains an unsettled issue in South Australia, interstate and overseas. Specifically, the operational limits of suppression orders (and takedown orders) across both State and national borders and into the online realm. It has also brought unprecedented expectations of access to information, which bears directly on the community's understanding of and tolerance for suppression orders.

Are we all on the same page when it comes to Suppression Orders?

The effects of suppression orders variously impact accused persons, victims, witnesses, litigants, the courts, the legal profession, the media, and the community. Whilst there will always be tension between the competing perspectives of all interested parties, are such tensions heightened by a lack of understanding and insight into suppression orders, their purpose and the reasons why they are made?

Your input is needed

The South Australian Law Reform Institute (SALRI) is an independent non-partisan law reform body based at the University of Adelaide Law School. As part of SALRI's comprehensive evaluation of the role and operation of suppression orders in South Australia, SALRI is seeking to undertake extensive consultation with the courts, the legal profession, the media, other interested parties and agencies, and the community at large, including both metropolitan and regional areas. SALRI is committed to an active and inclusive consultation process and wants to hear from you about your knowledge of, experience with and your views on the role and operation of suppression orders. SALRI is particularly interested about ways in which the present law and practice can be improved. Your experiences and views are important.

SALRI has several consultation questions which are detailed below. You are welcome to answer all questions or only those questions that are of interest to you. Your input can be on a de-identified basis if you prefer.

There are three ways that you can be involved:

1. Fill out the survey available at https://www.surveymonkey.com/r/Y68DD35;
2. Send us a written submission or letter (formal or informal) to salri_supporders@adelaide.edu.au; or
3. Attend an interested party roundtable discussion (by invitation only).

SALRI's consultation process will open on 31 March 2023 and close on 30 September 2023.

Consultation Questions

1. What is your perception of the role and operation of suppression orders in South Australia?
2. Do you think too many suppression orders are made in South Australia? On what do you base this?
3. What reliance should be placed on the total number of suppression orders made? Why?
4. Who do you think are best placed to make suppression orders? Parliament or the courts, or a combination of both?
5. What do you think should be the criteria for the making of suppression orders?
6. What issues, if any, do you identify with the law, procedures and/or practices associated with discretionary orders (under s 69A of the *Evidence Act 1929* (SA) and the common law) in South Australia?
7. What issues, if any, do you identify with the law, procedures and/or practices associated with automatic subject specific orders in South Australia?
8. Do you consider the role and operation of suppression orders in South Australia to vary between metropolitan and regional areas? Why?
9. How do you consider the suppression order framework in South Australia to be capable of meeting the challenges posed by the proliferation of technology and the internet (for example, online anonymous publications which are widely distributed, spanning multiple jurisdictions)?
10. Do you consider there to be a lack of knowledge and understanding surrounding suppression orders? If so, is it on the part of the courts, the legal profession, the media and/or the community? How might this be rectified?
11. Do you have any further comments or wish to raise any other issues relating to suppression orders or, more generally, the modern right to a fair trial before an impartial jury?

***Please note*: SALRI does not, and cannot, provide legal advice to individuals. If you are in need of legal advice, we encourage you to speak to a lawyer and/or contact a community legal service.**

The LAW FOUNDATION of SA Incorporated

SALRI acknowledges the assistance of the Law Foundation of South Australia Inc in providing grant funding for this project.

SOUTH AUSTRALIAN LAW REFORM INSTITUTE

31 March 2023