

Preliminary submission to the NSW Law Reform Commission ‘Open Justice Review’.

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This submission responds to the following terms of reference:

a) Any NSW legislation that affects access to, and disclosure and publication of, court and tribunal information, including:

- The Court Suppression and Non-Publication Orders Act 2010 (NSW);
- The Court Information Act 2010 (NSW); and
- The Children (Criminal Proceedings) Act 1987.

b) Whether the current arrangements strike the right balance between the proper administration of justice, the rights of victims and witnesses, privacy, confidentiality, public safety, the right to a fair trial, national security, commercial/business interests, and the public interest in open justice.

e) Whether, and to what extent, suppression and non-publication orders can remain effective in the digital environment, and whether there are any appropriate alternatives.

g) Whether, and to what extent, technology can be used to facilitate access to court and tribunal information.

Executive Summary

This submission is presented in two parts that address the following five aspects:

First: it makes particular reference to the role of professional communication and media workers within Australian courts and the potential to make greater use of this resource to promote open justice and communicate to the media and the public about suppression and non-publication orders. We suggest that a review of this role – which is typically carried out by communication and media professionals who have a close working relationship with journalists and specialised knowledge of social and digital media – may provide ways of managing suppression and non-publication orders more proactively or mitigating the damage of breaches.

Second: it draws attention to the need to review standing to oppose suppression orders, which is now restricted to representatives of the legacy media. We propose that Section 9 (2)(d) of the *Court Suppression and Non-publication Orders Act 2010* (NSW) be reviewed to remove

the limitation on the right to be heard on the making of suppression orders to ‘media organisations’ and allow open standing for any person who opposes the making of such orders who can advance a serious argument that the suppression or non-disclosure order should not be made, having regard to the objects of the legislation.

Third: we propose that to more effectively mitigate the risks posed to the conduct of criminal trials, in particular, and reduce the need to rely on suppression orders, greater attention should be paid to improving the content, delivery and reinforcement of ‘do not research’ instructions to jurors. Further research should also be conducted with jurors to more thoroughly investigate how such instructions can be made more effective, and appropriate methods of training for jurors should be developed to reinforce such instructions.

Fourth: it suggests that the failure to implement the *Court Information Act 2010* (NSW), coupled with the unduly restrictive approach taken to dealing with requests for access to court information that is non-contentious, is undermining open justice in NSW and fails to strike the right balance between the considerations outlined in b) above.

Fifth: it proposes that courts be better resourced to use modern forms of information technology to enable public access to court information.

Part 1

History and context

A series of Australian reports in the 1990s identified the need for better communication between the courts and the public/media, including Justice Ronald Sackville’s *Access to Justice* report (1994), Stephen Parker’s report into the *Courts and the Public* (1998), Keyzer’s *The Courts and the Media* (1998) and Prue Innes’s Churchill Report into *The Courts and the Media* (1998). One response to this issue was the appointment by courts of media professionals to assist in managing communications from the courts and to work with journalists covering court proceedings to facilitate accurate reporting. While the communication and media role in Australian courts has existed since 1983 (first in the Australian Family Courts), most appointments were made during the 1990s and 2000s (Johnston 2018). New South Wales courts have enjoyed the benefit of this type of assistance since Jan Nelson was appointed as the first Media and Communication Manager in the Supreme Court of NSW in 1993.

However, the appointment of media and communication officers in Australian courts during the past three decades has also paralleled a period of intense change in the media. This has

been characterised by massive media disruption and adaptation, with the emergence of the internet in the early 1990s, and a subsequent, radical shake-up of the news industry, followed by the emergence of dominant social media platforms. Since 2003, when the New South Wales Law Reform Commission (NSWLRC) issued its report on Contempt by Publication, the media landscape has changed dramatically. At that time, there was no social media as we know it today - Facebook launched a year later in 2004, Twitter in 2006, the iPhone in 2007, and Instagram in 2010. Most newspapers still relied on print editions for sales; the move online was still in relative infancy, for example the *ABC* and *The Age* became the first Australian media with an online presence in 1995; the *Sydney Morning Herald* began the move online in 1996 (Brief History of the Sydney Morning Herald, 2005; Sydney Theatre Co. 2017). Since then, the breakdown of media users – that is, journalists and others such as bloggers – has continued to escalate, to the point where the definition of ‘journalist’ has had to adapt. For example, in *Slater v Blomfield* [2014] 3 NZLR 835 the New Zealand High Court found that a blogger could be classed as a journalist for the purposes of the benefit of the privilege conferred on journalists under the New Zealand Evidence Act. The definition of “journalist” in the New Zealand Evidence Act is a broad one, cast in similar terms to the definitions in the equivalent Commonwealth and ACT legislation (see discussion in Johnston & Wallace 2017; 2018).

These developments have added significantly to the challenges faced by courts in striking an appropriate balance between the proper administration of justice and the public interest in open justice. The four authors of this submission were among six who provided a report to the Victorian Attorney General on *Social Media and Juries* (Johnston et al, 2013) relevant to this review. At that time, they noted escalating issues relating to the law of *sub judice* contempt arising from the easy publication and distribution of social media and the pervasive and ubiquitous nature of all internet republishing. Qualitative research that our team conducted among judges and court workers found: “Social media has created intense challenges for the law and judicial administration” (Keyzer et al, 2013, p. 47).

Nowhere are these challenges more evident than in the debate around the use of suppression orders to restrict media reporting on court proceedings, typically in the interests of ensuring a fair trial. There are multiple challenges to the effectiveness of suppression orders in the age of social media and internet-based news dissemination. These include the reality that the authority of a suppression order is based on the law of a particular jurisdiction and it is typically circulated only to mainstream media in the trial’s immediate vicinity, even if

worded to have a reach beyond that particular jurisdiction. Action for breach of a suppression order against social media users is unlikely because they might not even know of the existence of suppression or non-publication orders or might be willing, like some international media outlets, to openly flaunt them, knowing that they are effectively beyond the reach of any enforcement action. Court orders to take down earlier reportage on websites ('take down orders') are also typically futile, because online dissemination is so widespread. So, the bizarre situation exists where the prior character evidence and coverage of earlier proceedings still sits online for anyone to access with a simple search of an accused's name, and this detail can be shared easily on social media.

The recent trial of George Pell in the Supreme Court of Victoria highlighted "the difficulties faced by courts enforcing such orders in an age where information flows freely and immediately around the globe" (Birmingham & Bennet 2018) and media frustrations with the court's imposition of suppression orders. Commentary on that case raised questions about open justice and free speech with the ABC's *Media Watch* reporting how the "legal secrets" were "in contempt of the principle of open justice" (Media Watch 2018). The commentary also highlighted a lack of understanding on the part of the media about the nature and purpose of suppression orders. In that respect, it is not clear what provisions were put in place to explain the non-publication and suppression orders and whether the court took a proactive position in explaining its reasons. Professional communication practice has, in recent years, moved to a proactive, explanatory and 'co-creational' approach (Botan 2018). A lack of information and explanation on a contentious or disputed issue will simply fuel rumour and misunderstanding. Moreover, lack of consistency across jurisdictions compounds media and public (mis)understanding about policies, protocols and practices. Open justice can no longer be considered a passive option; a greater proactive position, coupled with appropriate resourcing, needs closer consideration (Johnston 2018; 2018a).

In light of this, we propose that, for suppression orders to remain effective, there is a need to review the contribution that the communication and media role within courts might have on how courts communicate about suppression and non-publication orders in the current, fragmented and pervasive digital media environment. Due to the major media and technological changes that have occurred over recent years we suggest that there is a need for court media and communication professionals to take a stronger, more pro-active, role.

We also note that the relevance and potential effectiveness of suppression orders in New South Wales is currently impaired by the current narrow scope for individual journalists to be

heard in relation to their making, which does not sufficiently recognise the legitimate interests of non-legacy media interests. Of particular concern is the fact that Section 9 (2)(d) of the *Court Suppression and Non-publication Orders Act 2010* (NSW), restricts standing “to appear and be heard by the court on an application for a suppression order or non-publication order” to “a news media organisation”, defined earlier at Section 3 as “a commercial enterprise that engages in the business of broadcasting or publishing news or a public broadcasting service that engages in the dissemination of news through a public news medium.” While at 9 (2)(e) the court might also allow “any other person who, in the court’s opinion, has a sufficient interest in the question of whether a suppression order or non-publication order should be made”, we argue that, in the interest of open justice, such standing should not be left to the discretion of the court. Declining resources in mainstream media, particularly in regional centres, means that individual journalists and sometimes freelance writers, reporters, bloggers, activists and student journalists might have legitimate open justice and public interest reasons for opposing or amending such an order and should therefore have standing to appear and be heard. (Many can no longer afford to engage lawyers to represent them in such circumstances.) These individuals might not even represent commercial enterprises engaged in the news business but might still be engaged in the practice of what we know as ‘journalism’. Thus, we propose that standing requirements should be removed. Open standing has been a feature of trade practices litigation for many years without any evidence that this practice has opened a floodgate of meritless claims (Truth About Motorways, 2000). The importance of determinations under the Act to open justice and the public right to know militates in favour of an open approach to standing. The difficulty with merely expanding the definition of journalist or media organisation beyond the legacy media to a wider group is that at some point a blogger or citizen journalist will be denied access to court to make serious submissions about open justice at the threshold, even though their contentions are perfectly consistent with the objects of the legislation. Expanding standing without removing it simply shifts the goalposts to a new place and enables opponents to advance arid arguments about whether a *person* or *organisation* should have the opportunity to make submissions, rather than focusing on the *merits* of those arguments (Keyzer, 2010). Traditional standing rules focus on the qualities of the person, rather than the qualities of the arguments, and are a hangover from the Victorian era, where one only had standing if one had a proprietary or pecuniary interest in the outcome of a matter. This private law paradigm of access to justice is alien to the objects of the legislation and the advancement of open justice. Suppression orders affect everyone and anyone, so,

correlatively, anyone and everyone should have standing. Furthermore, litigation over standing can and has been used by governments to stifle debate and intimidate impoverished or public interest litigants from seeking access to justice. For that additional reason, applicants for a suppression order should not be expected to bear the costs of a “winner” in a decision about open justice if they “lose”, unless a court rules that their *argument* is destitute of foundation or without merit. The parties should bear their own costs. All of this obviates the need for any test whether a person is ‘demonstrably engaged in journalism’, not just news organisations.

A key imperative for the making of suppression orders is the desire to shield jurors from potentially prejudicial material relating to an accused in a criminal trial. In the age of the internet and social media, it appears almost inevitable that in high profile cases jurors will have some level of exposure to such material. How to effectively reduce the risks posed to the proper administration of justice from such exposure was the subject of our earlier report to the Victorian Attorney General on *Social Media and Juries* (Johnston et al, 2013). We submit that the recommendations that we proposed in that report (pp.24-25) remain current. In our submission, supporting and resourcing courts to effectively prepare and instruct jurors for their role, can play an important part in reducing the need to rely on suppression orders.

Recommendations

In light of the changes to the media landscape, the increasing relevance and potentiality of courts’ communication and media professionals, and the need to better manage the use of suppression orders in criminal trials, this submission recommends the following:

Recommendation 1: Examine the professional role of communication and media professionals within courts and assess its potential to assist more comprehensively and proactively with suppression and non-publication orders in the digital environment;

Recommendation 2: Develop a publicly available manual outlining the types and categories of information that might be made the subject of suppression and non-publication orders;

Recommendation 3: Establish a national framework for the implementation of suppression and non-publication orders and access to court information to provide clarity for courts’ external stakeholders;

Recommendation 4: Section 9 (2) of the *Court Suppression and Non-publication Orders Act 2010* (NSW) be amended to extend standing “to appear and be heard by the court on an

application for a suppression order or non-publication order” to anyone ‘demonstrably engaged in journalism’, not just news organisations;

Recommendation 5: That NSW Courts dealing with criminal jury trials be supported and resourced to improve the content, delivery and reinforcement of ‘do not research’ instructions to jurors, conduct research to investigate how such instructions can be made more effective, and develop appropriate methods of training for jurors.

Part 2

The remainder of this submission addresses the fourth and fifth aspects raised in the Executive Summary:

Fourth: that the failure to implement the *Court Information Act 2010* (NSW), coupled with the unduly restrictive approach taken to dealing with requests for access to court information that is non-contentious, is undermining open justice in NSW and fails to strike the right balance between the considerations outlined in term of reference b), above.

Fifth: it proposes that courts be better resourced to use modern forms of information technology to enable public access to court information.

Open Justice

The promotion of open justice is one of the objectives the *Court Information Act 2010* (NSW) as embodied in s3(b) which provides that the Act is, inter alia, intended:

(b) to provide for open access to the public to certain court information to promote transparency and a greater understanding of the justice system,

The Act goes on to helpfully define different types of information held by courts about individual cases into either ‘Open access’ or ‘restricted access’ information (ss 5&6). ‘Open access’ information includes categories of documents the disclosure of which are obviously considered, by the framers of the legislation, to be legitimate matters of public interest, the disclosure of which contributes to fair reporting of court proceedings and does not risk the proper administration of justice, or compromise the privacy or safety of an individual, such as, for example, the indictment or list of charges in a criminal case. S 8(1) of the Act explicitly provides that

(1) Any person is entitled to access to court information that is open access information unless the court otherwise orders in a particular case.

In this submission, the failure to bring the legislation into force has resulted in a situation where access to information held on court files in NSW is still controlled through processes implemented by Court Practice Directions, which take an overly-restricted approach. For example, the method provided by the NSW Supreme Court for requesting access to any court information on a court file, is for the intending applicant to locate and complete a form (in Microsoft Word format) located down three levels on the court website – at ‘Document access, copying and search report forms’ located under ‘Forms & Fees’ see http://www.supremecourt.justice.nsw.gov.au/Pages/SCO2_formsfees/SCO2_forms/SCO2_forms_subject/document_access_copying_search_forms.aspx. The form, entitled ‘Application to access a court file’ informs intending applicants that a fee of \$82 is payable on its lodgement, provides an email address for contacts, but is not accompanied by any instructions as to how or where it can be lodged. A ‘non-party’ to the proceedings is requested to complete an additional section on the form justifying their access to the documents sought. The form contains the following notation (in bold):

Access to material in any proceedings is restricted to parties, except with the leave of the Court. (Practice Note No. SC Gen 2).

However, nowhere on the form, or the webpage, is the intending applicant informed that Section 7 of that same Practice Note provides that:

7. Access will normally be granted to non-parties in respect of:
- pleadings and judgments in proceedings that have been concluded, except in so far as an order has been made that they or portions of them be kept confidential;
 - documents that record what was said or done in open court;
 - material that was admitted into evidence; and
 - information that would have been heard or seen by any person present in open court,

unless the Judge or registrar dealing with the application considers that the material or portions of it should be kept confidential. Access to other material will not be allowed unless a registrar or Judge is satisfied that exceptional circumstances exist.

(In contrast, the equivalent page on the Federal Court of Australia’s website clearly informs a non-party applicant of the type of material to which access is normally granted – see <https://www.fedcourt.gov.au/services/access-to-files-and-transcripts/court-documents/non-party-access>).

The combined effect of an obscure application process, and inadequate disclosure of the grounds on which access may be granted, seems designed (at worse) to limit access to any court file to the immediate parties to any proceedings and (at best) to privilege other applicants who can afford legal representation, and have the time and resources to devote to pursuing an application. Regardless of whether the 2010 Act is in operation or not, it is difficult to see the any justification for this approach, at least in respect of the type of court documents that the framers of considered to be ‘open access’ and it can hardly be said to strike “the right balance between the proper administration of justice, the rights of victims and witnesses, privacy, confidentiality, public safety, the right to a fair trial, national security, commercial/business interests, and the public interest in open justice”.

Furthermore, in an era where many court documents are presumably created, filed and managed electronically and in a community characterised by high levels of digital literacy, it is difficult to see any justification for restricting the method of access to a physical inspection of the court file, unless the material is of the type that justifies a ‘restrict access’ classification. Technological solutions exist to provide electronic access to court documents without compromising the security of the court file and have been successfully implemented in other, comparable courts; see, for example, the US Federal Courts’ PACER system at <https://www.uscourts.gov/court-records/find-case-pacer>. In this submission, information technology solutions should be the default method of providing access to ‘open access’ court information, and courts should be adequately resourced to acquire, implement and maintain such solutions.

Recommendations

In light of the lack of clarity currently surrounding the right to access court information in NSW, and the procedures for obtaining access, this submission recommends the following:

Recommendation 6: That the NSW Department of Justice and the NSW Courts be resourced to fully implement and operationalise the provisions of the *Court Information Act 2010* (NSW);

Recommendation 7: That the NSW Department of Justice and the NSW Courts be resourced to implement technological solutions to provide for electronic access to ‘open access’ court information as the default option.

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