



NEW SOUTH WALES

## THE CHIEF MAGISTRATE OF THE LOCAL COURT

24 June 2019

Mr Alan Cameron, AO  
Chairperson  
Law Reform Commission NSW  
GPO Box 31  
SYDNEY NSW 2001

Dear Mr Cameron,

I apologise for the lateness of this submission in relation to the Open Justice Review. I do not propose to comment on all the matters raised in the terms of reference. The principle of open justice is an important and essential element in allowing for access to justice by the community.

### **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.*

In addition to the above there are many pieces of legislation that affect the suppression and non-publication of Court Proceedings. The interaction of these various pieces of legislation has the potential, to complicate and confuse the Court, Parties, the media and members of the public. In particular I draw your attention to the tension between the right by the media to access court records pursuant to S 314 *Criminal Procedure Act 1986* and the various provisions in relation to non-publication or suppression, and in particular the operation of s 578A of the *Crimes Act 1900*.

Some consolidation and simplification of the legislation would be of benefit. I understand that the *Court Information Act 2010* was passed in an effort to clarify these matters, however the court has

previously raised concerns about the operation that act. Of particular concern would be the onerous task of redacting personal information of court records before granting access.

The following tables represent various pieces of legislation that affect access and publication of court proceedings.

### Access to Court Records

Category	Legislation	Details
All proceedings	<i>Criminal Procedure Act 1986</i>	<p><b>314 Media access to court documents</b></p> <p>(1) On application to the registrar, a media representative is entitled to inspect any document relating to criminal proceedings, at any time from when the proceedings commence until the expiry of 2 working days after they are finally disposed of, for the purpose of compiling a fair report of the proceedings for publication.</p> <p>(2) The documents that a media representative is entitled to inspect under this section are copies of the indictment, court attendance notice or other document commencing the proceedings, witnesses' statements tendered as evidence, brief of evidence, police fact sheet (in the case of a guilty plea), transcripts of evidence and any record of a conviction or an order.</p> <p>(3) The registrar is not required to make documents available for inspection if the documents are not in the possession or control of the registrar.</p> <p>(4) The registrar must not make documents available for inspection if:</p> <p>(a) the proceedings are subject to an order prohibiting their publication or a suppression order, or</p> <p>(b) the documents are prohibited from being published or disclosed by or under any other Act or law.</p> <p>(4A) This section does not limit the operation of any other Act or law under which a person may be permitted to inspect documents relating to criminal proceedings.</p>
Prescribed Sexual Assault Proceedings	<i>Criminal Procedure Act 1986</i>	<p><b>291C Media access to proceedings held in camera</b></p> <p>(1) If a complainant gives evidence in proceedings in respect of a prescribed sexual offence from a place other than the courtroom by means of closed-circuit television facilities or other technology that enables communication between that place and the courtroom (whether under section 294B or Part 6), and the proceedings, or the part of the proceedings concerned, are held in camera under this Division, a media representative may, unless the court otherwise directs, enter or remain in the courtroom while the evidence is given from that other place. This subsection does not apply to proceedings in</p>

Category	Legislation	Details
		<p>respect of an offence under section 78A or 78B of the <i>Crimes Act 1900</i>.</p> <p>(2) The fact that proceedings in respect of a prescribed sexual offence, or any part of such proceedings, are held in camera under this Division does not prevent the court from making such arrangements as the court considers reasonably practicable to allow media representatives to view or hear the evidence while it is given, or to view or hear a record of that evidence, as long as the media representatives are not present in the courtroom or other place where the evidence is given during the in camera proceedings.</p> <p><b>Note.</b> For example, the court may permit media representatives to view the proceedings from a place other than the courtroom by means of closed-circuit television facilities.</p> <p>(3) In this section: <b>media representative</b>, in relation to any proceedings, means a person engaged in preparing a report of the proceedings for dissemination through a public news medium.</p>
All Proceedings	<i>Local Court rules 2009</i>	<p><b>8.10 Copies of court records</b></p> <p>(1) This rule applies to committal proceedings, summary proceedings and application proceedings.</p> <p>(2) A party to the proceedings is entitled to:</p> <p>(a) access to a copy of the court record or transcript of evidence taken at the proceedings, or</p> <p>(b) on payment of any fee prescribed by regulations made under the <i>Criminal Procedure Act 1986</i> or the <i>Local Court Act 2007</i>, obtain a copy of the court record or transcript of evidence taken at the proceedings.</p> <p>(3) A person who is not a party to the proceedings may, with the leave of the Magistrate or registrar:</p> <p>(a) have access to a copy of the court record or transcript of evidence taken at the proceedings, or</p> <p>(b) on payment of the prescribed fee, obtain a copy of the court record or transcript of evidence taken at the proceedings.</p> <p>(4) The Magistrate or registrar may grant leave for the purposes of subrule (3) if of the opinion that it is appropriate to do so in the circumstances.</p> <p>(5) In determining whether it is appropriate to grant a person leave for the purposes of subrule (3), the Magistrate or registrar is to have regard to the following matters:</p> <p>(a) the principle that proceedings are generally to be heard in open</p>

Category	Legislation	Details
		<p>court,</p> <p>(b) the impact of granting leave on the protected person or victim of crime,</p> <p>(c) the connection that the person requesting access has to the proceedings,</p> <p>(d) the reasons access is being sought,</p> <p>(e) any other matter that the Magistrate or registrar considers relevant.</p>

### Automatic non-publication/suppression provisions

Category	Legislation	Details
All proceedings	s 195 <i>Evidence Act</i> 1995	<p>A person must not, without the express permission of a court, print or publish:</p> <p>(a) any question that the court has disallowed under s 41 (Improper questions), or</p> <p>(b) any question that the court has disallowed because any answer that is likely to be given to the question would contravene the credibility rule, or</p> <p>(c) any question in respect of which the court has refused to give leave under Pt 3.7 (Credibility).</p>
AVO proceedings – where child involved	s 45(1) <i>Crimes (Domestic and Personal Violence) Act</i> 2007	The name of a child under the age of 16 yrs who is involved in AVO proceedings (whether as a person in need of protection, a witness or who is otherwise likely to be involved) must not be published or broadcast before the proceedings are commenced or after the proceedings have been commenced and before they are disposed of.
Bail	s 89 <i>Bail Act</i> 2013	A person must not publish the fact that a named person is a prohibited associate of an accused person (including information calculated to identify a person as such). This does not apply to the publication of an official report of the court proceedings: s 89(4).
Child protection – registrable persons	s 18 <i>Child Protection (Offenders Prohibition Orders) Act</i> 2004	In proceedings for an order under this Act, a person must not publish information that identifies or is likely to identify a registrable person, victim or person identified as a person at risk.
Children at risk of significant harm	s 29(1)(f) <i>Children and Young Persons (Care and Protection) Act</i> 1998	Where a person makes a report to the Director General in respect of a child at risk of significant harm, which is then used in care proceedings in the Children’s Court, coronial proceedings or other proceedings authorised by subs (1)(d), the identity of the person who made the report must not be disclosed unless consent is given or leave of the court is obtained.
Children’s Court proceedings (except crime) – where child	s 105 <i>Children and Young Persons (Care and Protection) Act</i> 1998	<p>At any time before, during or after proceedings, the name of a child or young person:</p> <p>(a) who appears, or is reasonably likely to appear, as a witness before the Children’s Court in any proceedings, or</p>

Category	Legislation	Details
involved		(a1) who is involved, or is reasonably likely to be involved, in any capacity in any non-court proceedings, or (b) with respect to whom proceedings before the Children's Court are brought or who is reasonably likely to be the subject of proceedings before the Children's Court, or (c) who is, or is reasonably likely to be, mentioned or otherwise involved in any proceedings before the Children's Court or in any non-court proceedings, or (d) who is the subject of a report under ss 24, 25, 27, 120, 121 or 122 must not be published or broadcast in any form that may be accessible by a person in NSW.
Coronial matters	s 75 <i>Coroners Act</i> 2009	A person must not publish any of the following matters without the express permission of the coroner in the coronial proceedings concerned: (a) any question asked of a witness that the coroner has forbidden or disallowed, (b) any warning that a coroner has given to a witness that he or she is not compelled to answer a question, (c) any objection made by a witness to giving evidence on the ground that the evidence may tend to prove that the witness has committed an offence.
Criminal proceedings – prescribed sexual offences	s 578A <i>Crimes Act</i> 1900	Nothing may be published that identifies a complainant in relation to a prescribed sexual offence, except where authorised by the court or with the consent of the complainant. The court is not to authorise a publication without seeking and considering the views of the complainant, and being satisfied that the publication is in the public interest.
Criminal proceedings – where child involved	s 15A(1) <i>Children (Criminal Proceedings) Act</i> 1987	The name of a person must not be published or broadcast in a way that connects the person with criminal proceedings if: (a) the proceedings relate to the person and the person was a child when the offence to which the proceedings relate was committed, or (b) the person appears as a witness in the proceedings and was a child when the offence to which the proceedings relate was committed (whether or not the person was a child when appearing as a witness), or (c) the person is mentioned in the proceedings in relation to something that occurred when the person was a child, or (d) the person is otherwise involved in the proceedings and was a child when so involved, or (e) the person is a brother or sister of a victim of the offence to which the proceedings relate, and that person and the victim were both children when the offence was committed. <b>Note:</b> the exceptions prescribed in ss 15B–F (ie, official report of proceedings, person convicted of a serious children's indictable offence, with consent, child deceased, and traffic offences not dealt with by Children's Court).
Family law proceedings	s 121 <i>Family Law Act</i> 1975 (Cth)	It is an offence to publish any account of any proceedings, or of any part of any proceedings, under this Act that identifies: (a) a party to the proceedings (b) a person who is related or associated with a party to the proceedings or allegedly concerned in the matter to which the

Category	Legislation	Details
		proceedings relate, or (c) a witness to the proceedings.
Forensic procedures	s 43 <i>Crimes (Forensic Procedures) Act 2000</i>	Where a magistrate authorises the carrying out of a forensic procedure on a suspect under s 24, a person must not publish information that would identify the suspect unless the suspect has been charged with the offence or the magistrate authorises the publication.
Involuntary drug and alcohol treatment	s 41 <i>Drug and Alcohol Treatment Act 2007</i>	A person must not, whether before or after the proceedings are completed and without the consent of the magistrate, publish or broadcast the name of any person: (a) to whom the proceedings relate, or (b) who appears as a witness in the proceedings, or (c) who is mentioned or otherwise involved in the proceedings.
Parentage matters	s 25 <i>Status of Children Act 1996</i>	A person must not publish the name, or the particulars relating to the identity, of any person by, or in relation to whom, an application for a declaration of parentage or for an annulment order under Div 2 or 3 is brought.
Sentencing	s 51B <i>Crimes (Sentencing Procedure) Act 1999</i> s 100H <i>Crimes (Sentencing Procedure) Act 1999</i>	A person must not publish information identifying a named person (other than the offender) in a parole order. A person must not publish information identifying a named person (other than the offender) in a non-association order.
Transmission of sounds or images in court	s 9A(1) <i>Court Security Act 2005</i>	A person must not use any device to transmit sounds or images from a room or other place where a court is sitting to any person or place outside; by posting entries containing sounds, images or information on social media sites or any other website or broadcasting or publishing by means of the internet; or by making the sounds, images or information accessible to any person outside that room or other place. <b>Note:</b> the exceptions prescribed in ss 9A(2)(a)–(e) (ie, device used for another purpose, transmission via audio link/AVL/CCL etc, approved transmission by judicial officer, transmission for the purpose of transcription, transmission by prosecutors to other (non-witness) prosecutors).

### **Non-publication/suppression provisions requiring a court order**

Category	Legislation	Details
Adoption information matters	s 186(2) <i>Adoption Act 2000</i>	In adoption information proceedings, the court or tribunal may make an order forbidding publication of all or any of the information mentioned in the proceedings relating to an adopted person, birth parent, adoptive parent, relative or other person.
Any proceedings before a recognised court (including criminal)	s 15 <i>Evidence (Audio and Audio Visual Links) Act 1998</i>	A recognised court may prohibit or restrict the publication of evidence given in the proceeding, or of the name of a party to, or a witness in, the proceeding.

Category	Legislation	Details
proceedings) (cf, use of interstate audio/audio visual links)		
Apprehension under warrant (Cth)	s 96 <i>Service and Execution of Process Act 1992</i> (Cth)	Where a person is taken before a magistrate after apprehension under a warrant pursuant to s 83, the magistrate may order that a report of any part of the proceeding or review held in public or any publicly made finding of fact made by the magistrate is not to be published. An order must not be made without being satisfied of one of the matters set out in subs (3).
Assumed identities	s 28 <i>Law Enforcement (Controlled Operations) Act 1997</i>	Unless it considers that the interests of justice otherwise require, the court must make an order for suppression of evidence given before it as, in its opinion, will ensure that the identity of a participant in an authorised operation is not disclosed. It may also make orders prohibiting the publication of any information that may identify such a person.
	s 34 <i>Law Enforcement and National Security (Assumed Identities) Act 2010</i>	Unless it considers that the interests of justice otherwise require, the court must make an order for suppression of evidence given before it as, in its opinion, will ensure that the identity of a person in respect of whom an authority is or was in force is not disclosed. It may also make orders prohibiting the publication of any information that may identify such a person.
		See also: s 26 <i>Witness Protection Act 1995</i> witnesses who are participants in the NSW Witness Protection Program s 28 <i>Witness Protection Act 1994</i> (Cth) witnesses who are participants in the National Witness Protection Program.
AVO proceedings – persons other than children	s 45(2) <i>Crimes (Domestic and Personal Violence) Act 2007</i>	The court may direct that the name of a person who is involved in AVO proceedings (whether as a person in need of protection, a witness or person who is otherwise likely to be involved) must not be published or broadcast before the proceedings are commenced or after the proceedings have been commenced and before they are disposed of.
Coronial matters	s 74 <i>Coroners Act 2009</i>	A coroner may order that any evidence in coronial proceedings not be published if of the opinion that it would be in the public interest to do so.
	s 75	A coroner may make a non-publication order prohibiting or restricting the publication of a report of the proceeding or any matter identifying the dead person or a relative of the dead person if it appears that a death or suspected death was self-inflicted.
DPP-initiated proceedings (Cth)	s 16A <i>Director of Public Prosecutions Act 1983</i> (Cth)	In proceedings taken or carried on by the Commonwealth DPP in relation to civil remedies or pecuniary penalties or in application proceedings for a restraining order under the <i>Proceeds of Crime Act</i> , the court may make orders prohibiting or restricting the publication of particular evidence or information as appear necessary in order to prevent prejudice to the administration of justice.

Category	Legislation	Details
Involuntary drug and alcohol treatment	<i>s 37 Drug and Alcohol Treatment Act 2007</i>	In proceedings relating to the review or extension of a dependency certificate, if the magistrate is satisfied that it is desirable to do so for the welfare of the dependent person or for any other reason, the magistrate may (of their own motion or on the application of the person or another person appearing at the proceedings) make various orders, including an order prohibiting or restricting: <ul style="list-style-type: none"> <li>the publication or broadcasting of any report of the proceedings</li> <li>the publication of evidence given in the proceedings, whether in public or in private, or of matters contained in documents lodged with or received in evidence by the magistrate</li> <li>the disclosure to some or all of the parties to the proceedings of evidence given before the magistrate, or of the contents of a document lodged with or received in evidence by the magistrate, in relation to the proceedings.</li> </ul>
Lie detectors	<i>s 6 Lie Detectors Act 1983</i>	Where output from an instrument or apparatus that has been used in the commission of an offence against this Act, or an analysis or opinion in relation to such output, is admitted into evidence for the purpose of proving the commission of the offence, the court may make an order forbidding publication of the evidence or a report of the evidence.
Professional confidential relationship privilege	<i>s 126E Evidence Act 1995</i>	The court may make such orders relating to the suppression of publication of all or part of the evidence given before the court as, in its opinion, are necessary to protect the safety and welfare of a protected confider.
Referee reports regarding questions of benefit to minors	<i>s 43(5) Minors (Property and Contracts) Act 1970</i>	The court may make such orders as it thinks fit for the purpose of preventing or limiting publication of a referee report filed under s 43.
Surveillance devices	<i>s 42 Surveillance Devices Act 2007</i>	The court must make an order prohibiting or restricting publication of information disclosed in the proceeding that could reasonably be expected to reveal details of surveillance device technology or methods of installation, use or retrieval of surveillance devices, unless the interests of justice require otherwise. The order is to contain such prohibitions or restrictions as the court considers necessary to ensure that those details are not revealed.

### Commonwealth suppression and non-publication provisions

Category	Legislation	Details
Criminal proceedings	<i>s 85B Crimes Act 1914</i>	[Court ordered]
	<i>s 93.2 Criminal Code</i>	At any time before or during the hearing of an application or other proceedings, the judge or magistrate, may, if satisfied that such a course is expedient in the interest of the security* or defence of the Commonwealth,



Category	Legislation	Details
		<p>order that no report of the whole or a specified part of or relating to the application or proceedings shall be published.</p> <p>* Criminal Code provision only.</p> <p><b>Note:</b></p> <ul style="list-style-type: none"> <li>Both sections are apply to proceedings before a court exercising federal jurisdiction, whether under or in pursuance of the Act in question or otherwise.</li> <li>Both sections also contain provisions for: <ul style="list-style-type: none"> <li>excluding some or all members of the public from all or part of the proceedings, and</li> <li>making orders (including after the proceedings have concluded) preventing access to evidence or other information in the proceedings without the approval of the court.</li> </ul> </li> </ul>
Family law proceedings	s 121 <i>Family Law Act 1975</i>	<p>[Automatic]</p> <p>A person who publishes in a newspaper or periodical publication, by radio broadcast or television or by other electronic means, or otherwise disseminates to the public or to a section of the public by any means, any account of any proceedings, or of any part of any proceedings, under this Act that identifies:</p> <p>(a) a party to the proceedings</p> <p>(b) a person who is related to, or associated with, a party to the proceedings or is, or is alleged to be, in any other way concerned in the matter to which the proceedings relate, or</p> <p>(c) a witness in the proceedings,</p> <p>is guilty of an offence punishable upon conviction by imprisonment for a period not exceeding one year.</p> <p><b>Note:</b></p> <p>subs (3) contains a list of identifying particulars and other circumstances, the publication of which will be taken to have identified a person.</p>
Interstate extradition	s 96 <i>Service and Execution of Process Act 1992</i>	<p>[Court ordered]</p> <p>The magistrate or court may, on application, order that a report of:</p> <p>(a) a part of the proceeding or review held in public, or</p> <p>(b) a finding publicly made by the magistrate or court,</p> <p>is not to be published.</p> <p><b>Note:</b></p> <ul style="list-style-type: none"> <li>Subs (3) provides an order may only be made where satisfied that publication would give rise to a substantial risk of: <ul style="list-style-type: none"> <li>prejudice to the fair trial by jury of a person charged with a Commonwealth or State offence</li> <li>death or personal injury being suffered by a witness or member of the witness' family</li> <li>damage to the property of a witness or a member of the witness' family</li> </ul> </li> </ul>

Category	Legislation	Details
		<ul style="list-style-type: none"> <li>○ prejudice to the prosecution of a Commonwealth or State offence or a proceeding to recover a pecuniary penalty</li> <li>○ prejudice to an investigation preparatory to such a prosecution or proceeding</li> <li>○ prejudice to national security</li> <li>○ if the proceeding concerns a sexual offence — identification of a victim of the alleged offence, or</li> <li>○ if the proceeding involves the welfare of a child, or an offence where a child is the victim or alleged perpetrator – identification of the child.</li> </ul> <ul style="list-style-type: none"> <li>• See further ss 97–103 for provisions regarding interim orders, duration of orders, variation and revocation of orders, etc.</li> </ul>

**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.**

No Comment.

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

No Comment.

**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.**

No Comment

**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.**

No Comment

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

Historically the courts records have been in a physical file and access may be gained, in person, by the interested parties. With the rise of the use of technology, evidence is now often produced in electronic form. Difficulties now arise in how that material may be accessed securely, without the

risk of copying or corrupting the information before the court. With the introduction of more electronic functions of the court this issue will only continue rise.

In addition where courts may move to “virtual” courtrooms in which no party is physically present, careful consideration must be given to effects on open justice and how the public may gain access to those proceedings.

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

There may be opportunities for technology to allow for the principles of open justice to be more widely available. Some courts have already used technology to live stream some parts of proceedings that have particular public significance. There are some benefits to such a direction, particularly when it comes to the accurate reporting of proceedings by the media.

I would suggest that should this process be more widely used, consideration should be given what the long term and possibly unintended consequences that such recordings may have on all related parties.

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

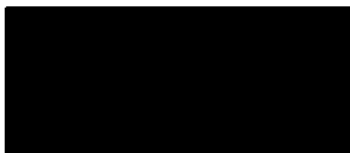
No Comment

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

No Comment

**j) Any other relevant matters.**

No Comment



Judge Henson, AM  
Chief Magistrate