# New South Wales Law Reform Commission
# Consultation Paper 22
# Court and tribunal information: access, disclosure and publication

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## 1. Overview

Open justice in the 2020s exists within a digitised and hyper-connected world of media and technology. While Australian courts are well-respected institutions, misinformation and disinformation is nevertheless an issue for courts everywhere. The digital media environment requires courts and tribunals to reconsider what open justice means for the courts and society and to strike the right balance between openness and transparency on the one hand and the fair and proper administration of justice and the right to fair trial on the other.

Amongst the challenges in this fragmented media environment are changed news media models which have resulted in a diminution of trained 'legacy' journalists as well as a blurring of the definition of 'journalism' and exactly 'who is a journalist?' in conducting reporting practices. For the judiciary, navigating this new territory presents a litany of issues, not least of which, the need for media literacy to understand the nature and impact of the media and technology disruptions. At the same time, the public's limited knowledge of the court system and the justice process is skewed toward high profile publicity cases and public disruptions about courts. The insurrection at the US Capitol on the 6th of January is a potent example of how democratic institutions can be vulnerable to misinformation and disinformation.

This submission considers these broader issues associated with open justice, definitions, publication and non-publication and responds to the call from the NSWLRC for a reassessment of the current laws as they sit within the media saturated world of the 2020s. As the digital environment becomes increasingly entrenched and ubiquitous, the logics of suppressing information from publication becomes highly problematic. This calls for clear and transparent strategies drawn from an urgent rethinking of suitable solutions for managing this disrupted hyper-connected world.

## 2. The open court principle and its exceptions

**Question 2.1: Statutory requirements to hold proceedings in private**

**(1) Are the current laws that require certain proceedings to be closed to the public appropriate? Why or why not?**

Under Section 8(1) of the *Court Suppression and Non-Publication Orders Act 2010* (NSW) ('the Act) a court may provide for such an order based on the following grounds:

> *(a) the order is necessary to prevent prejudice to the proper administration of justice,*
>
> *(b) the order is necessary to prevent prejudice to the interests of the Commonwealth or a State or Territory in relation to national or international security,*
>
> *(c) the order is necessary to protect the safety of any person,*
>
> *(d) the order is necessary to avoid causing undue distress or embarrassment to a party to or witness in criminal proceedings involving an offence of a sexual nature (including sexual touching or a sexual act within the meaning of Division 10 of Part 3 of the Crimes Act 1900),*
>
> *(e) it is otherwise necessary in the public interest for the order to be made and that public interest significantly outweighs the public interest in open justice.*

In addition, 8(2) of the Act makes clear that any such order 'must specify the ground or grounds upon which the order is made'.

The main focus on appropriateness here rests with 8(1)(d). This question was illustrated in 2020 when a Sydney-based criminal defence lawyer, charged with aggravated sexual assault, sought to have his name and his firm's name suppressed. Prosecutors argued that name suppression would amount to 'special treatment', arguing that 'embarrassment' should not outweigh the public's right to know (Sydney Criminal Lawyers 2020).

While this is true, the question might also be considered in light of other contemporaneous high profile cases which have received public attention, such as actor Craig McLachlan's trial in the Melbourne Magistrate's Court for indecent assault. In this case, there were heightened levels of publicity due to media coverage. This speaks to the potential for increased publicity having a compounding effect on any other case before the courts. In the converged and connected media environment in which the courts and society now operate, it is important to consider the social and cultural milieu of the time, and whether restrictions on publication should be considered due to excessive and associative media coverage relating to a broader series of cases.

Of course, any recommendations need to be made within a broader context that includes the law of defamation, contempt of court, and the availability of complaints to the Australian Press Council. Assessment of the adequacy of remedies available via these devices is outside the scope of this submission. However, it is important to observe that while allegations can be very damaging (e.g. McLachlan, Geoffrey Rush) and convictions even more so (George Pell), the justice system has rules and internal mechanisms that can remove the sting of inappropriate reportage.

**(2) What changes, if any, should be made to these laws?**

- ***Recommendations:***

  We propose the following minor wording changes:

  1. In 8(1)(d) remove the words 'embarrassment' and retain 'undue distress'
  2. In 8(1)(e) replace current wording with a more explicit and clear balance of public interests from (current wording):

- ‘it is otherwise necessary in the public interest for the order to be made and that public interest significantly outweighs the public interest in open justice’

To (proposed wording):

- ‘it is otherwise necessary in the public interest for the order to be made *in favour of the right to a fair trial* and that public interest significantly outweighs the public interest in open justice’

We further note it is also important for the courts to retain the power outlined in s 8(1)(c) to supress vigilantism.

## 3. Non-disclosure and suppression: statutory prohibitions

**Question 3.2: Current statutory prohibitions on publishing or disclosing information**

**(1) Are the current statutory prohibitions on publishing or disclosing certain information appropriate? Why or why not?**

In the current media climate, it appears existing prohibitions are not working. The review into the *Victorian Open Justice Act (2013)* (2017) found that the high level of orders which suppressed information from courts was both ‘surprising and unacceptable’ (Vincent 2017, p. 5), suggesting this was due to judicial concerns of inaccuracy, and selective unfair reporting in the media (Vincent 2017, p. 5).

Many will view the 2018 trial of George Pell for child sexual offences as the most recent and profound example of the question of effectiveness of these prohibitions. While the suppression order imposed by the Victorian County Court was intended to prevent ‘a real and substantial risk of prejudice to the proper administration of justice’ due to the fact Pell was facing a second trial on separate charges, the reality of this situation effectively backfired. Although the second trial was ultimately aborted and the order lifted, *prior to the lifting of the order* the guilty verdict from the first trial was published by easily accessed news websites. Many media outlets also ran stories which were published without naming the accused. However, publicity *about* the suppression order compounded the impact of the coverage. In short, the suppression order itself *became a story in its own right*. The entire front page of Melbourne’s *Herald Sun* was dedicated to the following headline:

> *Censored: The world is reading a very important story that is relevant to Victorians. The Herald Sun is prevented from publishing details of this significant news. But trust us, it’s a story you deserve to read.*

Sydney’s *Daily Telegraph* took a similar line with a different editorial approach, running a sign-posted ‘editorial’ on the front page, under the headline:

> *An awful crime. The person is guilty. You may have read the story online already. Yet we can’t publish it, but trust us … It’s the nation’s biggest story.*

In its editorial, the *Telegraph* went on to call the suppression ‘an archaic curb on freedom of the press in the current digitally connected world’. Commentary such as these become critiques of the justice system rather than a report of the case in question.

Yet, in a sign of how far the courts have come in directly sharing information about matters of public interest (i.e. bypassing the news media), in February the Supreme Court of Victoria livestreamed the penalty proceedings in that contempt case, the media companies having pleaded guilty.

This submission, therefore, broadly proposes that the realities of digital and social media are inconsistent with the traditional notion of suppression orders where there is widespread and long-term public interest in a case about a high profile person.

- ***Recommendations:***
  In high profile cases such as this, consider the following:
  1. bring in an open justice advocate (see below),
  2. provide for a judge-only trial for subsequent trials,

  Moreover, due to changing communication practices available to courts:
  3. revise the efficacy of live-streaming public interest proceedings via court-owned media channels.

**Question 3.3: Additional statutory prohibitions that may be needed**

**What further information, if any, should be protected by automatic statutory prohibitions on publication or disclosure?**

The George Pell case made it clear that supressing or not publishing names was not only an inadequate measure in seeking to not identify a person but it effectively backfired due to the scathing critiques of the courts. For any online reader, cross-checking with published stories in off-shore (or interstate) publications which *did* name the accused made the suppression of names in local publications pointless; potentially escalating the damage caused by the story. It raised questions about connections of open justice and free speech, with the ABC's *Media Watch* reporting how the 'legal secrets' were 'in contempt of the principle of open justice' having 'reached the height of absurdity' (Media Watch 2018).

The review into Victoria's *Open Courts Act 2013* (2017) found problems in the balance struck between open justice and suppression orders:

> It is apparent that the difficulties that can arise in the determination of an appropriate balance are substantial and only to a limited extent susceptible to resolution through legislative intervention. There is an important cultural dimension to the problem (Vincent 2017 p. 5).

This important cultural dimension pivots on the inconsistencies between the highly digital, technological environment of mainstream society and the systems in courts that are struggling to accommodate these. This issue is now well documented by academics and the judiciary itself (cf Johnston 2012; Johnston & Wallace 2018; McLachlan 2012; Vincent 2017; Warren 2013).

➢ ***Recommendations:***

1. We concur that greater attention needs to be given to the education of judges insofar as they are managing rapid changes in the social and technological environment (cf Vincent 2017; Johnston & Wallace 2018).
2. Further provisions in the legislation are outlined in following responses, e.g. appointing an open justice advocate, the establishment of a register of orders.

## 4. Non-disclosure and suppression: discretionary orders

**Question 4.1: Actions targeted by an order**

**(1) Are the existing definitions of "suppression order" and "non-publication order" in the *Court Suppression and Non-publication Orders Act 2010* (NSW) appropriate? Why or why not?**

Since publication is such a ubiquitous concept via social media, it would seem that the wording needs to be streamlined. In any event, the distinction between 'suppression' and 'non-publication' in the current Act is very vague.

- ***non-publication order*** means an order that prohibits or restricts the publication of information (but that does not otherwise prohibit or restrict the disclosure of information).
- ***suppression order*** means an order that prohibits or restricts the disclosure of information (by publication or otherwise).

**(2) What changes, if any, should be made to these definitions?**

➢ ***Recommendations:***

1. Move to the use of a single term, following others (e.g. Victoria), which uses only 'suppression orders'.
2. Consider substituting *'the communication of information'* for *'publication'* to cover broader scope and reflect the current digital communication environment. This will encompass social media sharing (which could perhaps be used as an example in a "note" in the legislation.)

**Question 4.10: A requirement to give reasons**

**(1) Should courts be required to give reasons for a decision to make or refuse to make a suppression or non-publication order in some or all circumstances? Why or why not? In what circumstances should this requirement apply?**

There is a current provision in the Act for giving reasons for a decision to order a non-publication order. This should be retained and, if anything, a higher priority placed on it. This should be delivered as a written statement of the reasons for the order (which could take place after oral delivery), including the justification for its terms and duration, and should be publicly available. This approach clearly accommodates the principle of open justice.

In the absence of such an order it is highly likely there will be speculation, as per the Pell case, which can develop into a potentially very damaging secondary wave of publicity and obloquy.

➢ ***Recommendation:***

1. Reasons should be given in all circumstances for transparency purposes in keeping with principles of open justice.

## 6. Access to information

**Question 6.1: Consolidation of the court information access regimes in NSW**

**(1) Should the regimes governing access to court information be consolidated? Why or why not?**
**(2) If so, how should the regimes be consolidated?**

➢ ***Recommendations:***

We support establishing an interstate register that is publicly available. As per the Victorian review (Vincent 2017) at 2.2.2 recommendation 5, i.e.:

- *the development of a system for interstate and territory recognition and enforcement of suppression orders.*

In addition, there may be a role for the Commonwealth government to work with the States and Territories to advance arrangements, consistently with ss 51(xxv) and 122 of the Constitution.

## 10. Media access to information

**Question 10.5: Contemporary media**

**(1) Are the current definitions and use of the terms "media" and "news media organisation" appropriate? Why or why not?**

The Act currently defines the news media wholly in the context of an 'organisation' as:

- ***news media organisation*** means a commercial enterprise that engages in the business of broadcasting or publishing news or a public broadcasting service that engages in the dissemination of news through a public news medium.

**(2) What changes, if any, should be made to these terms and their definitions?**

We believe this is urgently in need of review, reflecting the changed media environment as well as Australian and international court decisions and directions.

This issue has received significant attention in recent years as the digital environment results in changes to reporting models which have caused regulators, judges and legislative drafters to review traditional definitions of journalism and journalist (cf Gleason 2015; Johnston & Wallace 2018; Johnston & Wallace 2021; Peters and Tandoc 2013; Ugland and

Henderson 2007; West 2014). Most commonly, this has been in relation to defamation and shield laws.

In the United States, Canada, and New Zealand, for example, the definition of who is a journalist and what is the news media has been reviewed at many levels including within case law and legislative or policy review. Johnston and Wallace (2021) found in recent deliberations of the Journalist Sources Protection Act 2017 in Canada, a member of parliament noted:

> We have so many platforms nowadays that it is hard to pin down who exactly is a journalist … and what counts as traditional media versus new media. It is important to work with fairly broad definitions of "journalist" and "media" even if that means judges have to make their own calls about that as necessary. (Laverdière 2019)

The New Zealand Law Commission had previously decided against attempting a specific definition of news activity, deciding that it was better to leave it to be decided on a case by-case basis (Johnston & Wallace 2018; cf Law Commission of New Zealand, 2013). In a 2014 finding by the New Zealand High Court in *Slater v. Blomfield,* Justice Raynor Asher found a 'blogger can be legally defined as a journalist, and likewise that a blog can be journalism, even if the work is carried out for a non-mainstream media outlet' (Johnston 2014; cf *Slater v. Blomfield).*

More recently, Johnston & Wallace's examination of the definition was examined in light of Wikileaks and Julian Assange's connection with the news industry. They noted:

> Whether Assange should be afforded the title "journalist" and the activities of WikiLeaks "journalism" is not just a question of semantics. It is illustrative of a wider issue confronting law and policy makers around the world about who should be considered a journalist before the law, in cases where source anonymity is at stake, in matters of national security and terrorism, and in relation to privacy and data protection. (Johnston & Wallace 2021, p. 253)

This review highlights the need to consider definitions in light of suppression and non-publication orders. As the news media moves to a more malleable concept, moving away from solely legacy media roots and definitions, courts need to consider this in their forward-thinking planning, including the application of suppression orders and non-publication orders which will undoubtedly affect future reporting possibilities.

**(3) How else could members of the media be identified for the purposes of the laws dealing with media access to court information and proceedings?**

- ***Recommendation:***

1. In light of the above, we recommend revising the definition so that it is neither institutionally- nor income-dependent. Following development in this field, we propose the following definitions adapted from the following South Australian Evidence (Protections for Journalists) Amendment Bill 2014:

   ***professional journalist*** means a person engaged in the profession of journalism (whether on a paid or unpaid basis);

***news medium*** means any medium (whether printed, broadcast, digital or otherwise) used to disseminate news, or commentary on news, to members of the public.

Ultimately, the definition will be at the discretion of the judge. This broader definition does not diminish the role of the news media in its fourth estate function. While acknowledging this crucial element within democracy, the broader definition is responsive to emerging media models.

## 12. Digital technology and open justice

**Question 12.4: Tweeting and posting in court**

**(1) Are current provisions regulating use of social media by the media and public in court adequate? Why or why not?**

New South Wales was the first Australian jurisdiction to move towards an explicit institutional policy governing the transmission of information from court using electronic communication devices (Wallace & Johnston 2015). The amendment to the *Court Security Act 2005* (NSW) came into effect from 21 June 2013 'following considerable backlash from lawyers and journalists' (Spies 2013). While it had specific prohibitions attached to transmitting sounds, images or 'information that form part of the proceedings of a court', the Act included provisions for:

- communications between prosecutors;
- certain communications between prosecutors and witnesses;
- transmissions by lawyers generally;
- transmissions by court staff and judicial officers in the course of their duties; and,
- transmissions by journalists 'for the purposes of a media report on the proceedings concerned' (Wallace & Johnston 2015, p 19)

Further exemptions to these may be approved by a judicial officer, or at an institutional level by practice notes or policy directions (Wallace & Johnston 2015).

Assuming a revised definition of journalist is developed in the existing report which purports to broaden the scope of the role of journalists, our recommendations are to maintain the current provisions. In any event 'a media report' should be explicitly defined. We therefore offer the following recommendation.

**(2) What changes, if any, should be made to the existing provisions?**

- ***Recommendation:***

1. Retain the existing exceptions to tweeting from court, based on a broader definition of a journalist or news media beyond that which exists in the NSW Court Suppression and Non-publication Orders Act 2010 no 106.
2. As per the provisions in the above points, and following the responses list in Point 10 above, consider what is meant by 'a media report' and clarify this meaning.

## 13. Other proposals for change

**Question 13.2: An open justice advocate**

**(1) Is there a need for an advocate to appear and be heard in applications for suppression and non-publication orders? Why or why not?**

As per the Victorian review, we recommend the appointment of an open justice advocate which may also be called a 'Public interest monitor' (PIM) as per Victoria (Vincent 2017). This was widely supported by the news media, including the Media Entertainment and Arts Association (MEAA).

The PIM's functions would include acting as a 'contradictor' to make submissions when a judge is determining suppression orders, reviewing the order and making a determination to pursue the review of an order. The PIM would appear on request of the judge (Vincent 2017). They would presumably have a disinterested role redolent of the classic amicus curiae (Krislov, 1967; Keyzer, 2010).

- ***Recommendation:***

1. Investigate this role by reviewing other adoptions of such roles elsewhere for reports as to the utility and efficacy.

**Question 13.3: Education initiatives**

**(1) What education initiatives could be implemented to improve people's understanding of open justice and associated restrictions?**

We propose a 'literacies' approach is the best vehicle through which to approach this review. In 2018 Johnston & Wallace noted the need for digital media literacy for 'those working in roles in society in which media needs to be interpreted and understood, especially where it is challenged or in question' and how 'judicial officers are increasingly likely to find themselves in this category' (2018, p.68). They further noted:

> To take one recent example, the inquiry by the NSW Law Reform Commission into access to digital assets upon death or incapacity is likely to result in legislation that will require judicial application, and interpretation in relation to digital assets (Johnston & Wallace 2018, p. 68).

They divided media literacy into 'technical competencies' and 'critical interpretive skills' (p. 68) arguing that supporting judges to achieve the latter 'will require the ongoing provision of information and resources, and opportunities to acquire learning skills and share experience via judicial professional development programs' (Johnston & Wallace 2018, p. 68).

**(2) Who should be responsible for delivering those initiatives?**

- ***Recommendation:***

1. Considered attention, including resourcing, should be made available (in each state) by Departments of Justice and Attorney General to develop and maintain educational

resources for ongoing professional development for judicial officers in the field of digital media literacy.

**References**


Gleason, T. (2015) "If we are all journalists can journalistic privilege survive?" *Journal of the European Institute for Communication and Culture* , 22(4), 357–386.

Johnston, J. (2012) 'Courts' new visibility', in P. Keyzer, J. Johnston & M. Pearson (eds.) *The Courts and the Media: Challenges in the Era of Digital and Social Media,* (pp. 41-54) Sydney: Halstead

Johnston, J. & Wallace, A. (2018) 'Hastening Slowly: What the hare and the tortoise might teach the judiciary about social media,' *Judicial Officers Bulletin,* 30 (7), pp: 63-68.

Johnston, J. & Wallace, A. (2021) 'Media disorder and the future of journalism: International developments and the challenge of WikiLeaks', *Handbook of Communication Rights, Laws, and Ethics* by L. Corredoira, R.C. Presuel, & I. Bel (eds), Wiley-Blackwell, Hoboken: NJ.

Keyzer, P. (2010) *Open Constitutional Courts*, Federation Press, 2010.

Krislov, S. (1967) 'The Amicus Curiae Brief: From Friendship to Advocacy', 72, *Yale Law Journal,* pp: 1653-69

Laverdière, H. (2019). Open Parliament Debate, House of Commons Hansard #209. https://openparliament.ca/debates/2017/9/29/helene-laverdiere–2.

Law Commission of New Zealand. (2013) *The News Media Meets the 'New Media',* Report no. 128, Law Commission, New Zealand, Wellington. Retrieved from http://r128.publications.lawcom.govt.nz/

McLachlin, B. (2012) 'The relationship between the courts and the news media', in P. Keyzer, J. Johnston & M. Pearson (eds.) *The Courts and the Media: Challenges in the Era of Digital and Social Media,* (pp. 24-34) Sydney: Halstead

Media Watch, (21 May 2018) 'Legal Secrets', ABC. Retrieved from https://www.abc.net.au/mediawatch/episodes/legal-secrets/9972226

Slater V. Blomfield. 2014. NZHC 2221 (12 September 2014) (N.Z.)

Spies, A. (28 February 2013) 'Should Journalist's Tweet and Lawyers Work in Court? The UK Government Says Yes!' *IP Whiteboard.* Retrieved from http://www.ipwhiteboard.com.au/shouldjournalists-tweet-and-lawyers-work-in-court-the-nsw-government-says-yes/

Sydney Criminal Lawyers, (25 September 2020) Suppression and Non-Publication Orders in New South Wales, NSW Courts. Retrieved fromhttps://nswcourts.com.au/articles/suppression-and-non-publication-orders-in-new-south-wales/

Ugland, E. and Henderson, J. (2007) "Who is a journalist and why does it matter: Disentangling the legal and ethical arguments." *Journal of Mass Media Ethics* , 22(4), 241–261.

Vincent, F. (September 2017) Open Courts Act (2013) Review, Victoria State Government. Retrieved from https://engage.vic.gov.au/open-courts-act-review

Wallace, A. & Johnston J. (2015) 'Tweeting from court: new guidelines for modern media,' *Media Arts Law Review,* 20 (1), pp: 15-32.

Warren, M (2013) 'Open Justice in the Technological Age', Redmond Barry Lecture, State Library of Victoria, Melbourne.

West, S. R. (2014) “Press exceptionalism.” *Harvard Law Review* , 27, 2434–2462.