JOINT MEDIA ORGANISATIONS

SUBMISSION TO THE REVIEW OF THE *OPEN COURTS ACT* (VIC)

SUPPRESSION ORDERS

12 May 2016


The parties to this submission – AAP, ABC, Australian Subscription Television and Radio Association, Bauer Media Group, Commercial Radio Australia, Community Broadcasting Association of Australia, Fairfax Media, Free TV, HT&E – Here, There and Everywhere, MEAA, News Corp Australia, NewsMediaWorks, SBS and The West Australian (collectively, the Joint Media Organisations) – appreciate the opportunity to make a submission to the Victorian Government's *Review of the Open Courts Act (2013) regarding suppression orders* (the Review).

We acknowledge that this submission was compiled with the assistance of M+K lawyers and we are thankful for their deep experience and expertise in this area.

Free speech, free press and access to information are fundamental to a democratic society that prides itself on openness, responsibility and accountability. Key to this is a commitment to the principle and the enactment of the principle of open justice.

Our data shows that 474 suppression orders were issued in Victoria in 2016. We note that in the same period, just 189 suppression orders were made in New South Wales.[1]

Victoria's 'suppression culture' should not be allowed to continue. We make recommendations regarding how this can be addressed.

The structure of this submission is:

- Recommendations
- Open Justice – the centrality of this principle to the submission and the Review
- The culture of suppression in Victoria
- Proposed training for Judicial officers
- Concerns with orders prohibiting publication under the *Serious Sex Offenders Act*
- Amendments to the prohibition on publication of records of interview under the *Crimes Act*

RECOMMENDATIONS

The Joint Media Organisations make the following recommendations in order to address the issues – as identified in this submission – regarding suppression orders in Victoria:

Regular and robust training should be provided to judicial officers covering the mindset required to act as contradictor, ensuring that the media has a right to be heard, that appropriate duration periods are applied to suppression orders and that all relevant evidence is assessed critically. We are happy to assist with any aspect of this training, including input into the preparation of summary documents to be provided to judges and magistrates on completion of the training;

Suppression orders must include a succinct explanation of the particular reasons necessitating the order;

Section 184 of the SSO Act should be revisited so that judges are reminded that Parliament's intention is for community protection to be prioritised over protection of offenders' identities. Orders prohibiting publication should only be made in rare circumstances where community protection necessitates it. The mere possibility of risk of re-offending should not be sufficient for a Court to be convinced that it is in the public interest for an offender's identity to be suppressed; and

Section 464JA of the Crimes Act should be repealed or amended with the effect that access to ROIs is granted unless the prosecution successfully applies to the court for an order denying it on the basis that access or publication would jeopardise a particular investigation or prosecution.

[1] Figures drawn from the number of suppression orders notified to News Corp Australia during 2016 and may not be a complete record of the number of orders actually made.

1. OPEN JUSTICE

The Open Justice principle is a fundamental and abiding principle of the Australian Legal system. As stated by Gibbs J in *Russell v Russell* (1996) 134 CLR 495 at 520:

> "*The fact that courts of law are held openly and not in secret is an essential aspect of their character. It distinguishes their activities from those of administrative officials, for publicity is the authentic hallmark of judicial as distinct from administrative procedure."*

It is also a fundamental principle of Australian democracy, as noted by Sir John Donaldson MR in *Attorney-General v Guardian Newspapers (No. 2)* [100] 1 AC 109:

> *"I yield to no one in my belief that the existence of a free press, in which term I include other media of mass communication, is an essential element in maintaining parliamentary democracy and the British way of life as we know it. It is important to remember why the press occupies this crucial position. It is not because of any special wisdom, interest or status enjoyed by proprietors, editors or journalists. <u>It is because the media are the eyes and the ears of the general public.</u> They act on behalf of the general public."*

There are of course many more examples of jurisprudence enshrining open justice as a fundamental feature of our legal and democratic systems.

We have made this brief opening reference to open justice simply to illustrate that any discussion of the *Open Courts Act 2013* (Vic) (the Act) including the Review takes place against the backdrop of the basic notion that any proper democracy presumes that judicial proceedings are to be conducted in public.

2. CULTURE OF SUPPRESSION IN VICTORIA

Given the dealings with the Act by the organisations to this submission on an almost daily basis, we have observed a culture develop in Victoria which favours the making of suppression orders and the issuing of those orders without proper consideration for whether the criteria under the Act has been met.

A study by Jason Bosland in 2013 found that 300 suppression orders were made on average each year in Victoria from 2008 to 2012 (inclusive)[2] – the most of any Australian jurisdiction across that period. Parliament then introduced the Act in December 2013, signalling a clear intention to implement a regime that would reduce the number of suppression orders being made in Victoria.

Unfortunately, it appears that the Act has not been implemented in accordance with Parliament's intention as the evidence clearly shows that the number of Victorian suppression orders has NOT decreased since 2013.

In fact, an estimated 474 suppression orders were made in Victoria in 2016 alone. In that same period, just 189 suppression orders were made in New South Wales.[3] This represents a 58% increase on the average number of orders made in Victoria across the 2008-2012 period leading up to the commencement of the Act.

It is submitted that a 'suppression culture' can be said to have permeated two institutions in particular, namely the Victorian Bar and the Victorian Judiciary.

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[2] J. Bosland and A Bagnall, *"An Empirical Analysis of Suppression Orders in the Victorian Courts: 2008-12",* Sydney Law Review Vol 35:671, p.679.

[3] Figures drawn from the number of suppression orders notified to News Corp Australia during 2016 and may not be a complete record of the number of orders actually made.

a) Victorian Bar and Representatives of Suppression Order Applicants

Increasingly we see Victorian Barristers seeking instructions from clients to make misguided applications for suppression orders. It is possible in most court cases that an argument can be constructed that publication will have some form of adverse impact that may have little more than a tenuous connection to the grounds set out for making an order in section 18 of the Act or Parliament's intention as described above. In these circumstances, often the mere making of the application itself can place judicial officers in the difficult position of having to override a potential adverse impact of publication on the parties in order to preserve open justice and the requirements of the Act. We submit that the current implementation of the Act does little to combat this practice because there is no disincentive to such applications being made, regardless of their prospects of success.

In our experience, even where tenuous submissions are made and rejected by the presiding judge, applicants remain unrebuked and do not face any cost consequences as a result of the application being rejected. This process does not discourage counsel from taking instructions to make similar applications in future.

In instances where tenuous submissions are accepted, suppression orders are made and the public is excluded from court proceedings or a part of court proceedings in circumstances where that result is not in accordance with the intention of the Act.

We also view these applications as contrary to the practitioners' duty to the Court as judges and magistrates are being asked to determine applications that are plainly without merit.

In our submission there needs to be some form of negative consequence for parties who take up court time and public resources in brining misguided applications for suppression orders.

Beyond that, our experience is also that representatives of applicants do not seem inclined to assist the media with inquiries from legal representatives (or the media directly) about foreshadowed applications or with queries about the effect of orders after they have been made. We believe that where such queries exist, the media should be able to speak with a media liaison officer but, rather, the prosecutor with the carriage of criminal matters.

Application for Suppression order filing fee

One such consequence could be the introduction of a filing fee for suppression order applications. In our view a filing fee of an amount that is more than token but less than prohibitive would force parties to seriously consider the merits of their application before seeking suppression orders. It would also reduce the number of applications brought in circumstances where clients are advised that the prospects of their application being rejected are greater than the prospects of the order being made.

In order to further discourage this practice, courts must adopt a firm and consistent approach that material before the court will not be suppressed unless exceptional circumstances are established; that is unless the suppression order truly is 'necessary' as required by the Act. Once members of the Bar become accustomed to the courts properly applying the criteria under the Act to suppression order applications, we believe the incidence of frivolous applications will be significantly reduced.

b) Judiciary

Some organisations to this submission have observed a pervading hostile attitude towards the media from Victorian judicial officers. This mindset is regrettable as the media has an important part of play as an intermediary between the courts and the public.

A further challenge in relation to suppression orders is how judges and magistrates assess applications.

The starting point for decision makers appears to be that open justice is important but that the circumstances of the particular case before them take precedence. Therefore, the principle of open justice can be readily overridden.

Respectfully, 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 to open justice which must be shown to be necessary. Rather, 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. This point will be discussed in further detail under the training section below.

3. PROPOSED TRAINING FOR JUDICIAL OFFICERS

One potential measure for addressing the culture discussed above is for judicial officers to be provided with regular and robust training about the Act and the mindset with which they are required to approach suppression order applications.

Regular training is critical to address the matters set out below and to decrease the incidence of flawed orders being made. We encounter such orders regularly and attach to this submission a sample of 30 such orders made in the Victorian Magistrates Court in 2016 including summaries of the flaw/s of each order. In some instances, the grounds for the order are unclear. In other instances there is no clear expiration date or the orders have not been signed, The examples provided are in no way exhaustive but are intended as indication of the improvement required in training for judicial officers and the implementation of the Act.

We are of the view that training should not merely focus on the requirements of the Act, but should emphasise the importance of open justice, the role of the media in challenging suppression orders, and the need for judges and magistrates to effectively assume the role of contradictor and genuinely interrogate any requested orders against the legal requirements.

On completion of this training, decision makers should be given a summary document to assist with determining suppression order applications similar to the Decision-making flowchart prepared by the Judicial College of Victoria in November 2013. We are happy to assist with the preparation of such a document.

Primarily, training should be focussed on the following matters:

a) Mindset of judicial officers

Any preconceptions about the media or current standards of journalism are irrelevant and should be disregarded in any consideration of suppression order applications.

Judges and magistrates as contradictors must start with a presumption of reluctance to suppress any material before the court unless convinced otherwise by sound and tested arguments in exceptional circumstances. Even in the absence of a media intervener opposing the application, judges and magistrates must rigorously challenge any arguments put to them that material before their courts should be withheld from the public.

In 2017, media organisations are under constant pressure to reduce costs. As a result, media organisations do not have sufficient resources to assume the role of contradictor for each application that comes before the courts. While media organisations should be entitled to be heard in relation to suppression order applications, they cannot not be expected to fulfil the role of contradictor in all such applications.

The media should not have to perform the role of a contradictor if the Court properly fulfils it by testing applications and submissions. If properly carried out, this function requires judges and magistrates to maintain a level of interrogate any application under the Act. It also requires judges and magistrates not to regard their power to make suppression orders as discretionary. Far from being discretionary, the power must be exercised in accordance with relatively rigid criteria under the Act.

Additionally, too regularly in practice we observe judges and magistrates making suppression orders on the basis of a perceived sympathy for victims, witnesses or other parties to a proceeding who may be adversely affected by publication. We also note that suppression orders are regularly justified on the basis that making the order is in the "interests" of justice. This simply is not the test that must be satisfied before an order can be made under the Act. The Act refers to what is necessary for the 'administration' of justice not merely to the 'interests' of justice. This is an important distinction. Sympathy for victims or witnesses alone is not sufficient grounds for making an order, no matter how regrettable the circumstances of the victim or witness may be. There is also an extensive legislative framework providing automatic protections for persons in particular positions of vulnerability, such as the prohibition on identification of victims of sexual assault.

In our experience, judges and magistrates often consider that making a suppression order is a safe option because the media will be the only party adversely affected by the order. A decision to make an order is less likely to attract criticism from other judges or magistrates than a decision not to suppress. It is also less likely to be the subject of an appeal by the parties.

This approach has to be abandoned. Judges and Magistrates must be guided by the requirements in the Act and the prevailing principle of open justice rather than "just" outcomes without reference to the necessity test. Judicial officers should also acknowledge that the historical conception of the attitude and resources of media organisations no longer applies in 2017. Instead, media organisations are constantly forced to spread their resources in order to continue to inform the public in an increasingly challenging financial environment. Historically judicial officers may have assumed that if a representative from a particular media organisation was not present in court when a suppression order application was made, that it was not a priority for that media organisation and it was therefore acceptable for the order to be made. Judicial officers would often then presume that if the matter was not a priority for the media, that the decision to make an order was unlikely to be subject of a judicial review application brought by the media.

In contrast, in 2017 the absence of a particular media organisation from court rooms or its lack of appetite for judicial review is simply a reflection of significantly decreased resources and not a reflection of the importance of the particular matter before the court. It is submitted that the lesson that judicial officers should take from this is that the presence or otherwise of the media in their court room is an irrelevant consideration when hearing an application and considering the prospects of an order being the subject of judicial review.

b) Notice requirements

In our experience, notice requirements under the Act are often not complied with. For example, from 1 January 2017 to 28 April 2017 there were 137 suppression orders made in Victoria, yet media organisations to this submission received advanced notice on only 24 occasions.[4]

While we acknowledge in practical terms that it may be difficult for applicants to give three (3) days' notice before making an application we believe that sufficient notice to allow the media to exercise its legitimate right to be heard should be a minimum requirement.

We have sighted notices of suppression order applicants that do not specify in any way the nature of the suppression order to be made.

To this end, judges and magistrates should be trained to follow a relatively straight-forward procedure whenever an application is brought. That is, the applicant should be asked whether the notice period has been complied with. If it has not been complied with, the matter should be stood down for a brief period so that the applicant can discuss the matter with the court's media co-ordinator and the media can be appropriately notified.

Example 1- No notice from Magistrates Court

This principle should apply equally when courts are making suppression orders on its own motion. In a recent example, a suppression order was made in relation to the Accused's identity in a proceeding before the Frankston Magistrates' Court. The order was made on the Court's own motion without the media having any notice. One of the grounds for the order was that publication of the accused's identity would prejudice a separate trial in another jurisdiction.

With respect, in our view the order was without base because it rested on a fundamental misconception that publication of a person's identity in and of itself is prejudicial to a sufficient extent that the making of a suppression order is justified.

The explanation given for the absence of notice to the media was that being an order from the court's own motion, the notice requirements did not have to be complied with. Had the media received even very short notice, we would have been able to appear to make submissions and to avoid such an order being made.

Example 2- Amendment to order without the media being present

In an equally concerning recent example in the Melbourne Magistrates' Court, a suppression order was made in relation to the name of the Accused. The media received notice of the application for this order and in fact appeared to oppose it. His Honour ruled that the order should be made and an order suppressing the name was authenticated and circulated.

At a later stage during the hearing but on that same day, the applicant then requested that the order be extended to suppress the identity of the Accused, which would include any identifying material. His Honour noted that it was unfortunate that lawyers for the media were no longer present to respond but proceeded to extend the order in any event.

Whether the court is making a suppression order on its own motion, amending an order or considering an application brought by one of the parties, Judges and Magistrates should be trained to stand the matter down, however briefly, so that media can be notified and given an opportunity to be heard.

[4] Figures drawn from the number of suppression orders notified to News Corp Australia during 2016 and may not be a complete record of the number of orders actually made.

Most media lawyers make submissions on suppression order applications regularly and will usually be in a position to respond within a short period of time. There is no real practical obstacle to media lawyers working within a short notice period. As a result, a very short adjournment, at times of only approximately 60 minutes, will often be sufficient for the media to be notified, consider whether the order should be opposed and instruct lawyers if appropriate.

c) Clarity of terms

Orders are regularly made which are ambiguous or imprecise in their terms, leading to ambiguity about the interpretation and compliance with the orders. In seeking to clarify or understand the terms so as to comply with the order, the media are often forced to make further enquiries through the Court Media Officers, further tying up Court time and resources. Ambiguous orders also pose difficulties if it becomes necessary to revisit them at a later date, or if it comes before a different judicial officer, where the context in which the original order was made or the material to which it relates is not readily apparent from the wording of the order itself.

Examples of this are where orders are made too broadly (such as to suppress all reference to a person's name, ostensibly in any context, when the order should really be limited to references in connection with the proceedings), or with reference to some information or document that the media may not have access to, or which may create confusion if the order is being looked at some time later (such as references to paragraphs of affidavits or exhibits that the media do not have access to). Another example is where an order is made not to publish a person's "name" but where the actual intention was to suppress all identifying information (such as image, or identifying particulars), or vice versa.

d) Brief Reasons for decision

Another common issue is the lack of clarity around the reasons for orders made under the Act. The actual prejudice, risk to safety or national security giving rise to orders made under this section is often unclear.

A relatively simple solution to this issue is to require orders to articulate in a short sentence or two the actual prejudice, risk to safety or national security which publication poses and which therefore justifies the order being made.

Examples of such explanations in the case of orders made to avoid risk of prejudice under section 18(1)(a) of the Act could include:

i. Publication of the Accused's identity in circumstances where eye witnesses have not yet given their evidence to police may prejudice the evidence of those witnesses; or
ii. Publication of the Accused's criminal history may poison the mind of jurors at trial.

We do not envisage that elaboration beyond this succinct sentence or two would be necessary for the purpose of clarifying the prejudice.

There are various benefits to this requirement. Firstly, it forces the applicant to turn their mind to the specific reason for an order when they are considering whether to bring an application. In our submission, this is likely to reduce the number of frivolous applications that the courts are asked to determine.

Secondly, this requirement also directs the attention of the judge or magistrate being asked to make the order to the particular reason it is required such that it may become apparent that the order is not, in fact, necessary at all.

Thirdly, when the purpose of the order is clearly communicated, both the media and the public at large can be satisfied that the Act has been properly applied. And in the media's case, it is likely advice will be given not to take up the court's time and resources in an attempt to have the order revoked which is bound to fail.

Fourthly, it assists subsequent judges and magistrates in later hearings of the same proceeding. We often see judges at later stages in proceedings suppressing matters for the reason that an earlier order was made by a previous judge or magistrate. If orders articulate precise reasoning, a subsequent judge or magistrate can easily discern the grounds upon which the order was made and whether it is necessary for the order to be maintained or vacated.

In short, this measure is not overly burdensome when weighed against the benefits that it will bring to the proper implementation of the Act. It will require applicants and judges to consider the relevant criteria under the Act and the actual prejudice which an order seeks to avoid.

Further consideration is required as to whether this measure should be included in an amendment to the Act or whether simply adopting it as a protocol is more appropriate. If an amendment to the Act is required, we would be happy to assist with drafting or reviewing such an amendment.

e) Duration and Terms of orders

As part of any training, judges and magistrates should be regularly reminded about not only the importance of delivering clear and concise orders, but also the effect of section 12 of the Act dealing with the duration of orders. We often see judges defaulting to a termination date of five (5) years which is the maximum period provided for under section 12. The reference to the period of five (5) years in section 12 is of no particular significance other than to prevent orders having effect indefinitely beyond the period necessary to prevent the risk of prejudice.

If duration can be determined by reference to a relevant future event, then that option should generally be preferred over a fixed period of no particular relevance.

We are also aware that some judicial officers will simply limit the order with the phrase 'or until further order', which inevitably puts the onus on the media to pursue orders which continue to be in place unnecessarily.

In relation to the drafting or orders themselves, our experience is when providing pre-publication advice, that it can at times be difficult to understand the intent or orders that are drafted in an ambiguous manner. This is of particular concerns given the serious consequences of breaching a suppression order.

f) Evidence of medical experts

Another unsatisfactory practice which judges and magistrates appear to have adopted when assessing applications under the Act is accepting the evidence of medical professionals in relation to distress and embarrassment at face value.

There is obviously no suggestion by the media that these witnesses in particular are not credible. However, judicial officers should assess this evidence critically and to the same extent that all other evidence is tested. Judges and Magistrates sometimes fail to appreciate that the critical question is not whether the witness or complainant whom the order seeks to protect is distressed but whether publication will exacerbate that distress or embarrassment to an undue level such that it is necessary to override open justice in making a suppression order.

g) Take down orders

Finally, our experience shows that Courts are often overly concerned with the taking down of historical online stories that may in some way relate to a case presently before the Courts. This practice fails to acknowledge the futility usually involved in making such orders in two primary ways. Firstly, where historical stories are 'removed' from online pages, other stories from alternative sources (including from overseas and disreputable organisations that simply copy and make available content without permission from major media organisations) simply move to the top of search results in Google or otherwise. Secondly, jurors are routinely instructed at trial not to perform their own research, including by way of online searching. Accordingly, requiring the take down of old online stories means the order is made unnecessarily and, as such, contrary to the terms of the suppression order legislation.

4. SERIOUS SEXUAL OFFENDER LEGISLATION

The *Serious Sex Offenders (Detention and Supervision) Act 2009* (the SSO Act) repealed the *Serious Sex Offenders Monitoring Act 2005.* Under the 2005 Act, publication of offenders' identities was prohibited. That position was reversed by the introduction of the SSO Act. Under the SSO Act an offender's identity is not suppressed unless the court specifically makes an order under section 184 suppressing it. In assenting to the SSO Act, Parliament expressed a clear intention that offenders' identities should be reportable, unless it is in the public interest to make an order to the contrary.

Section 184 of the SSO Act was amended in 2012 to require courts to consider the protection of the community, amongst other factors, when deciding whether to make an order prohibiting publication of an offender's identity.

In the second reading speech for the amending act, Mr McIntosh, Minister for Corrections, described the amendments as:

> "*…both a highly practical strengthening of the act, and a measure of the government's intent in seeking to protect children, families and the community from those who might colloquially be described as the 'worst of the worst".*[5]

Again, the manner in which courts have implemented this provision has been inconsistent with the effect that the Parliament intended the SSO Act to have. Instead of the number of orders suppressing offenders' identities decreasing, almost every application for an order under section 184 has been successful. This is of particular concern as the will of the judiciary in relation to this provision appears to have supplanted the will of the legislature.

In our view, if the law was being applied correctly in accordance with Parliament's intention, it simply cannot be that every application for an order is decided in the same way. One of the unfortunate consequences of this practice is that the orders serve to protect convicted offenders which Parliament has described as "the worst of the worst" because innocent members of the community unknowingly come in to contact with them.

It is also of concern that an argument commonly advanced in support of an order under section 184 is that if an offender's identity is reported, it will increase that individual's stress which in turn will lead to the possibility of increased risk that the person will re-offend.

[5] M McIntosh, *Serious Sex Offenders (Detention and Supervision) Amendment Bill 2011*, Second reading, 12 September 2012, p.77.

Even if it is accepted that publication of an offender's identity does increase the possibility of risk of re-offending, which in our view is a tenuous argument, the mere possibility of an increased risk is not enough to satisfy the requirements under the Act. The Court should not be satisfied on this basis alone that it is in the public interest that an order prohibiting publication of the offender's identity be made.

The training referred to above should specifically cover the SSO Act. Judges who hear matters in this jurisdiction should bear in mind the principles discussed under the training section above. Judges must adopt a mindset of reluctance to suppress an offender's identity other than in wholly exceptional cases. Obviously the additional factors of community protection and the offender's previous compliance with SSO Act orders should be considered as required by the SSO Act. In our view, these considerations should weigh in favour of the community being made aware of offenders' identities far more frequently than currently occurs.

5. RECORDS OF INTERVIEW UNDER THE CRIMES ACT

Section 464JA of the *Crimes Act 1958* (Vic) prohibits the possession, supply, copying, playing, modification or erasing and publication of records of interview (ROI) by persons other than those directly involved in the proceeding in question without a direction from the court to do so under section 464JB. This provision has had a significant adverse impact on the media and the public's ability to access this material.

Prior to the introduction of this provision in 2009, access to records of interview was often granted as a matter of course. The content of these records is typically uncontroversial. Under the current regime, our experience is that courts are minded in almost every instance to refuse access to ROIs, even where the Defendant does not object and there is a considerable public interest in the case.

The rationale for the introduction of this provision has been explained as follows[6]:

(a) Protecting the identity of those involved in criminal proceedings, such as victims and witnesses;
(b) Avoiding criminal trials being jeopardised by jurors seeing ROIs published on the internet, sometimes in digitally edited form; and
(c) Preventing victims or witnesses manipulating their own evidence after viewing ROIs online or on television.

In light of these reasons, there is no basis for access to the records being restricted after a verdict has been handed down in a criminal proceeding.

An argument that has been advanced in opposition to the media accessing ROIs is that if people see ROIs being published, they will give less candid statements when they are being interviewed or might be inclined to exercise their right to silence when they otherwise would not have because they do not want to appear online or on national television, particularly to their loved ones.[7]

This argument is unconvincing. We consider it highly unlikely that anticipation of a ROI appearing on television or news websites would influence someone whilst being interviewed for a serious criminal offence who, in any event, will have just been cautioned that what they say may be given in evidence. Further, to the extent that we are offering any assurances to interviewees that their ROIs will never be the subject of some form of publication, this assurance is false and should not be given. ROIs, as with most other forms of evidence in criminal proceedings, have historically been publicly accessible as a matter of course and interviewees should not be given any false sense of security that ROIs are immune from this.

We propose that section 464JA should be repealed or amended so that access to and publication of ROIs is permitted unless the prosecution makes an application through which it convinces a Court that it is necessary for the proper administration of justice in a particular case that a ROI be suppressed. Where such

[6] Victoria, *Parliamentary Debates*, Legislative Assembly, 15 October 2009, p3687
[7] *DPP (Cth) v Thomas* [2006] VSC 88 (Ruling No 15), per Cummins J at [3]-[4].

an application is successful, only the portions of the ROI which are likely to risk prejudice or safety if published should be suppressed. Again, we are happy to assist as to the form of any proposed amendment to this provision.

RECOMMENDATIONS – RECAP

To recap, we make the following recommendations in order to address the culture surrounding suppression orders in Victoria:

1. Regular and robust training should be provided to judicial officers covering the mindset required to act as contradictor, ensuring that the media has a right to be heard, that appropriate duration periods are applied to suppression orders and that all relevant evidence is assessed critically. We are happy to assist with any aspect of this training, including input into the preparation of summary documents to be provided to judges and magistrates on completion of the training;
2. Suppression orders must include a short explanation of the particular reasons necessitating the order;
3. Section 184 of the SSO Act should be revisited so that judges are reminded that Parliament's intention is for community protection to be prioritised over protection of offenders' identities. Orders prohibiting publication should only be made in rare circumstances where community protection necessitates it. The mere possibility of risk of re-offending should not be sufficient for a Court to be convinced that it is in the public interest for an offender's identity to be suppressed; and
4. Section 464JA of the Crimes Act should be repealed or amended with the effect that access to ROIs is granted unless the prosecution successfully applies to the court for an order denying it on the basis that access or publication would jeopardise a particular investigation or prosecution.