THE LAW SOCIETY OF NEW SOUTH WALES
young LAWYERS

Open Justice Review: Court and tribunal information: access, disclosure and publication

Submission to the NSW Law Reform Commission

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GPO Box 31
Sydney, NSW 2001
Email: nsw-lrc@justice.nsw.gov.au

Contact: **Jennifer Windsor**
President, NSW Young Lawyers

Lauren Mendes
Chair, NSW Young Lawyers Criminal Law Committee

Contributors: Jessica Best, Matt Dimech, Nathan Johnston, Lauren Mendes, Bianca Newton, Hermione Nicholls, Savitha Swami

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The NSW Young Lawyers Criminal Law Committee (Committee) makes the following preliminary submission in response to the terms of reference of the Open Justice Review - Court and tribunal information: access, disclosure and publication.

NSW Young Lawyers

NSW Young Lawyers is a division of The Law Society of New South Wales. NSW Young Lawyers supports practitioners in their professional and career development in numerous ways, including by encouraging active participation in its 15 separate committees, each dedicated to particular areas of practice. Membership is automatic for all NSW lawyers (solicitors and barristers) under 36 years and/or in their first five years of practice, as well as law students. NSW Young Lawyers currently has over 15,000 members.

The NSW Young Lawyers Criminal Law Committee is responsible for the development and support of members of NSW Young Lawyers who practice in, or are interested in, criminal law. The Committee takes a keen interest in providing comment and feedback on criminal law and the structures that support it, and considers the provision of submissions to be an important contribution to the community. The Committee is drawn from prosecution, defence (both private and public), police, the courts and other areas of practice that intersect with criminal law.

Submissions in response to the terms of reference

The following submissions respond to the specific questions posed in the terms of reference.

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

The Committee strongly supports the principle of open justice and access to court information. However, acknowledges that the principle of open justice is not, and should not, be absolute, but should be limited in certain circumstances to strike the correct balance between various stakeholders whilst upholding core common law principles.

The Public Interest

It is in the public interest that members of the public have a right to attend court proceedings and access court information. This, to an extent, ensures not only that justice is done, but that it is seen to be done. It also ensures that court proceedings are open to public and professional scrutiny. Parliament's intention to safeguard the public interest in open justice is clearly stated in s 6 of the *Court Suppression and Non-publication Orders Act 2010* (NSW) ('**the *Act***'), which requires a Court to take into account that "a primary objective of the administration of justice is to safeguard the public interest in open justice" when deciding whether to make a non-publication order or suppression order.

When individuals come before the criminal courts, their identities may be suppressed. For example, ss 7 and 8 of the *Act* permit a court to make orders restricting the disclosure of information that may reveal the identity of a party or witness in proceedings for a number of grounds, including that it is necessary in the public interest (and that the public interest significantly outweighs the public interest in open justice), or that such orders are necessary to prevent prejudice to the proper administration of justice.

The Right to a Fair Trial

Open justice is a fundamental aspect of a fair trial, however in certain circumstances, it is appropriate that suppression and non-publication orders are made to ensure an accused person receives a fair trial. For instance, non-publication and suppression orders are commonly made where an ongoing matter is high profile, or involves co-accused persons who are tried separately, particularly when their matters are heard at different times. One committee member referred to a matter involving two co-accused persons, both of whom were charged with manslaughter of a child. An application to be tried separately was granted and the trial of one of the co-accused's was delayed due to that co-accused being unwell, resulting in the matters proceeding at different times. During the first trial both suppression and non-publication orders were made on various matters. The making of such orders in these circumstances protects an accused person's right to a fair trial by preventing the second co-accused from being prejudiced by the reporting or mis-statement of the evidence from the trial of the first co-accused.

In another matter, a person had been found guilty of several property offences at trial in the District Court, but on application to the Court of Criminal Appeal (**CCA**) was granted a retrial. The CCA made a non-publication order in relation to information about the trial, sentence and appeal proceedings. to ensure.

In both circumstances the courts, when deciding whether to make a non-publication or suppression order complied with the requirement in s 6 of the *Act,* to take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice, but still found the respective orders were necessary under s8 of the *Act.* Failure to do so may have resulted in the trials to miscarry and witnesses being recalled to give their evidence again. This would cause an undue waste of resources.

The Proper Administration of Justice

Some committee members have raised concerns that the administration of the current framework does not effectively take into account the evolving relationship between the courts and the media. This has undesirable consequences for the administration of justice and threatens the integrity of the Court from the perspective of members of the Australian community. An example is the suppression order made in matter of *DPP v Pell* [2018] VCC 905. Although a Victorian case, this example highlights the jurisdictional difficulties in relation to suppression and non-publication orders

due to the increasing reach of global media. While the Committee does not dispute the appropriateness of the suppression order, the Committee notes that non-publication and suppression orders are only enforceable domestically, resulting in numerous international media outlets, who were not bound by the orders, reporting on the matter before Australian media outlets were permitted to do so. This is problematic for two reasons; firstly, because many of the organisations reporting on the trial were not present in the Court room and therefore could not be considered reliable; and secondly, many of these journalists were not familiar with Australian law and court processes, which could increase the risk of inaccuracies in reporting.

The rights of victims, their privacy and confidentiality

The Committee strongly supports the requirements set out in ss 291, 291A and 291B of the *Criminal Procedure Act 1986* (NSW) that certain proceedings for a "prescribed sexual offence" be held in camera, as well as the prohibition on publishing the name of a victim of a "prescribed sexual offence" as per s 578A of the *Crimes Act 1900* (NSW). The Committee submits that such protection should extend to victims of offences of a domestic violence nature, on the basis that victims of offending of such a personal nature should not be discouraged from reporting such offences.

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

Numerous international instruments, including the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice 1985* and the *United Nations Convention on the Rights of the Child*, make clear that children and young people involved in criminal proceedings are entitled to special protections.

The Committee strongly supports the prohibition on identifying children involved in criminal proceedings as either accused persons or offenders ('young persons'), witnesses, or siblings of victims as per Division 3A of the *Children (Criminal Proceedings) Act 1987* (NSW). The Committee is also supportive of the courts' power to exclude from the courtroom anyone not directly interested in the proceedings when those proceedings involve children (apart from the victim's immediate

family), as set out in s 10 of the *Children (Criminal Proceedings) Act 1987* (NSW). The Committee is of the view that this prohibition on publication should extend to young people who have not been charged but who are under investigation.

The Committee is of the view that the prohibition on identifying young people is necessary to assist in the young person's reintegration into the community, their education and future employment opportunities. The impact of a young person's identity being broadcasted or published could be devastating and lead to that young person becoming further entrenched within the cycle of criminal offending. Such publication could also have a significant effect on the young person's emotional, social and mental wellbeing; the distress, embarrassment, or trauma this may cause can destroy the self-worth of an already vulnerable young person. Due to their age, young persons should be spared this trauma, and provided with an opportunity to enter their adult lives without the stigma of such adverse publicity, in the hope that this will assist in their rehabilitation.

The Committee submits that the above prohibitions play an increasingly important role as the use of social media grows exponentially and the availability of audio/visual evidence is more prevalent than ever before. For instance, it is not uncommon for footage depicting an offence to be posted on social media and for people to easily identify young persons involved in the incident.

Committee members report that in circumstances where a media outlet has breached a publication order in relation to a child, contacting the media outlet and requesting that the content be removed is often sufficient. However, it is unacceptable that a media outlet would publish the material in the first instance. In order to address this issue, the Committee recommends that the Law Reform Commission specifically consider and undertake further public consultation on the need for appropriate mechanisms (and/or additional resources) to monitor and enforce non-publication and suppression orders, including whether there ought to be an independent body to perform this function. The Committee submits that such mechanisms should be designed to provide a significant deterrent for these publishers and result in a decrease to the number of publication orders relating to children being breached.

Concluding Comments

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NSW Young Lawyers and the Committee thank you for the opportunity to make this submission to the NSW Law Reform Commission.

If you have any queries or require further submissions, please contact the undersigned at your convenience.

Contact:

[redacted]

Jennifer Windsor
President
NSW Young Lawyers
Email: [redacted]

Alternate Contact:

[redacted]

Lauren Mendes
Chair
NSW Young Lawyers Criminal Law Committee
Email: [redacted]