



9 August 2021

Open Justice Review
NSW Law Reform Commission
GPO Box 31
Sydney NSW 2001 Australia

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Dear Commission,

Submission to the Open Justice Review

The New South Wales Society of Labor Lawyers ('the Society') welcomes the opportunity to make a submission to the NSW Law Reform Commission's ('the Commission') review of open justice in New South Wales.

By way of background, the Society, originally established in 1977, aims to promote changes in the substantive and procedural law, the administration of justice, the legal profession, legal services, legal aid and legal education to help bring about a more just and equitable society. The Society provides a meeting ground for people involved in the law who believe in Labor principles of fairness, social justice, equal opportunity, compassion and community. The Society's membership and supporters include barristers, solicitors and trade union industrial officers.

The terms of reference require the Commission, inter alia, to review the legislative provisions on the disclosure or publication of NSW court and tribunal information and court suppression and non-publication orders. As part of its Review, the Commission has proposed a new statute, applicable to courts in NSW, which would contain general powers to make non-publication, suppression, exclusion and closed court orders¹. The Society expresses its broad support for the thoughtful and comprehensive proposals contained in the Commission's draft proposals, including the new statutory scheme which, in our view, is much needed to simplify and consolidate existing procedures.

However, we seek to draw your attention to the principles on open justice contained in Article 14(1) of the International Covenant on Civil and Political Rights ('ICCPR')². That treaty was ratified by Australia in 1980, and as a result, the federal and NSW Parliaments each has an obligation to implement the provisions of the treaty into its laws.

Article 14(1) of the ICCPR provides, inter alia:

...In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The Press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity

¹ Draft Proposals Paper [1.25].

² *International Covenant on Civil and Political Rights*, 999 UNTS 171 (entered into force 23 March 1976).

would prejudice the interests of justice; but **any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.**

[Emphasis added]

The United Nations Human Rights Committee analysed that provision in relation to judgments in General Comment No. 32, which states in part that³:

Even in cases in which the public is excluded from the trial, the judgment, including the essential findings, evidence and legal reasoning must be made public, except where the interest of juvenile persons otherwise requires, or the proceedings concern matrimonial disputes or the guardianship of children.

In the Society's submission a judgment would include in the criminal context, convictions, sentencing remarks and sentences, and in civil contexts final judgments or orders and the reasons for those decisions.

The Society appreciates that in the Commission's draft proposals you identify instances where, in the interests of justice, a judgment may need to be suppressed for a period after it is delivered. One example of such instances would be where publication of a conviction or sentence may prejudice a future criminal hearing, a recent example being the suppression of the conviction (since overturned) of Cardinal George Pell until after his subsequent trial.

Although the Commission's proposals include draft provisions which would prevent the suppression of judgments indefinitely, the Society is concerned that to include provisions allowing courts discretion to suppress judgments for long periods, say for years or even decades, may result in the effective practical denial of the principle of open justice in relation to such judgments, contrary to international law.

The Commission should include in its proposed principles, a reference to the human rights provisions we refer to above, and, further, should tailor its proposals to ensure they are consistent with those provisions, and in turn international law. Some suggestions follow as to how the Commission could achieve this end:

- (a) rather than including a broad discretion to allow the suppression of judgments for lengthy, albeit not indefinite periods of time, it is the Society's view that the categories of judgments that can be suppressed, even for short periods, should be identified to the extent possible. We accept it may be necessary to include an additional residual category for the most exceptional cases not yet envisaged.
- (b) the Society sees merit in imposing a sunset time limit on the maximum period of judgment suppression and nominates two years as the appropriate period, after which a new application for a further suppression order might be permitted, on the basis that it be heard by a different judicial officer.
- (c) alternatively to (b) above, the Society suggests that provisions be introduced into the statutory regime permitting a member of the public to apply for review of an order after a period of two years has lapsed, providing they have a sufficient interest in the subject matter of the proceeding.

In conclusion, if it be thought that our Society is unduly concerned about judgment suppression, which we acknowledge is rare in Australia, our concern was heightened after it was discovered in 2019 that

³ Human Rights Committee, *General Comment No 32: Article 14: Right to Equality Before Courts and Tribunals and to Fair Trial* 90th sess, UN Doc CCPR/C/GC/32 (23 August 2007).

the ACT Supreme Court had held a secret trial and permanently suppressed the conviction, sentencing remarks and prison sentence resulting. It appears that the secret imprisonment of that citizen would have remained secret but for the publication of a decision of that court in later proceedings brought by the offender concerning the administration of his prison sentence⁴.

We thank the Commission for their consideration of this submission. Please contact the undersigned at [REDACTED] if you require any further information.

Yours faithfully,

[REDACTED]

NSW Society of Labor Lawyers

President: Lewis Hamilton **Vice President:** Blake Osmond **Treasurer:** Claire Pullen **Secretary:** David Pink **Ordinary Committee Members:** Tom Kelly, Kirk McKenzie, Elise Delpiano, Jamila Gherjestani, Ellyse Harding, Penelope Parker, Nikhil Mishra, and Connor Wherrett.

The Society is not affiliated to the Australian Labor Party (NSW Branch). The views expressed in this submission are not those of the Australian Labor Party (NSW Branch), its members or the State Parliamentary Labor Party.

⁴ *Johns v Director-General of The ACT Justice and Community Safety Directorate* [2019] ACTSC 31.