Suppression orders, Non-Publication Orders and Pseudonym Orders

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1. Introduction

The CDPP is committed to the principle of open justice and the public's right to know what is happening in the criminal justice system. The reporting of cases not only promotes public confidence in the judicial system and the administration of justice, but reinforces the important role deterrence plays in sentencing criminal offenders.

The CDPP also recognises that the principle of open justice needs to be reconciled with other important considerations such as national security, ensuring a fair trial and the protection of vulnerable witnesses.

As a general proposition, suppression orders will only be warranted in very special circumstances, and should be limited in scope to only what is absolutely necessary to further the administration of justice in the particular circumstances of a case.

On the occasions that such protection is required, the CDPP may seek court orders to protect certain evidence or information, or advise another Commonwealth agency or entity of the development of a situation where they may wish to make an application to the court. Courts have a limited power at common law to make suppression orders. However, suppression orders are more commonly made pursuant to Commonwealth, State or Territory legislation.

In some jurisdictions, the terms 'non-publication order' or 'pseudonym order' are used.

Relevant terminology includes:

- Suppression order – an order made by the court to prohibit the publication or disclosure of the content of particular proceedings, evidence or information.
- 'Interim suppression order' – a suppression order made, in the interim, without determining the merits of the suppression order application.
- 'Pseudonym order' - an order which obscures the identity of a person in court documents and/or hearings, for example, by initialising a name in court documents or by restricting the way the person is referred to in open court.

- 'Non-publication order' – an order which serves to prohibit or restrict the publication of information (but does not otherwise prohibit or restrict the *disclosure* of information, being distinct from suppression orders, which broadly prohibit or restrict the disclosure of information, whether by publication or otherwise).
- 'Closed court' - a court proceeding where members of the public are restricted by an order of the court from access to the court room due to the nature and sensitivity of the proceedings.

For ease of reference, this document will refer to suppression orders, but the same principles apply in relation to non-publication orders and pseudonym orders.

The scope of suppression orders

Suppression orders may limit the disclosure or publication of:

- The transcript or content of particular proceedings, or reference to same;
- The names of particular parties or witnesses;
- Certain evidence;
- Details of charges or details of a defendant or accused's criminal history;
- The content of individual documents before the court such as a statement of facts or witness statements;
- The fact that the suppression order itself has been made; and/or
- Any other information originating from or relevant to proceedings.

2. Relevant legislation

State and Territory

All States and Territories have legislation governing the use of suppression orders.[1] Annexure E of the Victims of Crime Manual has a list of the relevant legislation in each State and Territory containing key provisions that you are likely to encounter. These statutory powers are included in a range of different types of legislation, including State or Territory *Evidence Acts*, *Bail Acts*, or in legislation covering general criminal procedure, sexual offences, witness protection, youth justice, or vulnerable witnesses.[2] Suppression orders in Commonwealth matters will usually be made under such State or Territory legislation, as Commonwealth legislation dealing with suppression orders is limited in application to certain types of matters.

Relevant court Practice Directions in each State or Territory may also deal with the procedure for seeking suppression orders.

Suppression orders made under State or Territory legislation will not usually have automatic effect in other jurisdictions, even where the State or Territory court is exercising federal jurisdiction.[3] For this reason, prosecutors should consult the relevant State or Territory legislation to ascertain whether it provides for extra-territorial application.[4] In cases where State or Territory legislation does not provide for extra-territoriality and where there is a risk of information being disseminated by the media in other jursidictions (for example, a prosecution likely to attract national media interest), prosecutors should consider whether a suppression order can be made under Commonwealth legislation.

Commonwealth

Commonwealth provisions providing for suppression orders include the following:

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[1] For example, the *Court Suppression and Non-Publication Orders Act 2010* (NSW), and the *Open Courts Act 2013* (Vic).

[2] For example, in the Australian Capital Territory, Northern Territory, South Australia, Tasmania, and Western Australia, the respective *Evidence Acts* include provisions for suppression orders.

[3] *R v Nationwide News Pty Ltd* [2008] VSC 526 (222 FLR 295). The court held that Magistrates Court of Victoria in a federal prosecution was not empowered under Victorian legislation to make a non-publication order in respect of conduct outside of Victoria. Note that Victoria has since enacted new suppression order legislation allowing for extra-territoriality.

[4] Victorian and New South Wales legislation explicitly provide for extra-territoriality.

- *Crimes Act 1914* (Cth) s15MM(8) – applies to proceedings involving witnesses who are police operatives and who are protected under a witness identity protection certificate.
- *Criminal Code* (Cth) s93.2 – applies to proceedings where suppression is in the interests of Australia's national security.[5]
- *Federal Court Act 1976* (Cth) Part VAA "Suppression and non-publication orders" – applies in Federal Court proceedings. See also *Federal Circuit Court of Australia Act 1999* (Cth) – Part 6A - applies in Federal Circuit Court of Australia proceedings.
- *Judiciary Act 1903* (Cth) – Part XAA "Suppression and Non-Publication Orders" – applies in High Court proceedings.
- *Director of Public Prosecutions Act 1983* (Cth) – s16A "Prohibition of publication of evidence etc. in certain proceedings" – applies in certain proceedings for civil remedies, recovery of pecuniary penalties, and proceeds of crime.
- *Service and Execution of Process Act 1992* (Cth) – Part 5, Division 3 ("Suppression orders") – applies where certain persons are apprehended on a warrant and brought before the Court (interstate extradition matters).
- *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) – regulates disclosure of information in federal criminal proceedings (and civil proceedings) where the disclosure is likely to prejudice national security, e.g certain counter-terrorism prosecutions.

Automatic statutory protections

Certain statutory provisions automatically prevent the publication of information in particular circumstances, without the need for an application for a suppression order. For example, child witnesses, child complainants, and vulnerable adult complainants are protected under section 15YR of the *Crimes Act* (Cth), which prohibits publication of their identity in prosecutions for certain offences including but not limited to slavery, trafficking, and child sex offences, unless leave of the court is granted.[6]

Before applying for a suppression order, prosecutors should consider the scope of any existing automatic statutory protections, as an application for an order may be unnecessary.

Suppression orders in different courts

Fresh suppression orders may be required at different stages as the matter proceeds between courts, including upon a party filing an application for special leave to appeal to the High Court.[7] It should not be assumed that a suppression order made in a lower court will continue to automatically apply in a higher court, so consideration should be given to this issue at the committal, trial, sentence and appellate phases of a matter.[8]

3. Prosecution Application for a Suppression Order

From time to time, the CDPP may, on its own initiative, decide to apply for a suppression order. Alternatively, the CDPP may receive a request to make an application for a suppression order from a third party, such as a referring agency, a victim or another entity. Where such a request is received, the CDPP will need to carefully consider whether the third party is the most appropriate agency to make the application, rather than the CDPP.

[5] Section 93.2 *Criminal Code* (Cth) enables orders closing the court, orders limiting reports of proceedings, and/or orders limiting access to evidence.

[6] See s15Y *Crimes Act* (Cth) for a list of offence proceedings to which the automatic protections apply.

[7] High Court of Australia Practice Direction No 2 of 2010 allows for the use of pseudonyms when a party makes its special leave application. Refer also to High Court of Australia Practice Direction No 1 of 2016 ('Applications for a suppression order or non-publication order').

[8] Refer *IMM v The Queen* [2016] HCA 14 and *Phillips v R* [2006] HCA 4; (2006) at para 81, for discussion of this issue.

When determining whether to make an application for a suppression order, the CDPP will closely consider the particular circumstances of the case, the applicable legislation and the possible grounds for making an application.

Such circumstances include where the publication of evidence or information may:

- Endanger the national or international security of Australia;
- Prejudice the administration of justice;
- Endanger the physical safety of any person;
- Cause undue hardship, distress or embarrassment to an alleged victim of crime or to a child witness;
- Offend public decency or morality.

Preventing the endangerment of national or international security includes, but is not limited to:

- Preventing the release of information which could jeopardise ongoing investigations;
- Preventing the release of information that might reveal operational methods and capabilities; or
- Protecting information provided by foreign governments and agencies.

Preventing prejudice to the administration of justice includes but is not limited to:

- Ensuring a fair trial by protecting juries from prejudicial pre-trial publicity (including suppression of prejudicial facts as well as information from related proceedings);
- Securing the evidence of a witness;
- Protecting parties, witnesses or informants from physical danger;
- Preventing particular continuing police investigations from being impeded (including suppression of the identity of undercover operatives); or
- Protecting victims where the purpose of the proceedings would be undermined if certain information was made public.

Notice of Application

Regard should also be had to any statutory requirements relating to giving notice to the defence, and third parties (such as the media), of an application for a suppression order.

Approval required

The relevant Practice Group Leader (PGL) must approve a prosecutor making an application for a suppression order (see Decision Making Matrix) ahead of the application being made. Prosecutors should create a decision task in CaseHQ reflecting those discussions and the relevant decision.

If an application needs to be made in court urgently, prosecutors should seek a brief adjournment and contact the relevant PGL by phone for verbal approval.

Duration of an order

Suppression orders should ordinarily contain an expiry date, otherwise they may continue long after the need for the order has lapsed, noting that the need for orders suppressing reporting of proceedings, or an aspect of proceedings, in perpetuity will be rare. In most matters, the purpose and effect of a suppression order is to postpone publication until the moment has passed when the publication would pose a serious risk to the proper administration of justice.[9] The expiry date of every suppression order should be clear upon viewing the written order itself.[10]

Prosecutors should, therefore, request the court to specify an end date, or ensure the order is otherwise self-executing. Example wording might be, *"This order is to remain in force until further order of this Court, or such other time as the charges are withdrawn or determined according to law".*

[9] *Dupas v Channel Seven Melbourne Pty Ltd* [2012] VSC 486; 226 A Crim R 53 at [57].

[10] The reasoning for this is that media and publishers must be able to see the expiry date on the face of the order, see *Queensland Newspapers Pty Ltd v Stjernqvist* [2006] QSC 200; [2007] 1 Qd R 171 at [25].

As an exception to the above, there are certain matters involving sexual offence victims, child victims/witnesses, and national security issues, and other specialised circumstances, where legislation may have the effect that protections extend past the conclusion of the proceedings.

4. Defence Application for a Suppression Order

Where the defence make application for a suppression order, the prosecutor's role is to assist the court and to carefully consider whether:

- there is a proper basis for an order applying the criteria relevant to making an application for a suppression order outlined above; and
- to ensure the court has not been misled about a matter of fact or law.

Prosecutors should guard against any tendency for orders to be made without a proper basis or as a matter of course in particular types of matters, for example child exploitation matters. Prosecutors should discuss these issues with their branch head and PGL in order to determine the appropriate approach to take. Where one or both of the issues outlined above is present, intervention by the prosecutor will be appropriate in order to assist the court, as a merely neutral stance may be misinterpreted by the court as acquiescence to the defence application.

Grounds which are insufficient to justify the making of a suppression order

Personal embarrassment or damage to the reputation of the accused, their family, or defence witnesses (subject to some exceptions for certain classes of victims of crime)[11] is not a proper basis for a suppression order.[12]

Approval of approach to be taken on a defence application

The relevant PGL must approve the approach to be taken, whether that be opposing, supporting or taking a neutral stance to the defence application for a suppression order (see Decision Making Matrix). If the prosecution has not been forewarned that an application will be made it may be necessary for the prosecutor to seek a short adjournment to allow him or her to discuss the matter with the PGL. Prosecutors should create a decision task in CaseHQ reflecting those discussions and the decision.

In considering the prosecution's stance on a defence application for a suppression order, the PGL should have regard to the factors and principles outlined in Parts 1 and 3 that pertain to making an application for a suppression order.

Duration of an order

As discussed in Part 3, prosecutors should submit to the court that the suppression order should have an end date, or otherwise be self-executing, (subject to the statutory exceptions noted above).

5. Applications made by other Commonwealth entities

There will be instances in CDPP prosecutions where other Commonwealth entities are best placed and have sufficient standing in a matter to seek a suppression order themselves or to be heard during a suppression order application. An example is where the Australian Government Solicitor, on behalf of the Attorney-

[11] For example, victims of sexual offences are protected by suppression orders under the *Federal Court of Australia Act 1976* (Cth) - s37AG(1)(d) "(where) the order is necessary to avoid causing undue distress or embarrassment to a party to or witness in a criminal proceeding involving an offence of a sexual nature (including an act of indecency)". State and Territory legislation contain similar provisions.

[12] The same applies to non-victim prosecution witnesses. See *John Fairfax Group Pty Ltd v Local Court of New South Wales* (1991) NSWLR 131 at [142] for a discussion of the balance between embarrassment and the principle of open justice.

General, seeks a suppression order where it is required in the interests of national security.[13] Another example is where the Australian Government Solicitor, on behalf of the Australian Federal Police, may seek a suppression order relating to confidential police investigative methodologies or to protect the existence or identity of a police informer.

The CDPP will need to form a view as to its position, which may be to support, oppose or take a neutral stance[14] on the application. The observations made above regarding approvals and the relevant factors to consider are equally apposite.

6. Templates

Prosecutors should have regard to any relevant statutory form of order, or notice provisions contained within State and Territory legislation. Refer also to the CDPP e-library which contains examples of suppression orders in various jurisdictions.

7. Media Interest

Prosecutors should be cognisant that media organisations may seek to oppose the making of suppression orders.

8. Recording Suppression Orders in CaseHQ and other required procedures

Suppression orders must be recorded in CaseHQ.[15] Prosecutors must also advise library staff of any suppression orders (or the lifting of those orders), noting that in e-library, any sentences and judgments where a suppression order exists must be marked with red warning text. Where material is to be published on the CDPP's website or annual report, or otherwise, prosecutors must ensure the Communications and Media team are aware of any limitations arising from suppression orders to ensure breaches do not occur.

9. Breach of Suppression Orders

Breach of a statutory order is enforceable by means of a prosecution, whereas breach of an order based on the court's inherent or implied power is punishable as a contempt of court and proceedings are launched by the court itself. State and Territory legislation commonly includes specific offences, penalties and procedures for breach of a statutory suppression order, and prosecutors should have regard to legislation in their jurisdiction.

Prosecutors should consult their branch head in any matter where it appears that there has been a breach of a suppression order.

10. Related Resources

Other resources include:

- Victims of Crime Manual – Paragraph 14 'Suppression or non publication orders' and Annexure E (List of relevant State and Territory suppression order legislation);
- National Legal Direction '*Media*';
- Guidelines and Directions Manual Chapter on '*Witness issues*' – Paragraph 2 ('National Witness Protection Program') and paragraph 4 ('Disclosure of a witness' name'); and
- *Witness Protection Act 1994* (Cth).

[13] See section 20A of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) – "Attorney-General etc. may attend and be heard at federal criminal proceedings".

[14] Where confidential affidavits have been filed to which the CDPP is not privy, it is likely that a neutral stance will be appropriate.

[15] Prosecutors can enter suppression orders under the option 'Add file action'.