



COMMERCIAL TELEVISION AUSTRALIA

**PARLIAMENT OF SOUTH AUSTRALIA
LEGISLATIVE REVIEW COMMITTEE**

**INQUIRY INTO SECTION 69A OF THE
EVIDENCE ACT 1929 (SA)**

**SUBMISSION BY
COMMERCIAL TELEVISION AUSTRALIA**

13 JUNE 2003

TABLE OF CONTENTS

Table of Contents.....	2
1. Introduction	3
2. Background of suppression orders: competing policy considerations.....	5
3. Section 69A.....	6
3.1 History of section 69A	6
3.2 1989 review of section 69A: the Second Reading Speech	6
3.3 Current wording of s.69A	7
4. Comparative legislation and application of legislation.....	9
4.1 Legislation and its application in other Australian jurisdictions	9
4.2 Legislation in other Commonwealth jurisdictions	10
5. Factors to be considered.....	15
5.1 Principle of open justice	15
5.2 Disadvantages of suppressing information.....	15
5.3 Contempt principles provide protection.....	15
5.4 Legislative safeguards already in place	16
5.5 Adequacy of current wording of section 69A	16
5.6 Application of s.69A by Courts	17
6. Summary of submissions.....	19

1. INTRODUCTION

The Legislative Review Committee has requested that the public make submissions in relation to section 69A of the *Evidence Act 1929 (SA)* following a referral from the Legislative Council. The Legislative Review Committee has been asked to inquire into and report on the operation of section 69A and, in particular, the effect of the publication of names of accused persons on them and their families who are subsequently not convicted or not found guilty of any criminal or other offence.

This submission is made by Commercial Television Australia Limited, representing all of the commercial free to air television broadcasters in Australia. Commercial Television Australia thanks the Committee for the opportunity to make this submission.

It is submitted that a review of the terms of s.69A of the *Evidence Act* is unnecessary. Substantial changes were made to s.69A in 1989 following a comprehensive review of the legislation and considerable debate by Parliament. The intention of Parliament at the time of amending s.69A in 1989 was to formally recognise the rights of the news media to publish information in relation to Court proceedings to ensure there is open justice, which is valued so highly by our democratic society.

A blanket suppression of the name of an accused is unwarranted. It is a radical departure from established principles of open justice which have been historically tested. It disregards accepted principles and imposes restrictions with no regard to individual circumstances.

It is further submitted that no changes should be made to the wording of section 69A. The current wording of s.69A recognises the competing policy considerations of the public interest in having a system of open justice and transparency in our legal system while ensuring that there is proper administration of justice and that undue hardship is not suffered by certain persons as a result of proceedings before the Courts.

The public have a right to attend open Court proceedings. The public and media have a consequential right to discuss and report such proceedings which are fundamental to our democratic and constitutional freedoms. Without the unfettered media reporting of Court proceedings, there is no effective dissemination of that information to the public.

In a real sense, the media stand in the public's shoes and allow the public to scrutinise the legal system and obtain information on the administration of justice. There is no evidence that this role is or has been abused. In any year, the media is involved in the reporting of many thousands of trials and Court hearings in a manner which is accurate fair and in the public's interest.

There already exists a comprehensive body of legislation and case law aimed at preventing undue hardship or interference with the administration of justice, such as to provide an appropriate balance. This balance already favours and safeguards the integrity of the administration of justice. Indeed the most recent study into juries in New South Wales concluded that they are "less vulnerable to bias in the reporting of trials than is often supposed by judges and legal practitioners". There is no basis for treating other members of the public differently.

Any further reporting restriction is superfluous in light of the requirements of section 71B of the *Evidence Act*. If a report of proceedings of someone who is ultimately acquitted is made, the person by whom the publication was made is required by law to publish as soon as practicable after the determination of the proceedings, a fair and accurate report of a result of the proceedings. Further, this report must be published with reasonable prominence

having regard to the prominence given to the earlier report. The Committee must proceed on an assumption that there will be compliance with s.71B. It is a legislative requirement and the consequence of failure to comply with it is prosecution.

The presumed detrimental effect of reporting the identity of an accused on an accused or their family is outweighed by:

- the concept of open justice
- the public's strong and legitimate interest in knowing who is facing criminal charges
- the public's undoubted acceptance and the administration of justice insistence that a person is innocent until proven otherwise. Proposals to further restrict publication assume that a person is guilty until proven innocent. Abandonment of the former presumption for a tacit acceptance of the latter will have significant implications for the judicial system
- the community's interest in the publication of material relating to a crime including an accused's name so that potential witnesses may approach authorities with relevant information and can observe and test the integrity and robustness of the prosecutorial system
- the usefulness of such reports to dispel rumour and innuendo among the community with respect to an accused or others.

Any further restrictions on the reporting of an accused's name would interfere with the important legislative acknowledgement inserted into the *Evidence Act* in 1989 regarding the media's right to publish information concerning Court proceedings. This acknowledgement is entrenched in the common law.

The practical result of reporting restrictions would inevitably be a reduction in Court reports and the gradual dismantling of dedicated Court reporting resources. Given the important role performed by the media in disseminating this information to the public, this would be a retrograde step.

There is, therefore, no justifiable basis for the existing provisions to be amended or expanded to introduce automatic suppression of name or identity.

There is, however, a basis for concern regarding the manner in which the Courts in South Australia have been applying s.69A in recent years. There appears to be a growing trend to impose suppression orders out of an abundance of caution rather than because the circumstances justifying the grant of an order outweigh the public interest in publication of information related to court proceedings, and the consequential right of the news media to publish such information..

There is also a basis for concern regarding the manner in which orders are made and the ability of the public and media to ascertain the existence, terms and meaning of that order.

If, notwithstanding the public policy considerations against the extension of the scope and operation of suppression orders in South Australia, an amendment to the suppression order provisions is contemplated, any proposed amendments should be the subject of public scrutiny and debate.

2. BACKGROUND OF SUPPRESSION ORDERS: COMPETING POLICY CONSIDERATIONS

A suppression order is an order made by a Court which prohibits the publication of certain information in relation to legal proceedings – eg evidence or specified evidence, an account or report of any evidence, the name of a party or witness and any other material which may identify such a person.

There are several competing public policy considerations which need to be taken into account when making a suppression order.

The first is the principle of open justice and a transparent legal system. It is a fundamental principle of our legal system and democratic society that justice should be conducted publicly. That is, the public has a right to know about the workings of the Courts and proceedings before the Courts. This goes hand-in-hand with the right of the media to publish such information.

The second policy consideration is ensuring the proper administration of justice and the right to a fair trial. It is also necessary to prevent undue hardship to certain persons. For example, witnesses and children are recognised as categories of persons who need to be protected by suppression orders.

These competing policy considerations need to be balanced by the Courts in deciding whether or not to make a suppression order.

Commercial Television Australia is concerned that the Issues Paper fundamentally misstates the test in s.69A. The paper states (at paragraph 4 page 3) that *“If a suppression order would ensure the proper administration of justice and prevent undue hardship, the right of the media to publish is of secondary importance”*.

The Committee seems to be proceeding on the assumption that a suppression order is made once issues of administration of justice or undue hardship arise. On the contrary, that is simply the first step, not the basis for an order.

If administration of justice or hardship issues arise, the Court must then proceed to consider whether those issues are of sufficient significance to outweigh the factors in s.69A(2). The starting point is that they are not. The applicant for the order must displace that presumption.

The Committee's description of the test incorrectly puts the public & media's interests second in line to proper administration and undue hardship considerations when the test is actually a balancing exercise where the suppression order can only be made if the Court is "satisfied that the prejudice to the proper administration of justice or the undue hardship, that would occur if the order were not made should be accorded greater weight" than the public interest and the media's right to publish which must be given substantial weight. (see s.69A (2)(b)).

3. SECTION 69A

3.1 HISTORY OF SECTION 69A

The suppression order provisions have taken different forms and been the subject of considerable discussion over the years. The current manifestation dates from 1989. At that time, the very issues being considered by the Committee were raised and were the subject of extensive debate in Parliament.

3.2 1989 REVIEW OF SECTION 69A: THE SECOND READING SPEECH

Prior to 1989, the Court was empowered to make a suppression order where it considered it desirable in the interests of the administration of justice, or in order to prevent undue hardship to any person.

In relation to the administration of justice ‘limb’, King CJ observed in *G v The Queen*¹ that:

“The width of this expression requires no emphasis. It comprehends every aspect of the administration of justice and is obviously intended to confer on the Courts the widest of discretions.”

In 1989, a comprehensive review of s.69A was undertaken which involved considerable debate in Parliament. Following this, significant amendments were made to s.69A. In this review, it was recognised that the system of suppression orders that was in place at the time was unsatisfactory for several reasons. First, the Government recognised that the law operated inconsistently because of the broad discretion to suppress and that as a result, suppression orders were often made in inappropriate cases. Secondly, suppression orders were believed to give rise to rumour and speculation. Thirdly, the terms of some suppression orders were believed to be far too wide, with even the reasons for suppression being suppressed in some instances. The Government was concerned about the quality of suppression orders being made and the bases upon which they were being made. Finally, it was recognised that South Australian legislation should be more in line with that of other States.

In its review of suppression orders, the Government was of the opinion that the Court must be satisfied on the balance of probabilities that a suppression order ought to be made, rather than considering such an order merely “desirable”. That is, an objective, proof-based level was introduced. The Bill recognised that the sole basis for making a suppression order would be to prevent prejudice to the proper administration of justice.

The rights of the news media to publish relevant material were formally recognised by the Government as a factor that should be considered by the Courts and enshrined in legislation. The Bill recognised that the Courts should only be able to make a suppression order if satisfied that grounds exist which justify subordinating the right of the news media to publish relevant material.

It was recognised that the courts give paramountcy to a fair trial and if there is threat to a fair trial, the courts already have the power under existing law to deal with that. The issue of blanket suppression orders was debated, as it had gained support in South Australia. In relation to blanket bans on the reporting of names, the Government was of the opinion that this only considers the effect on the accused and ignores the interests of the wider

¹ (1984) 35 SASR 349.

community. In addition, the suppression of a name may lead to speculation and rumour concerning other members of a relevant group.

The Government emphasised the fundamental aspect of our justice system that Courts are open to the public and that there is a public right to and interest in reporting of the workings of Courts, provided that the proper administration of justice is not thereby prejudiced.

It was also recognised that in South Australia, a judicial culture existed in which judicial discretion was exercised much more broadly than in other States, even though the terms for granting suppression orders in other States were quite similar to those in South Australia.

The concerns referred to above were taken into consideration and amendments were enacted so that suppression orders could only be made where, if such an order were not made, prejudice to the proper administration of justice would outweigh the considerations favouring publication.

3.3 CURRENT WORDING OF S.69A

As it currently stands, s.69A allows the Court to make a suppression order to prevent prejudice to the proper administration of justice or to prevent undue hardship to an alleged victim of crime, a witness or a child. The Court must give substantial weight to the consideration of the public interest in the publication of information related to court proceedings and the consequential right of the news media to publish such information. The Court may only make a suppression order if satisfied that the prejudice to the proper administration of justice or undue hardship that would occur if the order were not made outweighs the public interest considerations.

In *Cheatle and Sturdy v Davy*², Bollen J made it clear that the phrase undue hardship does in fact mean something more than the ordinary hardship to potential witnesses or associates of the accused which might be expected to follow from involvement in legal proceedings.

In *G v The Queen*³, King CJ stated that:

“In most cases... it cannot be shown that the publication of the name will add very much if anything to the distress and suffering which those close to the accused will suffer from the knowledge that he has been charged and that that fact is known or will soon be known, irrespective of publication, to his friends and close acquaintances. Cases must be rare in which the added factor of media publicity would cause significantly additional distress or physical or mental harm.”

The Act no longer includes reference to ‘undue hardship’ to the accused. This signalled a significant change in the regime. In *Re F*⁴, the implications of this change were considered. King CJ concluded that the structure of the section and the legislative history combined to refute any argument that hardship to the accused may still be regarded as a ground for suppression under the administration of justice limb. However, he went on to point out that considerations which are relevant to some other aspect of prejudice to the proper administration of justice are not to be disregarded simply because they disclose hardship to the accused⁵.

² (1989) 51 SASR 155.

³ (1984) 35 SASR 349 at 352.

⁴ (1989) 51 SASR 141.

⁵ Above, at 147.

In the recent Snowtown suppression decision⁶, Martin J confirmed that the concept of the “proper administration of justice” is a wide one and obviously includes the right of every accused to a fair trial⁷. As Martin J put it, to create a risk that the fundamental right to a fair trial will not be achieved is to prejudice the proper administration of justice. In the context of suppression of the details of committal proceedings, the distinction may be illustrated. The mere fact that publication of the identity of any accused will cause a stain on his or her reputation, even in the event of subsequent acquittal, is not a reason for granting an order. However, if publication of the details of the offence would prejudice potential jurors to an extent not remediable by other means, then the ‘proper administration of justice’ may weigh in favour of suppression.

Courts were a little more circumspect in exercising their discretion in favour of suppression orders following the 1989 amendments. However, in recent years, the Courts have begun to grant suppression orders more readily⁸ so that numbers have crept up to levels exceeding those prior to the 1989 amendments. This is notwithstanding the balancing act introduced by sub-section 69A(2).

⁶ *Advertiser Newspapers v Bunting* [2000] SASC 458.

⁷ Above, at para[19]. See also Doyle CJ in *Advertiser Newspapers v V* [2000] SASC 366.

⁸ Total suppression orders: 1999/2000: 684; 2000/2001: 823; 2001/2002: 736; 2002/2003: 628 – Source: Courts Administration Authority

4. COMPARATIVE LEGISLATION AND APPLICATION OF LEGISLATION

4.1 LEGISLATION AND ITS APPLICATION IN OTHER AUSTRALIAN JURISDICTIONS

Australian legislation regarding the power of the Courts to suppress the publication of information is based primarily on the “proper administration of justice” requirement. Despite the fact that there is no express recognition of the public's right to know or be informed of the Court's deliberations, the incidence of suppression orders in other States and Territories is significantly lower than in South Australia. Orders are only considered to be appropriate in the relatively few exceptional cases where interference by the Court with normal processes is warranted.

Examples of comparative legislation are set out below.

4.1.1 Australian Capital Territory

Section 83 of the *Evidence Act 1971* (ACT) states that:

- (1) *If it appears to a court that –*
- (a) *the publication of evidence, given or intended to be given, in a proceeding before that court, is likely to prejudice the administration of justice; or*
 - (b) *in the interests of the administration of justice, it is desirable that the name of a party to, or a witness, or intended witness, in such a proceeding be not published;*

the court may, at any time during or after the hearing of the proceeding, make an order –

- (c) *forbidding the publication of the evidence or a specified part of the evidence, or of a report of the evidence, either absolutely or subject to any conditions that the court specifies or for any period that is specified; or*
- (d) *forbidding the publication of the name of such a party or witness.*

4.1.2 Victoria

Section 18 of the *Supreme Court Act 1986* (Vic) provides that the Court may make an order prohibiting the publication of a report of the whole or any part of a proceeding or of any information derived from a proceeding. Section 19 provides that an order under section 18 may be made if the Court considers it necessary to do so in order not to prejudice the administration of justice or endanger the physical safety of any person.

Section 126 of the *Magistrates' Court Act 1989* (Vic) provides that the Court may make an order prohibiting the publication of a report of the whole or any part of a proceeding or of any information derived from a proceeding or an order prohibiting the publication of any specified material or any material of a specified kind relevant to a proceeding in the Court in order not to prejudice the administration of justice or endanger the physical safety of a person.

4.1.3 Western Australia

Section 635A(1) of the *Criminal Code* (WA) states that unless expressly provided otherwise, the court room or place of hearing where a trial or other criminal proceeding is conducted is an open and public court to which all persons may have access so far as is practicable. Subsection (2) provides that a Court, it satisfied that it is necessary for the proper administration of justice to do so, may make an order prohibiting the publication outside the court room of the whole or any part of the evidence or proceedings, or an order prohibiting the publication of the whole or any part of the evidence or proceedings except in accordance with the directions of the Court.

4.1.4 Northern Territory

Section 57 of the *Evidence Act* 1939 (NT) provides that:

(1) *Where it appears to any Court –*

(a) ...

(b) *that, for the furtherance of, or otherwise in the interests of, the administration of justice, it is desirable to prohibit the publication of the name of any party or intended party to or witness or intended witness in, such proceeding,*

the Court may, either before or during the course of the proceeding or thereafter, make an order –

(i) ...

(ii) *forbidding the publication of the evidence, or any specified part thereof, or of any report or account of the evidence, or any specified part thereof, either absolutely or subject to such conditions, or in such terms or form, or in such manner, or to such extent, as the Court approves; or*

(iii) *forbidding the publication of the name of any such party or witness.*

4.2 LEGISLATION IN OTHER COMMONWEALTH JURISDICTIONS

There is no precedent or equivalent for an automatic, across-the-board suppression of name in comparable Commonwealth jurisdictions.

4.2.1 United Kingdom

There are automatic reporting restrictions in relation to the following:

- victims of sexual offences (*Sexual Offences (Amendment) Act* 1992)
- the reporting of all rulings made at pre-trial hearings in the Crown Court together with orders for discharge and variation of such rulings and application proceedings for ruling and orders (ss.41 and 42, *Criminal Procedure and Investigations Act* 1996) – these restrictions can be lifted in whole or part where the court is satisfied that it is in the interests of justice to do so
- preparatory hearings heard by a judge of the Crown Court (ss.37 and 38, *Criminal Procedure and Investigations Act* 1995) – the restrictions can be lifted in whole or in part

by the Crown Court, Court of Appeal and the House of Lords if satisfied that it is in the interests of justice to do so.

Despite the above, the media is still able to publish the identity of the court; the name of the judge; the names, ages, addresses and occupations of the accused and witnesses; the offence(s) with which the accused is charged or a summary; the names of counsel and solicitors in the proceedings; bail arrangements; whether legal aid has been granted; and where and when proceedings have been adjourned to if adjourned.

Magistrates Court Act 1980

- the media can report or broadcast:
 - (a) the identity of the court and the names of the examining magistrates;
 - (b) the names, addresses and occupations of the parties and witnesses and ages of the accused and witnesses;
 - (c) the offence(s) or a summary of them with which the accused is charged;
 - (d) the names of the legal representatives engaged in the proceedings;
 - (e) any decision of the court to commit the accused or any of them for trial and any decision of the court on disposal of the case of any of the accused not committed;
 - (f) the charge(s) on which the accused, or any of them have been committed and the court to which they have been committed;
 - (g) the date and place to which committal proceedings have been adjourned, if adjourned;
 - (h) any arrangements as to bail on committal or adjournment;
 - (i) whether legal aid was granted
- in relation to committal proceedings for indictable offences, there are automatic reporting restrictions – however, once a person is discharged or committed for trial, the court gives notice of the person's name, address, age and the offence with which he/she was charged and whether he/she has been discharged or committed for trial
- in addition, full reports of committal proceedings can be published after the court has decided not to commit the accused, after the conclusion of the accused's trial, or as part of a report of a summary trial relating to the accused whom the court tries summarily (s.25)
- in relation to family proceedings before the Magistrates Court, the media can lawfully print, publish or include in programme services the names, addresses and occupations of the parties and witnesses; the grounds of the application and concise statement of charges, defences and counter-charges; submissions on any point of law and decisions of the court on such points; and the decision of the court and any observations made by the court in giving the decision.

In addition, it is the practice of the Magistrates Court for court lists and register of judgments to be made available to the media by courts which contain, as a minimum, each defendant's

name, age, address and, where known, his/her profession and the alleged offence. There is also an announcement in open court of the names and addresses of those involved in court proceedings (to enable the precise identification to distinguish a defendant from other persons in the locality).

The Magistrates Court also has the power in appropriate cases to impose temporary or permanent restrictions on the media's reports. However, the authorities emphasis the paramount importance of the open justice principle, the exceptional nature of any restrictions and the criteria safeguarding that principle which must be satisfied before any such reporting restriction can be imposed.

Children and Young Persons Act 1933

- the public is restrained from attending Youth Court proceedings, however, bona fide representatives of a news-gathering or reporting organisation may attend (s.47)

Youth Justice and Criminal Evidence Act 1999

- there is a prohibition on the publication of the name, address, school, workplace or picture of a juvenile suspect once a criminal investigation has begun if the publication of any of these would lead to his/her identification
- gives Courts the power to ban the identification of an adult witness if his/her evidence or cooperation would be diminished by fear or distress and that his/her evidence or cooperation would be improved if his/her identity were protected (s.25)
- the Court can make a reporting direction that no matter relating to the witness shall be published during his/her lifetime if it is likely to lead members of the public to identify him/her as being a witness in the proceedings
- in making an order referred to above, the court must consider whether the making of a reporting direction would be in the interests of justice and consider the public interest in avoiding the imposition of a substantial and unreasonable restriction of on the reporting of proceedings
- allows a Court to make special measures and directions to ease the strain on vulnerable or intimidated witnesses – eg excluding the public

Children and Young Persons Act 1933

- the Courts have discretion to exclude the public, but not to exclude bona fide representatives of newspapers, broadcasters and news agencies during the testimony of witnesses aged under 18 in proceedings relating to an offence against, or conduct contrary to, decency and morality (s.37)

Criminal Justice Act 1990

- reports of an application for dismissal of charge are restricted to identity of court and judge; names, ages, addresses and occupations of accused and witnesses; offences with which accused is charged; names of counsel and solicitors; bail arrangements; whether legal aid granted; date and place of adjournment if adjourned; whether reporting restrictions are lifted

Contempt of Court Act 1981

- under section 11, in any case where a Court allows a name or other matter to be withheld from the public in proceedings before it, it may give such directions prohibiting the publication of the name or other matter in connection with the proceedings as appear to be necessary for the purpose for which it was withheld
- in considering whether to make such an order, the Court's prime consideration should be the administration of justice and whether it is satisfied that failure to make an order would frustrate or impede it
- the media or their legal representatives may be heard in relation to the making, variation or lifting of a s.11 order
- the Court also has power in restricted circumstances to order that publication of reports of part or all of proceedings held in open court be postponed for so long as necessary (s.4(2))

Human Rights Act 1998 and European Convention on Human Rights

- under section 12, publication before trial should not be restrained unless the court is satisfied that the applicant is likely to establish that publication should not be allowed
- the court must have regard to the importance of the Convention right to freedom of expression and the public interest in publishing material

Sexual Offences Amendment Act 1992

- there are automatic reporting restrictions which protect the identification of complainants in sexual offence proceedings – but there are no automatic reporting restrictions in relation to the identification of defendants

4.2.2 New Zealand

Section 138 of the *Criminal Justice Act 1985* (NZ) states that:

‘...

- (2) *Where a court is of the opinion that the interest of justice, or of public morality, or of the reputation of any victim of any alleged sexual offence or offence of extortion, ... it may make any one or more of the following orders:*
- (a) *An order forbidding publication of any report or account of the whole or any part of –*
- (i) *The evidence adduced; or*
- (ii) *The submissions made:*
- (b) *An order forbidding the publication of the name of any witness or witnesses, or any name or particulars likely to lead to the identification of the witness or witnesses ...*

...

- (6) *... the announcement of the verdict or decision of the court (including a decision to commit the defendant for trial or sentence) and the passing of*

sentence shall in every case take place in public; but, if the court is satisfied that exceptional circumstances so require, it may decline to state in public all or any of the facts, reasons, or other considerations that it has taken into account in reaching its decision or verdict or in determining the sentence passed by it on any defendant.'

Section 140(1) of the *Criminal Justice Act 1985* (NZ) states that 'a court may make an order prohibiting the publication, in any report or account relating to any proceedings in respect of an offence, of the name, address, or occupation of the person accused or convicted of the offence, or of any other person connected with the proceedings or any particulars likely to lead to any such person's identification'.

4.2.3 Canada

Section 37(1) of the *Canada Evidence Act* (1985) states that 'a Minister of the Crown in right of Canada or other official may object to the disclosure of information before a court, person or body with jurisdiction to compel the production of information by certifying ... that the information should not be disclosed on the grounds of a specified public interest'. Section 37(5) provides that if the court has jurisdiction to hear the application and 'concludes that he disclosure of the information to which the objection was made under subsection (1) would encroach upon a specified public interest, but that the public interest in disclosure outweighs in importance the specified public interest, the court may, by order, after considering both the public interest in disclosure and the form of and conditions to disclosure that are most likely to limit any encroachment upon the specified public interest resulting from disclosure, authorize the disclosure, subject to any conditions that the court considers appropriate, of all of the information, part or summary of the information, or a written admission of facts relating to the information'. Under section 37(6), if the court does not authorise disclosure, the court shall, by order, prohibit disclosure of the information.

The above provision only allows a Minister of the Crown or other official to make such an application.

There is also protection for witnesses and complainants in relation to a range of sexual offences pursuant to section 486 of the *Criminal Code*. Section 486(3) allows the judge to make an order directing that the identity of or any information that could disclose the identity of a complainant or witness

There is no such protection for an accused/defendant in criminal proceedings.

5. FACTORS TO BE CONSIDERED

5.1 PRINCIPLE OF OPEN JUSTICE

Open justice and freedom of speech are fundamental principles of our democratic society. A democratic society depends on there being freedom of press which is dependent on access to information of public interest. Public awareness of proceedings before the Court and the workings of Court is necessary to preserve the integrity of and public confidence in our Courts and legal system, provided that the proper administration of justice is not thereby prejudiced. That is, our legal system must be open to public scrutiny. The public interest in the administration of justice, freedom of speech and free press require that court proceedings be open to the public and are able to be freely reported.

The reality of modern day society is that, while interest in the judicial system and the cases proceeding before the Courts has never been greater, very few members of the public will attend Court to witness the activities of the Court in person. The media reporting of Courts fulfils that role. This was recognised in the 1989 amendments. To prevent the media from performing that role is to deny the public a basic right.

5.2 DISADVANTAGES OF SUPPRESSING INFORMATION

Suppression orders prevent the public from knowing about proceedings before the Courts. While that may be able to be justified in exceptional cases, the imposition of suppression orders on an automatic basis is patronising to the public and media. Despite the accepted principles of open justice, the grant of a suppression order sends the message that the public and media cannot be trusted with the suppressed information.

Continual and regular suppression of information (as has been the experience in South Australia) eventually leads to a deterioration in public trust in the workings of the Court and in the integrity of the judicial system. Suppression orders may lead to suspicion of the processes and generate false rumour and speculation regarding the identity of the accused or the offences involved.

Further, suppression has the potential to hamper ongoing investigations. Publication of the name and details of the accused is an effective means of bringing potential witnesses forward.

In addition, the artificial suppression of details within South Australia does not prevent the publication of details outside the State and the accessing of those details by people within the State. If fairness and the ability of an accused to obtain a proper trial demands limits be placed on the information disclosed, the extension of the suppression order provisions under the Evidence Act will not achieve that goal.

5.3 CONTEMPT PRINCIPLES PROVIDE PROTECTION

The law of contempt establishes a broad range of protections for the judicial process and those involved in that process. Contraventions carry penalties far more serious than those under the suppression order provisions.

Suppression provisions are designed to supplement not replace or duplicate the existing safeguards under the law of contempt. There must be a job for the order to perform.

Extending the grounds for the grant of suppression orders without regard to the existing coverage provided by the law of contempt is inappropriate.

5.4 LEGISLATIVE SAFEGUARDS ALREADY IN PLACE

The scheme of a number of Acts imposes suppression-style restrictions in circumstances which have been identified as requiring specific attention. For example, the provisions of section 71 of the *Evidence Act* attach automatic suppression of name and other identifying details in the case of sexual offences (prior to committal or guilty plea).

Unless the type of matter, by its very nature (eg, sexual offences), warrants suppression of certain facts or details, suppression should be considered on a case by case basis rather than imposed in a blanket fashion without regard to the individual facts or circumstances.

The operation of section 71B must also be taken into account. That section provides for details of acquittals and the results of cases to be published where publicity has been given to the case before the result is known. In particular sub-section 71B(1) provides:

"Where:

- (a) a report of proceedings taken against a person for an offence is published by newspaper, radio or television;*
- (b) the report identifies the person against whom the proceedings have been taken or contains information tending to identify that person;*
- (c) the report is published before the result of the proceedings is known;*
- (d) those proceedings do not result in conviction of the person to whom the report relates of the offence with which he was charged,*

the person by whom the publication is made shall, as soon as practicable after the determination of the proceedings, publish a fair and accurate report of the result of the proceedings with reasonable prominence having regard to the prominence given to the earlier report".

Section 71B specifically addresses the very concerns which are under consideration by the Committee.

5.5 ADEQUACY OF CURRENT WORDING OF SECTION 69A

Section 69A requires the Court to exercise its discretion based on all the circumstances before it. This is appropriate. The nature of a discretionary decision is such that it cannot and should not be circumscribed by rules or hardening of principles. This would be precisely the effect of requiring automatic suppression of names.

Section 69A, as it is currently worded, recognises the importance of the public interest in publication of information related to court proceedings and the consequential right of the media to publish such information. It also recognises the fundamental principle that every accused is entitled to a fair trial – ie ensuring the proper administration of justice. Section 69A provides that the Court may only make a suppression order if it is satisfied that the prejudice to the proper administration of justice that would occur if the order was not made outweighs the public interest in the publication of such information.

Accordingly, orders suppressing names or identity can already be made in appropriate circumstances. There is no need for automatic suppression without regard to specific circumstances. Matters outside the scope of the existing provisions are not appropriate for inclusion in the grounds for suppression.

In light of the various factors outlined above, there is no need for any amendments to be made to s.69A. However, a change in the application of the s.69A by the Courts is desirable.

5.6 APPLICATION OF S.69A BY COURTS

The current application of the suppression order provisions by the Courts does not accord with Parliament's intention in 1989 when amendments were made to s.69A. Parliament emphasised the importance of having a free press which reports responsibly and is entitled to have access to information of public interest, such as proceedings in Court. It also emphasised the importance of the administration of justice being open to public scrutiny, so that undesirable practices within the judicial system do not develop.

It is apparent there is an inherent suspicion of the media in some sections of the judiciary which manifests itself in a willingness to grant and even initiate suppression orders. Media representatives are called upon to justify why they "need" information from the Court proceedings. This approach is inconsistent with all relevant criteria.

This trend also manifests itself in the practical difficulties now experienced in obtaining documentary material from the Court. Provisions were inserted in the relevant Acts⁹ which were designed to streamline the ability of the public and the media to obtain documentary material from the Court. This is no longer the practical reality. Written submissions are now sought in respect of each request for material and refusals to release information (even information which is available as of right) are common.

In order for suppression orders to be effective, they must be easily accessible and in a form which can be comprehended by any member of the public or media who accesses those orders. Presently, orders are entered on a Suppression Register at the Court and (except in certain circumstances eg., the Snowtown case) only available by attendance in person and by copying the terms of the order by hand. This creates obvious logistical difficulties and increases the risk that reports are prepared without knowledge of the existence or terms of orders made. It also prevents access to information at times when the Court is closed.

A journalist or media organisation may be penalised where a suppression order has been breached despite a lack of fault. The dearth of such prosecutions in comparison to the extent of media coverage of the courts is testament to the media's ongoing efforts to properly report proceedings. However, this is clearly an issue requiring attention.

There is also a need to ensure that the Register represents a complete record of all orders made, the reasons for each order and any conditions attaching to those orders. In this regard, there is some concern that interim orders are not necessarily noted on the register exposing the public and media to unnecessary risk.

An online database of suppression orders should be established with all orders being entered as soon as practicable upon that database. This would allow public access to all relevant details at all times.

⁹ Section 131, Supreme Court Act;
Section 54, District Court Act;
Section 51, Magistrates Court Act

A practice has arisen in New South Wales and Victoria whereby details of suppression orders are emailed to certain media organisations on a daily basis. The wider public interest in the administration of justice is served by the implementation of systems and procedures which serve to prevent potential inadvertent breaches of suppression orders.

This is also relevant when it is realised that different wording is employed by different judicial officers when making suppression orders. This often results in confusion regarding the precise scope and intent of those orders. Requests for clarification of the orders are invariably denied. Consideration of the adoption of standard wording or of the recognition of a right to seek clarification from the relevant judicial officer is needed.

Difficulties are also experienced with suppression orders granted "*until further order*" during the course of proceedings. Reports to be published after the conclusion of proceedings regarding persons involved or evidence given in the proceedings can still be the subject of suppression despite the fact the original grounds for granting the suppression orders have long ceased to be relevant. This necessitates bringing all the parties back before the Court to lift those orders. It is submitted that, unless specified otherwise, orders should cease at the conclusion of proceedings. Should the parties consider there to be grounds for ongoing suppression of any matters at that stage, application can be made at that time. Under the present system, there are hundreds of old orders which remain in force (and expose media and other parties to penalty) notwithstanding that the circumstances which underpinned the orders have disappeared.

6. SUMMARY OF SUBMISSIONS

- The principle of open justice is fundamental to our judicial system
- There is no basis for the extension of the scope of section 69A
- The benefits flowing from public awareness and media reporting of Court processes and proceedings outweigh any perceived disadvantages
- These issues have been considered on previous occasions and adequate safeguards exist to address any concerns regarding the publication of the name or details of accused
- Suppression orders are far more prevalent in South Australia than in comparable jurisdictions. A legislative extension of the scope of the suppression order provisions will put South Australia significantly out of step with those jurisdictions
- The current application of the suppression order provisions is inconsistent with the intentions of the legislature expressed at the time of the 1989 amendments.
- Consideration is needed to ensure that the existing provisions are properly applied and that other steps are taken to ensure the orders made are in a form which is both accessible and comprehensible.