SUBMISSION TO VINCENT OPEN COURTS ACT REVIEW
REMAINING LEGISLATIVE RECOMMENDATIONS IMPLEMENTATION OPTIONS CONSULTATION PAPER

29 NOVEMBER 2019

Australia's Right to Know coalition of media organisations welcomes the opportunity to make this submission to the *Vincent Open Courts Act Review – remaining legislative recommendations implementation options Consultation Paper* (the Paper).

This submission follows our original submission to the Vincent Review of the *Open Courts Act (Vic)*.

We believe it is important to reiterate here an important reference point regarding open justice which was included in our original submission to the Vincent Review. That is:

A starting point that open justice is important is inadequate. The test stated in both the Act and repeatedly throughout the common law is that suppression orders are a departure from status quo of open justice which must be shown to be necessary. Judges and magistrates must adopt a presumption in favour of reluctance to suppress any information before the Court unless arguments to the contrary have been rigorously tested and they are convinced otherwise. The principle should prevail over the individual case in all but exceptional circumstances.

Our response to the Paper follows.

RECOMMENDATION 6 – REQUIREMENT TO PROVIDE WRITTEN REASONS FOR THE MAKING OF SUPPRESSION ORDERS

Recommendation 6 of the Review said:
That, in each matter in which a suppression order is made, the court or tribunal be required to prepare a written statement of its reasons for the order, including the justification for its terms and duration. Save for restrictions and redactions reasonable required to effect the purpose and efficacy of the order, these reasons should be publicly available.
Government response: Support.

Question 1 – In what timeframe should the written statement of reasons be prepared? Should there be a timeframe?

ARTK response – It is our strong position that a written statement of reasons be provided. It is untenable that weeks, perhaps even a month, could pass before a statement of reasons be available for the application of a suppression order. We believe an appropriate manner of dealing with unacceptable delays in a statement of reasons being available would be for the judge and/or magistrate to be required to deliver the statement of reasons ex tempore and for a transcript of the statement to be made available later that day. It is well recognised that there is a public interest in contemporaneous fair and accurate reporting of proceedings. By not requiring written reasons, even on transcript, to be available later the same day (or the following day) will have an adverse effect on contemporaneous reporting, as it will necessarily prevent an immediate appeal of the decision.

Question 2 – Should a different procedure be applied to the preparation of the written statement of reasons in some jurisdictions, namely the Magistrate's Court and the Victorian Civil and Administrative Tribunal (**VCAT**)?

ARTK response – We are of the view that the same procedure should be applied across all jurisdictions, including the Magistrate's Court and the VCAT.

RECOMMENDATION 8 – IMPROVING THE ABILITY TO CHALLENGE A SUPPRESSION ORDER BY PROVIDING MORE TIME

Recommendation 8 of the Review said:
That all suppression orders should be treated as interim for a period of 5 days to enable interested parties to present submissions as to their necessity or terms. In the absence of any such challenge, the orders would continue in effect for the period and terms stated.
Government response: Support in principle.

Question 3 –

a) Where there has been no advance notice of the making of a suppression order, should a further hearing be required (rather than the current process under which there is an opportunity to challenge the order but no mandatory further hearing)?
b) If adequate advance notice of the making of the order has been given to interested parties should a further hearing be required?
c) Should the current practice of news media organisations receiving notice of orders once made be legislated in the Act?

ARTK response – It should be clarified that the interim period is 5 *business* days. As far as possible, it should be the case that adequate advance notice be provided for the application and making of suppression orders. Notice of application for orders - including timeframes for that advance notice and grounds on which the order is sought - and notice of the making of an order -including timeframes within which this must occur and the reasons for the making of the order - must be legislated in the Act.

Question 4 – Are there ways to improve the advance notice of applications for news media organisations or for the parties? Should the advance notice be given earlier? Should more details be included, such as the grounds on which an order is sought?

ARTK response – Advance notice of applications should be provided, as early as practicable, and that notice must include the grounds on which an order is sought, and a brief statement of facts relied upon. The notice period is currently not adhered to more often than it is adhered to, and judges too readily allow parties to dispense with the notice period and have the application heard immediately. We suggest that the grounds for dispensing with the notice period be restricted to circumstances where the applicant could not have known the basis for the application with sufficient time to comply with the notice period.

Questions 5 – Should the Act be amended to clarify that the notice requirements (under sections 10 and 11) extend to applications for an extension or variation of a suppression order (under section 15)?

ARTK response – Yes: the Act must be amended to be clear that it is a requirement that notice requirements include applications for an extension or variation of a suppression order, including timeframes and reasons being required for applications for extension or variation.

In addition to the comments above, it is important that attention also be given to the timeframe of suppression orders being the minimum possible length of time to give effect to the purpose for which it is made. Judges should not assume that orders should automatically be made for 5 years, which is the longest timeframe available.

We recommend that a 6 monthly audit process be undertaken – at least for the first 2 years of the operation of the already legislated amendments – regarding applications for suppression orders, the grounds on which the application is made, the record for the granting – or not – of the applications including reasons, and timeframe if the application was granted. This should be reported publicly to shine a light on progress of the changes made by the Vincent Review. It also enables prompt identification of continuing issues, and further changes as may be required. This audit process should also include a review of orders which do not comply with the Act, or predate the Act, which did not specify an expiry date and are therefore still unintentionally or unnecessarily in effect.

RECOMMENDATION 10 – REMOVING THE DISTINCTION BETWEEN 'PROCEEDING' AND 'BROAD' SUPPRESSION ORDERS

Recommendation 10 of the Review said:
The *Open Courts Act* should be simplified by removing the unnecessary distinction between broad and proceeding suppression orders.
Government response: Support.

Question 6 – Should the terminology of 'broad' and 'proceeding' suppression orders be removed from the Act, with the existing powers to make suppression orders otherwise substantially retains in their current form, and moved into one part of the Act?

ARTK response – No, there is utility in maintaining the distinction between the different types of orders. Without the distinction, and if that distinction is not made clear by the judge when the order is made, there is the propensity for orders which intend only to suppress information derived from a proceeding to unintentionally act as a broad suppression order and therefore suppress more information than is necessary.

One example may be that information is suppressed in the proceeding of one accused person to protect the trial of a second accused person. If that order is not specified as a proceeding suppression order, therefore limiting the order to information derived from the proceeding involving the first accused, it may unintentionally suppress publication of the same information during the proceeding of the second co-accused even where suppression of that information is not necessary.

RECOMMENDATION 14 – LIMITING SCOPE TO MAKE ORDERS SUPPRESSING THE IDENTITY OF WHEREABOUTS OF PERSONS UNDER THE *SERIOUS OFFENDERS ACT 2019*

Recommendation 14 of the Review said:
That section 184 of the *Serious Sex Offenders (Detention and Supervision) Act 2009** should be amended to restrict the making of suppression orders concealing the identity or whereabouts of persons subject to supervision under [that Act]. In so restricting the making of suppression orders, the Act should continue to have regard to the ramifications of disclosure, including the personal safety of individuals.

Government response: Support in principle

*Now repealed, and replicated in section 279 of the *Serious Offenders Act 2018*. This Act applies to both serious sexual and violent offenders.

Question 7 – Which option/s should be implemented to give effect to this recommendation? What further details might need to be included?

ARTK response – Option 5 is the only option that should be considered. Suppression orders should always be restricted. They should be the exception not the 'norm' and should only apply in circumstances where it is necessary, in this case regarding the offender's safety or address or other unacceptable risks. It should also be made clear in the legislation that the default position is that no suppression order ought to be made, and that presumption is to ensure community safety. That presumption should only then be displaced if it is necessary to protect the safety of any person.

Question 8 – Are there any other legislative options that should be considered to implement this recommendation?

ARTK response – We note here that suppression orders, if granted here, must also include reasons and timeframes and should be subject to audit procedures as we have outlined previously in this submission. There should also be a requirement that any order made under section 184 must be made on sufficient credible evidence of danger to safety. There is always some level of risk to safety of a person who is convicted of a sexual offence, and it should be made clear that the evidence must show some actual risk, not the general theoretical risk which would apply to all offenders.

RECOMMENDATION 17 – PROTECTING THE IDENTITY OF VICTIMS EARLY IN THE CRIMINAL PROCESS

Recommendation 17 of the Review said:
That it becomes mandatory at initial bail hearings consequent upon the laying of charges in relation to alleged sexual or family violence criminal offences for an interim suppression order to be issued, confining publication of reports to the laying of charges and the fact and date of the hearing. This order would remain in effect for 5 working days. Alternatively, the Judicial Proceedings Reports Act should be amended to the same effect.
Government response: Support in principle.

Question 9 – Should interim suppression orders be mandatory under the Act at initial bail hearings consequent upon the laying of charges to alleged sexual or family violence criminal offences?

ARTK response – We do not support such an approach. We note the South Australian Government is currently pursuing changes to laws in that state to the automatic statutory suppression of details concerning perpetrators of alleged sexual offences. In 2019 it is very difficult to see any reasons why automatic suppression, either by way of statute or mandatory orders, should be considered in these circumstances. No other crime attracts this formed of closed justice.

It is more appropriate for a party to make an application for a suppression order if it is required and the judge/magistrate to have to make a decision based on necessity which is recorded, rather than a default suppression order be applied. That will allow proper considerations for the individual circumstances of each case and will allow scrutiny regarding those decisions. Although the Report found that victims groups generally suggested that there was a greater scope for victims' interests to be given regard', that does not necessarily mean that it's in each victim's interest for an automatic suppression order to be made. It may be that some victims support public scrutiny of the Court process and wish the public to know those details. In order to give effect to the concern of victims' groups, each matter should therefore be considered on its merits and no automatic suppression order or legislative prohibition should apply.

We note there are already statutory restrictions relating to the complainant in alleged sexual offences.

Question 10 – Should there be a statutory restriction on publication at initial bail hearings consequent upon the laying of charges in relation to alleged sexual or family violence criminal offences?

ARTK response – We do not support such an approach.

RECOMMENDATION 18 – INVOLVING THE PUBLIC INTEREST MONITOR IN ASPECTS OF THE SUPPRESSION ORDER PROCESS

Recommendation 18 of the Review said:
That the Public Interest Monitor (PIM) receive additional funding and resources necessary to perform the following functions:

1) The Monitor should be empowered, if requested by the judge to appear as contradictor, to make submissions and ask question when the judge is determining whether orders should be made under the Open Courts Act, on what grounds and the faming of their scope.
2) Orders, once made, can be referred to the Monitor for consideration by interested parties to enable the independent consideration of the needs, terms and duration of the order while maintaining the security of the underlying information. The Monitor's decision whether or not to pursue the review of an order is final.
3) If it is considered necessary in the public interest to intervene, the Monitor should be able to seek the review of the order by the judge or prosecute an appeal
4) The Monitor would report annually to the Attorney-General on the operation of the Open Courts Act.

Government response: Subject to further consideration

Question 11 – Is the PIM the appropriate agency to perform functions specified in Recommendation 18 (i.e. court-appointed contradictor, reviewer, and annual report functions)?

ARTK response – As outlined previously in this submission we want to see material changes to the application for and issuing of suppression orders, including a robust audit, report and review process.

As we raised in our previous submission, it is unrealistic for media company representatives to operate as the challenger to the issuing of all suppression orders. Rather, the process of application and issuing of suppression orders requires a more disciplined approach – including timeframes for notification to enable media companies to challenge the application for and issuing of warrants. However, it cannot and should not be the case that media companies are the check-and-balance on the system.

Having said that, there may be a role for a Public Interest Monitor in challenging the application for and issuing of, appeal of suppression orders in instances where it is not possible for media companies to perform that role if media companies instruct the PIM to do so. In which case it must be stipulated that the PIM appear as a contradictor, acting under instruction of the media company or other third party – always as contradictor to the order being made.

Question 12 – Should the PIM be given <u>all</u> of the functions specified in Recommendation 18 (i.e. court-appointed contradictor, reviewer, and annual report functions)?

ARTK response – We do not support the concept of a court appointed contradictor. We are also of the view that there's a conflict between the role we outline above for the PIM functioning as per our outline above and the 'reviewer' function in the Paper.

Question 13 – Alternatively, should the PIM be given the court appointed contradictor and annual report function, but not the reviewer function?

ARTK response – If the PIM functions as we have outlined this should be the focused function of the PIM.

Question 14 – If the PIM is given the annual report function, what specific matters should be covered in the PIM's annual report to the Attorney-General on the operation of the Act?

ARTK response – An annual report function – or more specifically a 6-monthly audit and report as we have recommended – should be undertaken by an independent party to ensure robustness of reporting and analysis.