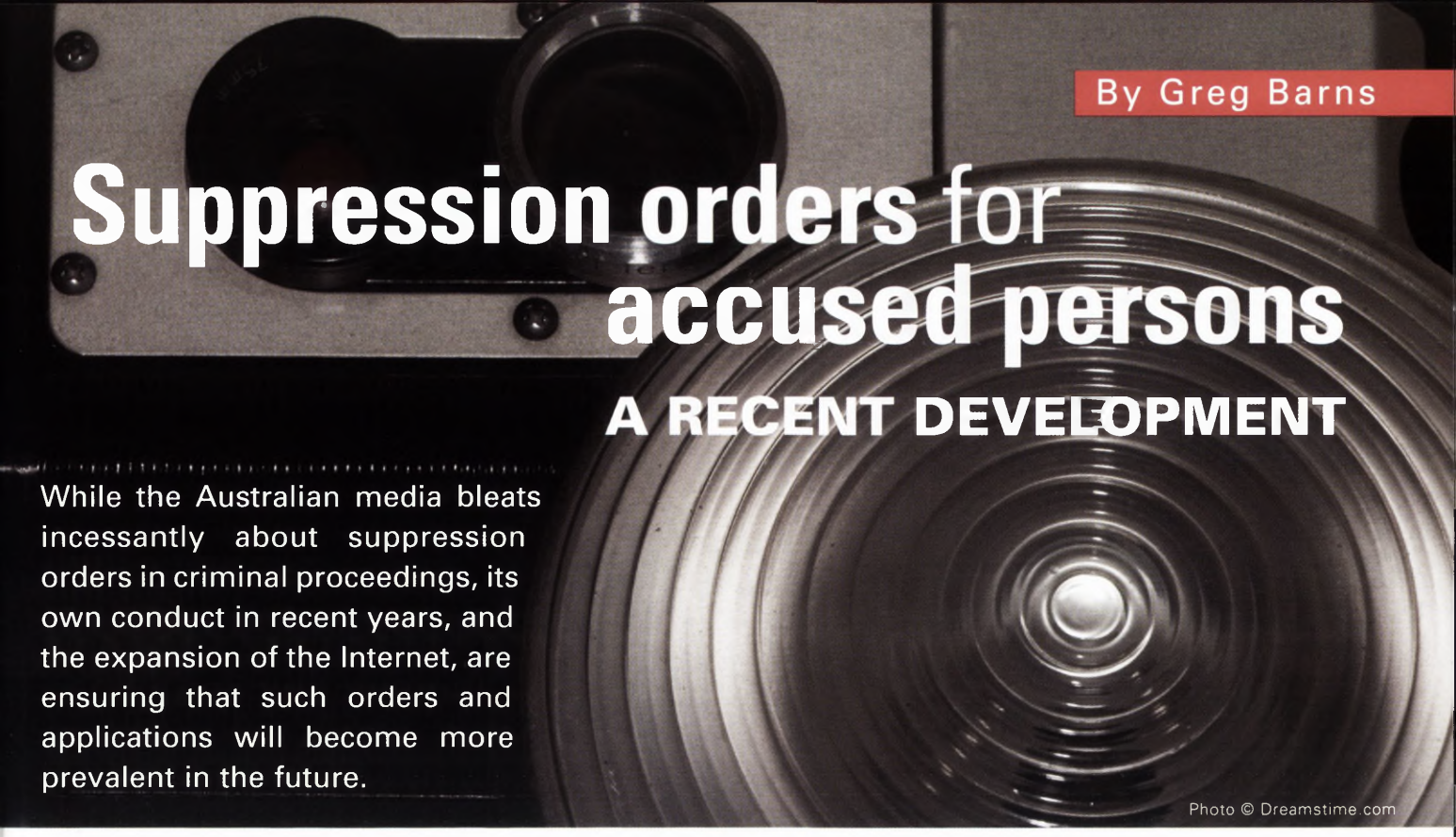

By Greg Barns

Suppression orders for accused persons

A RECENT DEVELOPMENT

While the Australian media bleats incessantly about suppression orders in criminal proceedings, its own conduct in recent years, and the expansion of the Internet, are ensuring that such orders and applications will become more prevalent in the future.

Photo © Dreamstime.com

In one week alone in Victoria in March this year, 16 suppression orders were granted by various courts.

There is now debate at the national level about harmonising laws around suppression orders across the nation.

News Limited, which publishes newspapers in every jurisdiction and nationally, has for some time now been conducting a 'Right to Know' campaign, part of which is aimed at making it harder for suppression orders to be granted by the courts.

So if the law relating to suppression orders – particularly as regards accused persons seeking to protect their right to a fair trial – is to be harmonised, what form should this take? A recent development in South Australia provides one example of legislative reform of suppression orders.

SUPPRESSION ORDERS: SA's 'REFORM'

The law concerning suppression orders in criminal proceedings is well developed. It is underpinned by the principle of open justice. A classic and neat exposition of the relationship between the principle of open justice and suppression (or non-publication orders) can be found in the judgment of Spiegelman CJ in *John Fairfax Publications Pty Ltd v District Court of NSW*:[1]

'[19] It is also well established that the exceptions to the principle of open justice are few and strictly defined. (See, for example. *McPherson v McPherson* [1936] AC 177 at 200; *R v Tate* (1979) 46 FLR 386 at 402.) It is now accepted that the courts will not add to the list of exceptions but, of course, Parliament can do so, subject to any Constitutional constraints. (See, for example Dickason at 51; *Russell* at 520; *John Fairfax Publications Pty Ltd v Attorney General* (NSW) [2000] NSWCA 198; (2000) 181 ALR 694 at [70]- [73].)

[20] The entitlement of the media to report on court proceedings is a corollary of the right of access to the court by members of the public. Nothing should be done to >>

Is it desirable to make it harder for defendants in criminal trials to obtain suppression orders?

discourage fair and accurate reporting of proceedings. (See, for example *Attorney General v Leveller Magazine Limited* [1979] AC 441 at 450.)

[21] From time to time the courts do make orders that some aspect or aspects of court proceedings not be the subject of publication. Any such order must, in the light of the principle of open justice, be regarded as exceptional. (See, for example, *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47 at 50D-E and 54G.)'

As noted earlier, the media, particularly News Limited, is campaigning to reduce the use of suppression orders in various jurisdictions. In SA, the Rann Labor government has been notoriously consistent in its legislative activity eroding the rights of an accused person (most recently with its 'anti-bikie' laws). It has also succumbed to the pressure of media interests and narrowed the capacity of the courts to grant suppression orders to an accused person. It is worth considering this legislative change, as it may be a template if other jurisdictions are tempted to follow suit.

In 2006, the *Evidence (Suppression Orders) Amendment Act* (SA) was passed by the SA parliament and came into force on 1 April 2007. The Act amended s69A (2) of the *Evidence Act 1929* (SA). Section 69A provides:

'69A Suppression orders

(1) Where a court is satisfied that a suppression order should be made –
  (a) to prevent prejudice to the proper administration of justice; or
  (b) to prevent undue hardship –
    (i) to an alleged victim of crime; or
    (ii) to a witness or potential witness in civil or criminal proceedings who is not a party to those proceedings; or
    (iii) to a child,

  the court may, subject to this section, make such an order.

(2) If a court is considering whether to make a suppression order (other than an interim suppression order), the court –
  (a) must recognise that a primary objective in the administration of justice is to safeguard the public interest in open justice and the consequential right of the news media to publish information relating to court proceedings; and
  (b) may only make a suppression order if satisfied that special circumstances exist giving rise to a sufficiently serious threat of prejudice to the proper administration of justice, or undue hardship, to justify the making of the order in the particular case.'

Evidence is defined in s68 of the Act to include 'any statement made before a court whether or not the statement constitutes evidence for the purposes of the proceedings before the court ...'

The SA government specifically noted that it wanted to reduce the opportunity for the accused to be able to obtain a suppression order. Attorney-general, Michael Atkinson, said in his Second Reading Speech:[2]

'We need to change the use of suppression orders in our courts in the interests of public confidence. Our justice system is built on the principle of openness and transparency, yet confidence can be shattered when a case is suddenly shrouded in the secrecy of a suppression order, seemingly with little explanation. Victims can also feel insulted by what they see as the unfair protection of the accused. To family members under stress, this looks like a cover-up.

We want to make sure that these orders are used genuinely in the interests of justice, to protect the privacy of victims and to prevent the accused escaping through mistrial.'

As Doyle CJ observed in *B, RD v Channel Seven; B,RD v Advertiser Newspapers*:[3]

'Section 69A(2) of the Act replaces an earlier provision. It is clear from the change that Parliament made and from the second reading speech of the Attorney-General that the newly enacted subsection (2) is intended to make the criteria for making a suppression order stricter, and to make it more difficult for an applicant to make out the basis for the making of an order: see *Hansard*, House of Assembly, Wednesday 30 August 2006, pp785-6.'

Doyle CJ further explained the intent of the amendment to s69(2)in *Advertiser Newspapers Pty Ltd & Anor v B, RD & Anor*:[4]

'Section 69A(2) was amended by the *Evidence (Suppression Orders) Amendment Act 2006* (SA) which came into operation on 1 April 2007. The effect of the amendment was to require a court to recognise the "primary objective" now referred to in subpara (a) of subs (2), and to limit the power of the Court to make an order to cases in which there are "special circumstances" which give rise to "a sufficiently serious threat of prejudice to the proper administration of justice". There can be no doubt that by these amendments Parliament intended to restrict the circumstances in which a court would make a suppression order: *B, RD v Channel Seven; B, RD v Advertiser Newspapers* at [18] Doyle CJ.'

In *Advertiser Newspapers v B. RD*, the Full Court of the Supreme Court of SA considered the meaning of the phrases 'special circumstances', and 'prejudice to the proper administration of justice.'

In that case a district court judge had made a suppression order in relation to the defendant, which included this standard condition: a prohibition on the publication of 'evidence of any fact which would disclose the name of the accused, his occupation and any other material tending to identify him'.[5]

The Full Court held that this order offended s69A(2)(b) because, Doyle CJ said, (at para 50) that provision 'does not permit an order to be made merely because there is a

theoretical possibility of a threat to the fair hearing of an application or to a fair trial, if a suppression order is not made. An order cannot be made on the basis that although no circumstances giving rise to a sufficiently serious threat of prejudice can be identified, the bare possibility of some such circumstance arising cannot be excluded.'

But does s69A(2)(b) really raise the bar in relation to what an applicant must demonstrate to the court in order to obtain a suppression order? The answer to this question can be best understood by comparing the situation to that in other jurisdictions where such a provision does not exist.

In Victoria, for example, Kellam J in *R v Williams; ex parte The Age*[6] said that the state of the law around Australia is that a court 'has power to prohibit pre-trial publicity if there is a real or substantial risk that such publication will cause an interference with the administration of justice'.

In NSW, the position is that put a number of years ago, and cited frequently since, by McHugh JA in *John Fairfax & Sons Pty Ltd v Police Tribunal of New South Wales*,[7] where His Honour observed that:

> '...an order of a court prohibiting the publication of evidence is only valid if it is really necessary to secure the proper administration of justice in proceedings before it. Moreover, an order prohibiting publication of evidence must be clear in its terms and do no more than is necessary to achieve the due administration of justice. The making of the order must also be reasonably necessary; and there must be some material before the court upon which it can reasonably reach the conclusion that it is necessary to make an order prohibiting publication. Mere belief that the order is necessary is insufficient. When the court is an inferior court, the order must do no more that is "necessary to enable it to act effectively within" its jurisdiction.'

In SA, what is now required to be shown is that there are 'special circumstances' that give rise to 'a sufficiently serious threat of prejudice to the proper administration of justice'. It would not be enough, in McHugh J's words, to merely place before the court 'some material' that supports an application for a suppression order.

Therefore, it is arguable that the requirements of 'special circumstances' and 'sufficiently serious threat' mean that an accused person must demonstrate to a very high, if not overwhelming degree, that the administration of justice would be prejudiced, if their identity and/or association with criminal charges are not suppressed.

For example, whereas a suppression order might be granted to an accused person if it can be shown that they might lose their employment, or their business would suffer as a result of the adverse publicity from being a defendant in a criminal trial, the position in SA may now be that a person would have to show actual loss of business or employment, or point to a direct threat, in order to be able to argue 'special circumstances'.

On the other hand, it is far from clear that the second limb of the SA legislative test – 'a real and substantial risk of publication causing an interference with the administration of justice' – is any stronger than what is meant by the phrase used by Kellam J; namely, 'a sufficiently serious threat'.

A COMMENT

From a media and political perspective, the SA reforms appear to be working. *The Australian* reported that the number of suppression orders granted in South Australia hit a five-year low in 2008. 'The number of suppression orders peaked in 2006 at 235, figures released under FOI by the state Courts Administration Authority show. This fell to 212 orders last year and to 143 in the first 11 months of this year.'[8]

But is it desirable to make it harder for defendants in criminal trials to obtain suppression orders? Particularly if the motivation of government, aided and abetted by the law-and-order lobby, is to more easily secure convictions by ensuring that there is a greater risk of potential jurors being exposed to prejudicial material, whether it be in the traditional media forms, or via the internet.

From this perspective, the SA initiative is not one that should be pursued by other jurisdictions. ■

Notes: **1** (2004) NSWSCA 324. **2** *South Australian Parliament Hansard*, 30 August 2006, p785. **3** (2008) SASC 282 at para 18. **4** (2008) SASC 362 at para 10. **5** *Ibid* at para 1. **6** (2004) VSC 413 at para 31. **7** (1986) 5 NSWLR 465 at p476-77. **8** *The Australian*, 30 December 2008.

Greg Barns *is a barrister, based in Republic Chambers, Hobart, Tasmania.* **EMAIL** *republicone@ozemail.com.au*