

2 September 2021

NSW Law Reform Commission  
GPO Box 31  
SYDNEY NSW 2001

Via email: [nsw-lrc@justice.nsw.gov.au](mailto:nsw-lrc@justice.nsw.gov.au)

Dear Commissioner

## **Open Justice: Court and tribunal information: access, disclosure and publication – Draft Proposals**

### **Introduction**

1. Rape & Domestic Violence Services Australia (“RDVSA”) welcomes the invitation to provide a response to the Open Justice Review Draft Proposals.
2. RDVSA is a non-government organisation that provides a range of trauma specialised counselling services for people who have experienced sexual, domestic or family violence and their supporters. Our services include the NSW Rape Crisis counselling service for people in NSW whose lives have been impacted by sexual violence; Sexual Assault Counselling Australia for people accessing the Redress Scheme resulting from the Royal Commission into Institutional Responses to Child Sexual Abuse; a counselling service and support for people experiencing domestic and family violence across Australia and the LGBTIQ+ violence counselling service.
3. In the 2020/21 financial year, RDVSA provided 16,195 occasions of service to 3,984 clients nationally. 46.5% of our clients contacted from New South Wales, 84% of callers identified as female and 90% identified as someone who had experienced sexual, domestic and/or family violence.
4. Our focus in this submission is on the impact of the Draft Proposals on people who have experienced sexual assault and/or domestic and family violence. Therefore, our

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#### **Counselling Services**

24/7 NSW Rape Crisis:	1800 424 017
Domestic Violence Impact Line:	1800 943 539
Sexual Assault Counselling Australia:	1800 211 028
LGBTIQ+ Violence Service:	1800 497 212
<a href="http://rape-dvservices.org.au">rape-dvservices.org.au</a>	

submissions will primarily relate to court proceedings for sexual, domestic and family violence.

5. What underpins all of our feedback is the notion that the rights of victim-survivors should be paramount in any consideration of open justice. We support the presumption that all proceedings for sexual, domestic and family violence be as confidential as possible, subject to the view of the victim-survivors themselves. Victim-survivors have a right to be heard but they need to be supported to make their voices heard (for example, through counselling and legal representation). This is consistent with the Charter of Victims Rights.<sup>1</sup>
6. We believe this is so because proceedings relating to sexual, domestic and family violence involve specialised considerations including:
  - Delays in reporting due to fears of disclosure and the stigma and shame attached to proceedings. Victim-survivors might delay reporting for many years,<sup>2</sup>
  - The overrepresentation of vulnerable societal groups including Aboriginal and Torres Strait Islander people, culturally and linguistically diverse and LGBTIQ+ communities and older women;<sup>3</sup>
  - The likelihood that disclosure of the accused's identity might also reveal the victim's identity (particularly in rural or remote communities),
  - Court processes including the giving of evidence and victim impact statements which are re-traumatising for victim-survivors, particularly children (who are society's most vulnerable),<sup>4</sup> and
  - Very low levels of reporting, prosecution and conviction of sexual assault.<sup>5</sup>
7. We strongly agree with the Commission's guiding principal that departures from open justice are appropriate to protect certain sensitive information, vulnerable people and the administration of justice.<sup>6</sup> We submit that justice cannot be done or seen to be done if victim-survivors (and other vulnerable persons) are not protected and their rights upheld. We also agree with the principal that any legislation that departs from open justice should be uniform and consistent and exercised in a way that is transparent, accessible and subject to scrutiny.<sup>7</sup>

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<sup>1</sup> *Victims Rights and Support Act 2013 (NSW)*, s. 6.

<sup>2</sup> See, eg, Patrick Tidmarsh and Gemma Hamilton, 'Misconceptions of sexual crimes against adult victims: Barriers to justice' (2020) 611 *Trends and Issues in Crime and Criminal Justice* <<https://doi.org/10.52922/ti04824>>.

<sup>3</sup> See, eg, Australian Human Rights Commission, Submission to the Special Rapporteur on violence against women, *Violence Against Women in Australia*, 20 January 2017, [13].

<sup>4</sup> See, eg, Mary Iliadis and Kerstin Braun, 'Sexual assault victims can easily be re-traumatised going to court — here's one way to stop this', *The Conversation* (online), 25 March 2021 <https://theconversation.com/sexual-assault-victims-can-easily-be-re-traumatised-going-to-court-heres-one-way-to-stop-this-157428>.

<sup>5</sup> NSW Law Reform Commission, *Consent in relation to sexual offences*, Report No 148 (2021) 14-24.

<sup>6</sup> NSW Law Reform Commission, *Open Justice Court and Tribunal information: access, disclosure and publication*, Draft Proposals (2021) [1.26].

<sup>7</sup> *Ibid.*

8. We note that some of our submissions might not apply to proceedings involving other offences (for example, terrorism offences) because the considerations outlined at paragraph 6 might not be relevant. Therefore, any legislation that deals with open justice needs to not only be uniform and consistent, but also nuanced enough to account for the varying needs of the participants in any particular proceeding and society in general.
9. We will now outline our feedback in relation to specific proposals. We do not intend on addressing all of the Commission's Draft Proposals.

## Chapter 3 Uniform Definitions

### Proposal 3.3 and 3.4

10. RDVSA agrees with Proposal 3.3 and welcomes the expansion of the definition of "party" to protected persons and any person named in evidence given in proceedings (such as tendency witnesses). We also agree with the definitions in Proposal 3.4.

### Proposal 3.5

11. RDVSA agrees that a list would be useful to assist people in understanding what kind of information might be capable of identifying a person. It is important that legislation is as clear and easy to understand as possible, given the serious safety implications of disclosing a victim-survivor's identifying information in the context of sexual, domestic and family violence.

## Chapter 4 A New Act

### Proposal 4.2

12. RDVSA agrees with and recognises the importance of the principles outlined in proposal 4.2. However, there needs to be some kind of express acknowledgement that departing from the principles of open justice is required *in certain cases* to protect certain sensitive information, vulnerable people and the administration of justice. Just as the Commission has been guided by this principle when drafting its proposals, so to the inclusion of a direct acknowledgement will guide decision makers to recognise the needs of victim-survivors when making decisions under the new Act.

## Proposal 4.9

13. We agree with the submission of knowmore in relation this proposal,<sup>8</sup> and express our concern with the inclusion of journalists and media representatives in the list of those who have automatic standing to appear in appellate proceedings as non-parties in circumstances where the proceedings relate to sexual, family and domestic violence. We do not think it is appropriate they have automatic standing, and they should be required to, at the very least, demonstrate a “sufficient interest” in the decision that is the subject of the appeal.
14. We echo the following sentiment of knowmore in their submission

The stigma associated with survivors of childhood sexual abuse, the trauma that results from it and the overarching feelings of shame that survivors experience, must be key considerations in determining whether any third party has the right to publicise attributable and identifiable information.<sup>9</sup>

15. In our experience, this sentiment equally applies to adult and child victim-survivors of sexual, domestic and family violence. We strongly recommend that further consideration is given to this proposal.

## Proposal 4.14

16. We welcome the inclusion of Proposals 4.14(1)(c), (d), (e) and (f) as grounds on which a court can make a non-publication or suppression order. We particularly welcome the inclusion of domestic violence proceedings (as recommended in our submission to the Consultation Paper) and agree with the reasoning behind that proposal, namely

...complainants of domestic violence related offences, like complainants of sexual offences, often experience stigma, distress, and humiliation as a result of being involved in court proceedings. Our proposal is meant to encourage reporting of domestic violence related offences, by making it clear that suppression and non-publication orders are available to protect complainants in domestic violence related proceedings

17. However, we would like to emphasise that placing the onus on victim-survivors to apply for suppression orders is problematic and we need to ensure that victim-survivors are adequately informed and resourced to be able to assert their wishes in Court. It is hard enough for victim-survivors to navigate the process of giving evidence, let alone making an application for a suppression order.

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<sup>8</sup> knowmore, Submission No CI43 to NSW Law Reform Commission, *Open Justice Court and Tribunal information: access, disclosure and publication*, 2 August 2021, 10.

<sup>9</sup> Ibid.

18. We submit that further consideration needs to be given to funding independent legal representation for victim-survivors to inform them of their rights under the new Act and enable them to assert their rights under Proposal 4.14.

### **Proposal 4.18**

19. We repeat the concerns expressed at Proposal 4.9 in relation to the media and journalists having automatic standing to be heard on any review. We consider that this needs to be reviewed.

## **Chapter 5 Statutory prohibitions on publication or disclosure**

### **Proposals 5.3**

20. We agree with extending the prohibition of s 578A to include the period before proceedings have commenced and from the time that the alleged offence is reported to police.
21. We also reiterate the recommendation made in our response to the Consultation Paper that s 578A be extended to tendency witnesses in sexual assault proceedings, complainants in domestic violence offence proceedings and protected persons in proceedings for an Apprehended Domestic Violence Order.

### **Proposal 5.6**

22. We welcome Proposal 5.6 that the prohibition in s 578A should be extended to include publication of a deceased complainant's identity, subject to our recommendations regarding Proposal 5.13 (below). As noted in our submission on the Consultation Paper, the public policy behind the legislation (to encourage reporting and to spare complainants the stigma associated with being a victim-survivor) continue to operate after a person's death and the prospect of automatic removal after death could be a source of distress and a barrier to disclosure, particularly for Aboriginal and Torres Strait Islander people. Again, the emphasis should be on victim-survivor agency and choice, and that of their (non-offending) loved ones.

### **Proposals 5.8 and 5.9**

23. We recognise and acknowledge the empowerment that comes from victim-survivors telling their stories. We know from our experience that speaking out about sexual, family and domestic violence can be important to individual recovery. We also know from the "Let her speak" and "Let us speak" campaigns that the ability to speak out can address barriers to justice and foster community understanding about the nature and extent of sexual, family and domestic violence. We also strongly agree with the

need to consult with victim-survivors to ensure that any disclosure or non-disclosure of information is in keeping with their wishes.

24. However, speaking out can also come at great personal cost. In high-profile matters, victim-survivors might be under great public and media pressure, and this can be extremely re-traumatising. Therefore, if consent is to be granted, it needs to be informed consent. Victim-survivors need to be provided with wrap around services to help them to safely disclose and these services should include (but not be limited to) counselling (like the counselling provided by RDVSA) and legal support. Funding legal representation for complainants in sexual assault matters would go some way to achieving this where proceedings are ongoing. We also agree with the Court having oversight of the process while proceedings are ongoing.

### **Proposal 5.12**

25. We broadly agree with this proposal and reiterate our emphasis on informed consent as outlined at paragraphs 23 and 24 above. We strongly recommend that if there is going to be a requirement for children to obtain legal advice, then it is essential that children have access to free legal advice if they need it. If this advice is not available, there is a risk of creating a two-tier system where only the privileged can properly exercise their rights. We would also like the Commission to consider the therapeutic needs of children in this situation and recommend that consideration be given for children to receive non-legal services such as counselling from an organisation such as RDVSA.

### **Proposal 5.13**

26. We agree with Proposal 5.13, provided para (b) is extended to include family members acting in support of the alleged or convicted offender. It is important that the victim's family not be silenced from speaking out about their loved one in circumstances where that is what their loved one would have wanted. Conversely the views of the alleged or convicted offender or any of their supporters should not be regarded as relevant.

## **Chapter 7 Requirements and other powers to make exclusion orders**

### **Proposal 7.3-7.5**

27. We are very concerned that Proposals 7.3-7.5 grant access to the media to proceedings involving sexual, domestic and family violence including proceedings involving children. We strongly oppose this proposal. We believe it could seriously affect the confidence of victim-survivors coming forward and reporting if they know that their proceedings could be watched and reported on by members of the media. Some victim-survivors would be horrified to find out that media and journalists could witness

and report on some of the most intimate, personal details, notwithstanding that their identities would be suppressed.

28. We strongly recommend, at the very least, that victim-survivors are required to give express and informed consent before media and journalists are allowed to watch and report on proceedings. We strongly recommend that prior to implementing this Proposal the Commission do further research and consultation with support organisations like RDVSA, children's rights' groups and Aboriginal and Torres Strait Islander community groups.
29. We agree with what knowmore said in their submission

While we recognise that generating public awareness and discussion of issues surrounding sexual offences is important, we do not support the view that journalists' access to closed court proceedings is the only, or even a viable option in facilitating this. Publicity surrounding child sex offending can have differing impacts upon those who have experienced such crimes and consequently, complex trauma...Triggering media coverage, particularly coverage that question's a complainants account, will discourage, rather than encourage some survivors from coming forward. Instead, it spirals them back to instances of trauma, making them less likely to report, and extending the amount of time it may take for them to come forward. This indicates that the media is not in itself the appropriate mechanism to achieve the aims of encouraging the reporting of offences.<sup>10</sup>

30. We see an uptake in calls to our service when there is sustained media coverage of sexual, domestic and family violence. If victim-survivors are going to disclose, they need to be able to own the process of disclosing and be comfortable with it. This isn't always the case with media coverage, especially if the media questions the complainants accounts or perpetuates rape myths and gender stereotypes. We acknowledge that the media does play a role in facilitating public awareness and discussion. However, it should not come at the cost of victim-survivors' wellbeing especially given they are already some of our most vulnerable members of society.
31. We welcome and support the requirement to make exclusion orders in all ADVO proceedings.

### **Proposal 7.9, 7.10**

32. We welcome the opportunity for victim-survivors (as parties) to be given the right to request reasons and to request a review. However, we do note that if a victim-survivor is unrepresented it is unlikely that they will be aware of this right or know how to access it. This is another situation in which would be beneficial for victim-survivors to have access to free or low-cost legal representation.

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<sup>10</sup> Ibid.

## Proposals 7.14 to 7.16

33. We welcome and support the requirement to make exclusion orders in all ADVO proceedings in Proposal 7.14, which corresponds and supplements Proposal 7.4 above.

34. We are however, concerned with the following comment from the Draft Proposals

The purpose of all these powers is to reduce distress or trauma to participants in the proceedings, rather than to protect the secrecy or confidentiality of evidence or other information in proceedings, for example. This purpose can be achieved by making an order to exclude members of the public from proceedings.

35. Unfortunately, the Commission appears to have misunderstood that the confidentiality (or lack thereof) or a particular proceeding can often be the driver of trauma and distress to victim-survivors. As has already been discussed at length above, knowing that proceedings will be private and confidential can often be crucial to obtaining a victim-survivors agreement to come forward in the first place. It is not always the case that protecting a victim's identity is enough, sometimes proceedings might need to be subject to closed court orders which prohibit disclosure (including by publication) of information. An example of this might be in proceedings for a domestic violence offence in a rural and remote community where the perpetrator is a high-profile member of that community. In a case like that, a victim-survivor might be more willing to come forward if she knows that nothing that comes out of that proceeding can be disclosed.

36. We therefore do not agree that closed court orders are not necessary in proceedings involving sexual, domestic and family violence and we submit that victim-survivors should have the option of asking for a closed court order if they want it, and they should be supported in making that application.

## Chapter 9 Monitoring and enforcing departures from open justice

### Proposal 9.5

37. We welcome the creation of a register of non-publication, suppression and closed court orders but note that many of our clients would be unable to pay the fee. We submit that there needs to be options for waivers of fees for victim-survivors and other vulnerable persons and their legal representatives.

38. We also submit that victim-survivors should be specifically named as persons who get notified of orders under Proposal 9.5(5)(b).



## Chapter 10. Access to records on the court file

### Proposal 10.1

39. We agree and welcome a new legislative framework governing access to records on the court file which would be supplemented by individual court rules, policies or practice notes. We submit that any access framework needs to be as accessible as possible for vulnerable groups.

### Proposal 10.3

40. We do not agree with the Commission's observation that the term "party" should not include victim-survivors. Firstly, this might make the access framework confusing because the definition is different than what is set out in the new Act. Secondly, we note that the definition of "court file" only includes records that have been tendered into evidence, judgments and transcripts. We don't see any reason why victim-survivors couldn't have access to this information once proceedings had concluded, given their own evidence would feature in some of this material. Thirdly, some of this information might be necessary for civil proceedings or applications for victims' compensation.
41. We also note as a general observation that victim-survivors aren't specifically discussed as a category of persons requiring documents. We don't understand why the media and journalists have a simpler process to access documents and victim-survivors are effectively treated like members of the public when having to access records about their own matter.
42. We suggest that the definition of "party" be extended to include victim-survivors or alternatively a separate proposal be considered to specifically outline what records victim-survivors have access to without leave of the court. We would be happy to consult with you further on what this list might entail.

### Proposal 10.7

43. We support the inclusion of the list to assist decision-makers to make requests, however we think that the needs of victim-survivors should be directly acknowledged. For example, a new section (j) could be added stating "where someone other than the victim or complainant is making the request, the impact on the safety, welfare, wellbeing and privacy of the victim or complainant" [must be taken into account].

## Proposals 10.8 and 10.9

44. We reiterate our comments at paragraphs 40 to 42 above and recommend that the definition of party be extended to include victim-survivors or alternatively a separate proposal be considered to specifically outline what records victim-survivors have access to without leave of the court.

## Proposal 10.12

45. We warmly welcome the exemption for victim-survivors to pay an access fee.

## Chapter 11 Technological issues and open justice

### Proposal 11.1

46. We know that the use of virtual proceedings is on the rise, given the demands of COVID. The Commission should be aware of anecdotal information we have received about the limitations of virtual proceedings for complainants and witnesses. We welcome the discussion of this important issue but suggest that much more detailed research and consultation needs to be undertaken (by virtue of a separate enquiry undertaken by the appropriate body) to ensure that virtual court proceedings are conducted in a safe and trauma informed manner. We realise that this is unlikely to be the forum to discuss these issues in detail but wish to raise the following for the Commission's information.
47. We are aware of anecdotal examples of:
- Perpetrators of violence (ie. defendants) being inadvertently given virtual access to proceedings while a complainant is giving evidence
  - Proceedings being indefinitely stayed because:
    - A victim or witness is unable or refuses to give evidence because the only place they can give evidence from is the family home where the perpetrator also lives, or
    - A victim or witness refusing to give evidence because they are at risk of seeing or hearing the perpetrator while giving evidence virtually.
48. These examples also highlight how important confidentiality is for victim-survivors during the court process.
49. Finally, we welcome the Commission's suggestion to include an offence under section 9 of the *Court Security Act 2005* (NSW) to make it an offence to record court or tribunal proceedings. As foreshadowed above, we consider that further, detailed consultation and review of any electronic courtroom technology needs to occur from a security lens

to ensure that perpetrators are not covertly record proceedings. It is acknowledged in the research on coercive control that perpetrators are becoming more adept at using technology as a means for coercive control and this area is ripe for exploitation.<sup>11</sup>

50. Thank you again for the opportunity to make a submission. If you have any questions or would like to discuss further, please do not hesitate to contact myself or Laura Henschke on [REDACTED] or [REDACTED].

Yours faithfully,

A large black rectangular redaction box covering the signature area.

Hayley Foster  
Chief Executive Officer  
Rape & Domestic Violence Services Australia

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<sup>11</sup> Julie Inman Grant eSafety Commissioner, 'Calling out technological tethers in coercive control' on *E Safety's Latest blogpost* (30 March 2021) <https://www.esafety.gov.au/about-us/blog/calling-out-technological-tethers-coercive-control>.