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PRELIMINARY SUBMISSION

NSW Law Reform Commission's Open Justice Review

Court and tribunal information: access, disclosure and publication

This preliminary submission is provided by Banki Haddock Fiora (**BHF**), a Sydney-based boutique media and intellectual property law firm, in response to the NSW Law Reform Commission's (**NSWLRC**) call for preliminary submissions to help frame the issues to be addressed in consultations in its *Open Justice Review - Court and tribunal information: access, disclosure and publication* (**Review**). In these submissions, we set out and respond to the proposed terms of reference published by the NSWLRC.

Pursuant to section 10 of the Law Reform Commission Act 1967, the NSW Law Reform Commission is to review and report on the operation of:

1. ***legislative prohibitions on the disclosure or publication of NSW court and tribunal information,***
2. ***NSW court suppression and non-publication orders, and tribunal orders restricting disclosure of information, and***
3. ***access to information in NSW courts and tribunals.***

In particular, the Commission is to consider:

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.

BHF welcomes a review of the operation of the legislative provisions listed above. BHF submits that the Review should not only consider the operation of these provisions, but also their application by the Courts and Court registries.

In particular, BHF submits that the review should consider the effect of the failure of parliament to proclaim the *Court Information Act 2010* (NSW) (**CIA**). The Act was passed by both houses of parliament in tandem with the *Court Suppression and Non-Publication Orders Act 2010* (NSW) (**CSPO Act**). The CIA was passed with bipartisan support, and assented to on 26 May 2010, following extensive consultation with stakeholders including the Chief Justice of New South Wales, the Chief Judge of the New South Wales District Court, the Chief Magistrate, the Law Society of New South Wales, the New South Wales Bar Association and media organisations. The CIA was designed to promote the principle of open justice and to overhaul the existing complex system governing the release of court information, in

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furtherance of the principle that access to information held in court records is an essential feature of an open justice system. There is no reasonable basis for the delay in proclaiming the Act, and no explanation has been offered as to the delay.

We note that the Office of the NSW Department of Public Prosecutions (**DPP**) does not support the commencement of the CIA.[1] The basis of the DPP's opposition appears to be that it would require Court Registry staff to distinguish between "open access information" and "restricted access information" (including "personal identification information") as those terms are defined in the CIA. However, the Review should consider whether the issues identified by the DPP could be overcome with some common-sense amendments to the CIA (including the definitions) to remove any obligation on the part of Registry staff to undertake such an analysis of the material sought by an applicant. For example, the CIA could make it clear that making an "open access" document available is not a contravention of section 20 of the CIA, notwithstanding that it might contain "restricted access information". Further, Registry staff would have the benefit of section 20(3) of the CIA, which provides:

> *If a court officer discloses court information by providing access to the information and believes in good faith when providing access to the information that this Act permits or requires that access to be provided, the officer is deemed to have disclosed the information in the execution of this Act.*

The burden of proving that the relevant officer did not have the requisite good faith belief when he or she made the information available would rest on the prosecution, which would be an onerous evidentiary burden. In any event, the media would be obliged not to publish any personal identification information, pursuant to section 10(3) of the CIA. The objections of the DPP are therefore not of sufficient weight to supplant the will of the NSW parliament in passing the CIA with bipartisan support. The inconsistent regimes for accessing Court documents set out in Court Rules and practice notes across NSW civil and criminal jurisdictions is inapt.

In addition to the provisions listed in the terms of reference, BHF submits that the Review should consider the operation, and application, of the following provisions:

- *Criminal Procedure Act 1986* (NSW). In particular consideration should be given to the effect of section 314(3)(b), the erroneous application of which has resulted in a blanket ban on media access to Court documents in prescribed sexual offence matters. The Review should also consider whether to recommend amendments to section 314 to remove the definitive list of documents the media is entitled to access to foster greater flexibility both for the Courts and the media. The inflexibility of the current wording has given rise to difficulties, for example, in sentencing proceedings where the Court has relied not on a police statement of facts (which the media is entitled to access), but on an agreed statement of facts (to which there is no entitlement).
- *Children (Criminal Proceedings) Act 1987* (NSW), sections 15A-15E;
- *Adoption Act 2000* (NSW), section 180(3);
- *Crimes Act 1900* (NSW), section 578A;
- *Civil and Administrative Tribunal Act* 2013 (NSW), section 64;
- *Mental Health Act 2007* (NSW) section 162;
- *Coroners Act 2009* (NSW), section 74;

[1] Office of the Director of Public Prosecutions, *Preliminary Submission to the Law Reform Commission – Open Justice Review, May 2019*, page 6.

- *Young Offenders Act 1997* (NSW), section 65; and
- *Children and Young Persons (Care and Protection) Act 1998* (NSW), section 105.

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.

BHF agrees with this term of reference in principle. However, the use of the term "arrangements" is ambiguous, and fails to adequately distinguish between the legislative regime in place and the application of those laws by the Courts and Court registries. BHF submits that the Review should also consider whether the current regime *and its application* are effective in striking the right balance, including with respect to the interaction between the various statutory provisions, which has been productive of ambiguity and confusion.

For example, the Review should consider the effect of the blanket ban on media access to Court documents in prescribed sexual offence matters currently imposed by the NSW Local and District Court registries, purportedly pursuant to the interaction between section 578A of the *Crimes Act 1900* and section 314(3)(b) of the *Criminal Procedure Act 1986*. Although this blanket prohibition was recently held by the Deputy Chief Magistrate of the Local Court to be founded on an erroneous interpretation of section 578A,[2] the registries nevertheless persist in imposing the ban, notwithstanding the express entitlement to access such documents pursuant to section 314(1). This has had a significant effect on the media's ability to accurately report on matters of public interest before the Courts, and resulted in costly and time-consuming applications being brought by media organisations. This indiscriminate ban has tipped the balance too far in favour of the privacy and confidentiality of individuals, at the expense of the proper administration of justice and the greater public interest in open justice.

c) The effectiveness of current enforcement provisions in achieving the right balance, including appeal rights.

BHF submits that this term of reference is uncertain and should be clarified. It is not clear what enforcement measures are being referred to.

d) The appropriateness of legislative provisions prohibiting the identification of children and young people involved in civil and criminal proceedings, including prohibitions on the identification of adults convicted of offences committed as children and on the identification of deceased children associated with criminal proceedings.

BHF agrees that reasonable restrictions on the publication of the identity of children involved in civil and criminal proceedings remain, on the whole, appropriate. However, it is submitted that section 15A(1)(c)-(e) of the *Children (Criminal Proceedings) Act* establishes an unreasonable prohibition on publication of information that could identify persons who may have been mentioned only very peripherally in criminal proceedings. These restrictions are not replicated in any other Australian jurisdiction and serve no discernible public interest purpose.

Section 15A(4)(b) prohibits publication of the identity of a deceased person who was a child at the time of the relevant proceedings, but who may have been significantly older (including of old age) at the time of death. While BHF accepts that family members of deceased persons

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[2] *R v David Patrick R Frost* (2017/00334302) dated 6 November 2018 (transcript ref: T7.49 ff).

who were children at the time of the proceedings might in some instances prefer that their identity not be published, it is submitted that the prohibition is excessive, is not limited in time, and tips the balance too far in favour of privacy at the expense of open justice. This prohibition stifles public interest reporting and undermines the principle of open justice.

The Review should also consider the effect of section 180(3) of the *Adoption Act 2000* (NSW). A person affected by an adoption application should be entitled to consent to the publication of his or her identity, provided he or she has capacity to provide informed consent, as is the case with other restrictions such as those imposed by sections 578A of the *Crimes Act* and 15A of the *Children (Criminal Proceedings) Act*.

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.

As submitted above, the Review should not only consider whether the provisions of the CSPO Act can remain effective, but should also consider whether the application of the CSPO Act by the Courts and Court registries is and can remain effective. There is currently no disincentive to an applicant bringing an application for CSPO Act orders in circumstances in which such orders (including take-down orders) would be futile, particularly in light of the instantaneous dissemination of information across the globe via social media and the Internet.

With respect to the CSPO Act and its application, BHF submits that the Review should consider:

- the frequency with which suppression and non-publication orders are sought, made, and revoked, both in NSW and in other Australian jurisdictions, and the impact of such a large number of orders upon the principle of open justice;
- deficiencies with the current *ad-hoc* methods of disseminating information relating to suppression and non-publication orders as made (i.e. via a group email), including the failure of Courts to adequately identify the subject of the order in the order itself. It is far too common an occurrence for an order to refer to a Court document (such as *"the person identified in paragraph [x] of the affidavit of [person y]"*), a document that is likely not available for inspection by the media. This reflects a misunderstanding of what constitutes "publication" under the CSPO Act and leads to the Kafkaesque situation where the media is bound by an order, the subject and effect of which they have no way of knowing. The overly cautious approach taken by the Courts in refusing to identify the subject of non-publication orders is unnecessary and counterproductive, and ignores the reality that a member of the public who is present in the Court would have heard the suppressed information, notwithstanding the imposition of any non-publication order;
- whether section 6 of the CSPO Act should be amended to expressly require the Court, in exercising its discretion as to whether to grant the order, in each instance, to undertake a balancing exercise between the public interest in open justice as against the competing interests sought to be protected by the order;
- whether the CSPO Act should be amended to create an exemption from the effect of a non-publication or suppression order, in circumstances where the subject of the order consents to publication of their identity;
- whether the CSPO Act should be amended to clarify the entitlement of parties to seek their costs, for example in respect of frivolous, vexatious or oppressive non-

publication or suppression order applications, or those that are brought, maintained or contested without a proper basis;

- whether the CSPO Act should be amended to provide that the duration of the order must be stated with specificity, that the date of revocation of the order must be specified in the order, and to expressly prohibit a suppression or non-publication order being made *"until further order"*;
- whether the concept of "necessity" as it applies to the making of an order pursuant to section 8 of the CSPO Act, should be expressly defined in the Act to more closely reflect the understanding of that principle in the relevant authorities, including whether the Act should specify that no order is to be made where it would be futile to do so;
- whether the Court should be required to provide reasons for the granting of an order in each instance. We agree with the University of Sydney Policy Reform Project's submission,[3] that the omission of a requirement to require reasons to be given for an order leads to a culture in which the making of an order becomes the norm whenever an application is made;
- whether the CSPO Act should be amended to require that an application cannot be heard unless the applicant provides evidence of service of the application upon affected parties named in the application, with sufficient notice to enable affected parties to appear;
- whether, in light of the high frequency of applications for CSPO Act orders made by defendants in criminal proceedings, the "undue embarrassment" test in section 8(3) should be amended, for example, to provide that the Court must be satisfied that there is a sound evidentiary basis for finding that exceptional circumstances apply, which are unrelated to the nature or severity of the accused's alleged offending;
- whether the NSW Department of Justice should be required to keep statistics as to the number and duration of suppression and non-publication orders made, and the grounds upon which they are made;
- in light of the deficiencies identified above with respect to the application of the current regime, whether a program to educate judicial officers and Court staff with respect to the terms and effect of the current legislative regime is warranted; and
- with respect to the futility of take-down orders in the modern media landscape, BHF notes the comments of the DPP with respect to the durability of juries in criminal trials, which reflect Spigelman CJ's observations in *John Fairfax Publications Pty Ltd v District Court (NSW)* (2004) 61 NSWLR 344 at 366, [103]. BHF agrees with the DPP's submission that the NSWLRC should consider whether the criminal courts are adequately observing the principle that properly directed jurors will refrain from making independent enquiries and will be true to their oath, when deciding whether they should make take-down orders.

f) The impact of any information access regime on the operation of NSW courts and tribunals.

BHF agrees with this term of reference, but submits that the term of reference should include the impact of any such regime on the principle of open justice.

[3] University of Sydney Policy Reform Project, *Submission to the NSW Law Reform Commission 'Open Justice Review': a response to term of reference (e)*, May 2019, para 2.4.

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

BHF agrees with this term of reference. While technology could conceivably be deployed to facilitate access to Court information, the more pressing issue is the overly restrictive policies implemented by Court registries to providing access to that information.

Nevertheless, BHF submits that the Review should consider whether an online register of non-publication and suppression orders ought to be established and made available to the media, to ensure that the media is properly informed and to assist with compliance. Such a register could require, as a precondition for the entering of an order, that the order specify the grounds in section 8 of the CSPO Act upon which the order is made, and specify the duration of the order. Such a register would reduce uncertainty, lead to greater compliance and result in fewer applications to amend, revoke or set aside CSPO Act orders. It is likely that the costs of maintaining such a register would be far outweighed by the savings associated with fewer applications to review CSPO Act orders (and the consequential reduction in impact on Court resources).

h) The findings of the Royal Commission into Institutional Responses to Child Sexual Abuse regarding the public interest in exposing child sexual abuse offending.

BHF notes the findings of the Royal Commission, which relevantly included that media coverage and publicity about child sexual abuse encouraged and supported adults to disclose childhood abuse (amongst other factors such as access to support groups, education and awareness of redress schemes). This outcome is in keeping with the principle of open justice. BHF supports consideration by the Review of the public interest in supporting the media to continue to play a role in exposing offending.

i) Comparable legal and practical arrangements elsewhere in Australia and overseas.

BHF supports the implementation of uniform provisions relating to the access, disclosure and publication of court information across all Australian civil and criminal jurisdictions, particularly in the context of rapid technological change, which has led to profound changes in the media landscape and the erosion of geographic and temporal barriers to the dissemination of information.

j) Any other relevant matters.

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