

SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS
ATTORNEY-GENERAL'S DEPARTMENT

Group 2

Program 1.1

Question No. 189

Senator Boyce asked the following question at the hearing on 23 May 2012:

- a) In the previous 3 years on what occasions did the Federal Court/Federal Magistrates Court/AAT impose a suppression order or non-publication order?
- b) How many of these were a permanent suppression of the information?
- c) How many are still subject to suppression?
- d) If there is no data how does the department monitor the principle of open justice to ensure the openness of the courts?
- e) Does the AG's Department maintain a watching brief on the use of suppression orders, and what work in this area is it currently undertaking?
- f) Generally speaking what is the current Government policy on open justice in our federal courts?

The answer to the honourable senator's question is as follows:

- a) *Federal Court of Australia:* Data to respond to parts a), b) and c) of the question is not readily available. It could not be compiled within any reasonable time frame and without a significant diversion of resources. As noted in the response to part d), in November 2011 the Court (for other purposes) provided the Attorney-General's Department with information about suppression orders made over a less extensive period. This was undertaken as a discrete exercise and was not as comprehensive as would be required to provide the data sought in parts a), b) and c) of the question but nevertheless required significant time and effort. A much more resource intensive exercise would be required to compile data sought by this question.

Federal Magistrates Court of Australia: The Federal Magistrates Court (FMC) is unable to provide data to respond to parts a), b) and c) of the question as it is not readily available. The data could not be compiled within any reasonable time frame and without a significant diversion of resources. Anecdotally, the court can advise however that we are only aware of a few orders made in the FMC pursuant to the current power contained in section 61 of the *Federal Magistrates Court Act 1999*.

Administrative Appeals Tribunal: The Tribunal's power to make confidentiality orders is set out in section 35 of the *Administrative Appeals Tribunal Act 1975*.

The Tribunal does not keep a register of orders made under section 35 of the Act and does not otherwise have any statistical data on the number or type of orders that have been made over time. The Tribunal can, however, provide some general information about orders of this kind.

The Tribunal does not commonly make orders under section 35 of the Act to suppress the name of a party or witness, or to prohibit or restrict the disclosure or publication of all of the information held by the Tribunal in relation to a proceeding. Orders that specific pieces of information should not be disclosed or published are made somewhat more frequently. In general, orders made to prohibit or restrict the disclosure or publication of specific information do not prevent any hearing taking place in public or the Tribunal publishing reasons for its decision.

b) Federal Court of Australia: See answer to (a) above.

Federal Magistrates Court of Australia: See answer to (a) above.

Administrative Appeals Tribunal: Where orders are made to suppress the name of a party or witness, they usually continue permanently. Even if the name of a party or witness has been suppressed, the Tribunal generally endeavours to publish any reasons for its decision in a way that does not identify the party or the witness.

Where orders are made that specific pieces of information should not be disclosed or published, they usually continue permanently.

c) Federal Court of Australia: See answer to (a) above.

Federal Magistrates Court of Australia: See answer to (a) above.

Administrative Appeals Tribunal: See answers to (a) and (b) above.

d) At present, none of the federal courts keep a register of suppression orders. However, the Courts have been able to provide the Attorney-General's Department with an indication of the number of suppression orders made when requested. For example, in November 2011

- the Federal Magistrates Court advised that it had only made 4 suppression orders since its creation in 1999,
- the Federal Court advised that it had made approximately 306 suppression orders in 175 matters since December 2009 (the Federal Court's statistics were extracted by Court staff manually at AGD's request, with the proviso that there may be some small margin of error), and
- the High Court and the Family Court advised that they rarely make suppression orders.

- e) The Attorney-General's Department recently reviewed the use of suppression orders by federal courts in the context of developing the [Access to Justice \(Federal Jurisdiction\) Bill 2011](#), which implements the Standing Committee of Attorneys-General model provisions on suppression orders.

The Department consulted with courts in relation to the draft provisions, including requesting indicative information on the numbers of suppression orders made by the courts (see above). The provisions in this Bill are intended to tighten up the scope of suppression orders.

The Department has also been working on developing a proposal for the Standing Council on Law and Justice (formerly, the Standing Committee of Attorneys-General) regarding the possible establishment of a national suppression and non-publication orders register, in consultation with officers from other jurisdiction. This process is ongoing.

- f) The Government is committed to open justice in our federal courts. To this end, the Government has introduced the Access to Justice (Federal Jurisdiction) Bill 2011, which implements the Standing Committee of Attorneys-General model provisions on suppression orders.

These provisions are intended to provide a more robust legislative framework for federal courts when making suppression orders. They provide a clearer approach to the granting of suppression orders, which puts front and centre the fundamental importance of the open justice principle. The provisions are intended to assist the court to appropriately craft suppression orders, so that they are only made when they are clearly justified, and in as narrow terms as necessary to achieve their purpose, recognising the important role that open justice plays in upholding the rule of law.

The Government was aware that concerns had been raised about the breadth of the grounds upon which suppression orders can be made under the SCAG model bill, and modified its own Bill to take those concerns into account. The Bill will clarify:

- the grounds on which suppression orders can be made
- that the court must state the grounds upon which order is being made
- what information suppression orders can cover
- how long they should last for
- how broad they should be, and
- rules about standing.