ODPP
New South Wales

New South Wales Law Reform Commission

Open Justice Consultation Paper

Submission by the Office of the Director of Public Prosecutions (ODPP)

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Contents

Introduction

The ODPP is an independent prosecuting agency primarily responsible for the prosecution of serious offences in the District and Supreme Courts of New South Wales.

As an agency we strongly support the principles behind open justice, as it is of fundamental importance to the operation of criminal justice that our public work as prosecutors is visible and understood by the community.

As prosecutors we must also be conscious of the need to protect the privacy of vulnerable persons and witnesses who become involved in criminal cases through no fault of their own. But this must be balanced against the public interest of the criminal courts to denounce criminal conduct and bring accused persons to account.

Accurate and balanced reporting by the media is central to the principle of Open Justice. We support the media having timely access to court information, to enable the evidence to be accurately reported. However, too frequently are cases delayed through untempered pretrial publicity that may unfairly prejudice the accused right to a fair trial. A trial delayed or aborted comes at a significant cost to criminal justice, in a monetary sense and in terms of the adverse emotional impact it has on victims, witnesses and accused persons. We consider that by improving access to information by the courts to the media, greater accuracy, and more restraint in reporting before the matter gets to trial may be promoted.

The justice environment is changing rapidly, indeed since we provided our preliminary submission on Open Justice and this consultation paper, there have been significant changes wrought by adaptations that were made in response to COVID 19. The changes and challenges we are seeing include the way evidence is received, the proliferation of information/evidence arising from technology at every witness' finger tips, the transition to digital filing and tender of evidence, virtual court rooms and live streaming of proceedings. As this consultation paper so clearly highlights, for the principle of Open Justice to continue to effectively operate, the media used and handling of court information needs to be modernised to adapt to the digital age and meet contemporary expectations about access to information about justice.

As the Courts in NSW progressively change their practices and adopt digital procedures, it seems likely that some of the issues raised in the Consultation Paper may be resolved by digital solutions – and still other issues may emerge. We caution however that for the time being there is a hybrid paper and digital system, that creates challenges in formulating rules and procedures that are universal and consistent.

We also think it is important to recognise as was by the Supreme Court of the United Kingdom [1]

> The purposes for which court records are kept are completely different from the purposes for which non-parties may properly be given access to court documents. The principle of open justice is completely distinct from the practical requirements of running a justice system. What is required for each may change over time, but the reasons why records are kept and the reasons why access may be granted are completely different from one another.

We have focussed our answers to the consultation questions on areas where we have the most interest.

Chapter 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?

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

(3) Are the current statutory exceptions to the requirement to hold proceedings in private appropriate? Why or why not?

(4) Should there be standard exceptions that apply in all (or most) circumstances? If so, what should they be, and in what circumstances should they apply?

We consider that the current laws applicable to criminal cases achieve the correct balance in terms of closing the courts in specific circumstances, for example sexual assault complainants' evidence and criminal proceedings involving children. As prosecutors it is important that we can provide assurance to sexual assault complainants and vulnerable witnesses that the court will be closed if they so desire. If that assurance cannot be made there is a risk that the complainant will not wish to proceed to give evidence. Failing to provide that protection undermines the policies designed to encourage victims of violence to come forward.

It is true that these laws are not consistently expressed and may be found in different pieces of legislation and the common law. But from our perspective there is no imperative to make any changes.

[1] Lady Hale delivering the judgment of the court in Cape Intermediate Holdings Ltd V Dring [2019]UKSC 38 at par 24.

Question 2.2: Statutory powers to hold proceedings in private

(1) Are the existing laws that give courts discretionary powers to make exclusion orders appropriate? Why or why not?

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

(3) Should there be standard grounds that need to be satisfied before a court can make a discretionary exclusion order in all (or most) circumstances? If so, what should they be and in what circumstances should they apply?

The discretionary powers currently available to close court rooms at common law are appropriate. It is important that the courts have powers to retain order in the court room and to ensure that justice is administered in the public interest. On occasion it will be appropriate in criminal proceedings to exclude supporters or other members of the public if order cannot be maintained, however it may not be necessary to close to the court.

It is important that the courts continue to have the discretion to maintain these powers.

In criminal cases there are common scenarios where the courts are closed on a discretionary basis such as where there is evidence in the nature of public interest immunity, such as national security and the safety of any person including the sentencing of informer witnesses. We submit that there would be greater transparency if the rules were codified and accordingly, we support the *Court Suppression and Non Publication Orders Act* 2010 (CSNOP Act) being amended, along the lines of the Victorian *Open Courts Act* 2013, to accommodate the circumstances not otherwise prescribed by legislation where a court may be closed on discretionary grounds. We consider that the CSNOP Act should also prescribe offences for breaches and how there are to be dealt with.

If the provisions are codified, we consider that the provision could be constructed in a similar way to section 8 of CSNPO Act.

Chapter 3 Non-Disclosure and Suppression: Statutory Prohibitions

Question 3.1: Statutory prohibitions on publishing or disclosing certain information

(1) As a matter of principle, should there ever be automatic statutory prohibitions on publishing or disclosing certain information? Why or why not?

Yes, we strongly support automatic statutory prohibitions, victims should not have to bear the burden of applying for a suppression order, and in many cases would not be able to adduce evidence to satisfy a court of the criteria in section 8 CSNPO Act.

Further in our experience criminal courts are extremely busy, and therefore non-publication orders may be overlooked. Automatic statutory prohibitions ensure that there is appropriate protection in accordance with public policy.

One downside of automatic orders is that the opportunity to explain the effect of the order is missed. In our experience parties, supporters and witnesses sometimes need assistance in understanding why the order is in place and what it means they can and cannot say or do. Also, because the orders are standard, there is often not adequate explanation of what the order is, a transcript might simply say for instance "Non-Publication Order", without further explanation.

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?

(2) What changes, if any, should be made to the current statutory prohibitions?

We support the current statutory prohibitions on publishing or disclosing certain information. Please see our comments at Chapter 7 Protections for children and young people and Chapter 9 Protections for sexual offence complainants.

Question 3.3: Additional statutory prohibitions that may be needed

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

The ODPP supports statutory protections for the following categories of information:

- Names of parties in domestic violence proceedings to protect victims and to encourage victims to come forward
- Evidence in bail applications and preliminary criminal proceedings, in particular evidence that would not go before a jury, such as criminal histories.
- In addition to the address and phone numbers of victims and witnesses, personal identification information for example drivers licence numbers, Medicare numbers, etc should be automatically protected.
- Sensitive evidence in criminal proceedings, as the publication of graphic details can traumatise victims.

Question 3.4: Types of action a statute may prohibit

(1) Is the existing variety of types of action that a statute may prohibit justified? Why or why not?

(2) What changes, if any, should be made?

(3) Should a standard provision setting out the types of action that a statute may prohibit be developed? If so:

(a) what should the provision say,
(b) how should key terms be defined, and
(b) when should it apply?

We agree that greater consistency in the definitions of publication and use of information, and standardised orders is desirable.

We support the concept of a standard provision on the prohibition of information disclosure relating to identification information as described in paragraph 3.64 of the consultation paper.

Question 3.5: Duration of the statutory prohibition

(1) Should the statutory prohibitions on publishing or disclosing certain information always specify the duration of the prohibition? Why or why not?

(2) What changes, if any, should be made to the existing duration provisions attached to statutory prohibitions on publishing or disclosing information?

(3) What prohibitions, if any, should include a duration provision that do not already? What should these duration provisions say?

In some situations, it may be difficult to identify when the prohibition should cease. In most criminal cases the prohibition would apply to two classes of information:

a) that may prejudice a jury e.g., prior convictions of the accused
b) that should be withheld indefinitely, e.g., name of a child victim, identity of an informer witness.

In the first case the prohibition should continue until a conviction is recorded, in the second case indefinitely or until further order of the court. Interested parties should have the standing and means to approach the court for variations within reason.

Chapter 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?

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

(3) What other statutes should these definitions (with or without amendment) apply to?

(4) What other changes (if any) should be made to these statutes in relation to the types of action an order may prevent?

We support the definitions in the CSNPO Act, but there would be greater clarity and consistency if the same definitions applied to other statutes, where possible.

Question 4.2: Types of information that may be subject to an order

(1) Are the current provisions that identify the types of information that may be the subject of a suppression or non-publication order, adequate? Why or why not?

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

We do not have any issue with the current provisions that identify the types of information that may be the subject of a suppression or non-publication order. A court should be able to control the types of information generated by proceedings, including evidence, judgments and documents filed or subpoenaed.

It is of course important that care is taken in the framing of orders to ensure that there is sufficient particularity to ensure the order is given effect. One of the problems frequently encountered in criminal proceedings is ensuring that evidence that tends to identify a witness is clear. Victims' groups are rightly concerned that the media in particular needs to be careful when reporting on the evidence in a case where it may inadvertently identify the complainant. This may include for example reciting from the facts tendered on a bail application, where the mere facts of the matter tend to identify a complainant as they could only apply to a very narrow class of person. For example, if the High School which a complainant attends is named, then members of that school community may be able to identify the complainant given very limited additional information such as the age of the complainant, noting that the complainant's absence from school around the time of the incident may be known.

Parties and media need to be able to approach the court for clarification or rulings on particular pieces of evidence if it is unclear.

Question 4.3: Consent to publication or disclosure

(1) What provision, if any, should be made about making an order where a person consents to the publication of information that would reveal their identity?

We support the right of an adult victim to consent to the order not being made. However, we are concerned to ensure that the decision is an informed one. It maybe that it would be preferable for the proceedings to have concluded, prior to the restriction being lifted, to ensure the weight of publicity does not detract or deter the victim from continuing to give evidence. There may be associated difficulties if there are multiple victims as the name of one may identify the other. There needs to be a straightforward process for this occur. While the prosecution is on foot an application can be easily facilitated by the prosecution. However, once the proceedings have concluded, there are hurdles for the victim in navigating how to lift the order, without legal assistance, and it may not be possible to reconvene the same prosecution or defence teams with knowledge of the matter.

Question 4.4: Limits to orders

(1) Are the existing provisions relating to the scope of suppression and non-publication orders appropriate? Why or why not?

(2) What changes, if any, should be made to existing provisions in relation to:

(a) the exceptions and conditions that apply
(b) the geographic limits of such orders
(c) the duration of such orders, and
(d) any other aspects of the scope of such orders?

We consider that the existing provisions relating to the scope of suppression and non-publication orders are appropriate. The problems lie in the practicalities of enforcing the provisions rather than the provisions themselves.

We question the utility of the geographical limits of orders, where the matter is reported digitally. State boundaries it would seem no longer act as much of a shield as media reports are syndicated by papers across the country. This reality dictates that all orders need to be national in their scope.

As to the duration of orders, the duration it seems is largely dependent on the issue the order is addressing. If the end date is clear then the courts should have flexibility in applying orders.

As a default, in the absence of a specific order, we agree that in relation to court information that orders in criminal matters should cease to have effect after 75 years. This is consistent with the *State Records Act*.

Question 4.5 Service and Notice Requirements

(1) are the existing procedures (under the CSNPO Act, or any other statute) for making suppression and non-publication orders adequate? Why or why not?

(2) What changes, if any, should be made to existing procedures in relation to:

a) Who may make and application for an order?

b) When an order can be made

c) Who can appear and be heard in an application for an order?

d) The service and notice requirements for an order, or

e) Any other matter?

We do not have any issue with the procedure in criminal cases for the making of a non-publication or suppression order.

We also consider that the CSNPO Act provides sufficient scope for those with an interest in the proceedings to have standing to be heard.

Requiring service of notice before a party can make an application will not always be possible in criminal cases, as unanticipated issues may arise in the course of persons giving evidence. Sometimes the issue may arise on the first appearance after an arrest. Please see our comments at 13.2.

Question 4.7 The Public interest in open justice

(1) does the CSNPO Act deal with the consideration of the public interest in open justice appropriately? Why or why not?

(2) What changes if any should be made to the existing provision?

(3) What provision if any should be made in other statutes that grant power to make suppression or non-publication orders for recognising the public interest in open justice?

(4) What other considerations should be taken into account before an order is made?

In our submission the CSNPO Act deals with the concept of public interest in open justice appropriately. It is useful to have the policy objectives within the statute as a guiding principle.

We do not consider that it is realistic to include open justice objectives in non-publication orders that persist in other statutes. These provisions tend to exist for specific public policy reasons germane to the subject matter of that Act. If that is not the case, then the provision should be repealed and the CSNPO Act should apply.

Question 4.8: The "necessary" test for making orders

(1) What changes, if any, should be made to the "necessary" test?

(2) Should a definition of "necessary" be included in the *Court Suppression and Non-publication Act 2010* (NSW) or any other statute? If so, what should it be?

We do not advocate for any changes to the "necessary" test, the term has been judicially considered and is understood.

We also do not believe that "necessary" should be defined in the CSNPO Act.

Question 4.9: Grounds for making orders

(1) Are the grounds for making suppression and non-publication orders under the *Court Suppression and Non-publication Act 2010 (*NSW) and other NSW statutes appropriate? Why or why not?

(2) What changes, if any, should be made to them?

We repeat what we said in our Preliminary submission to this inquiry:

> It is our experience that despite a victim's name not being published, reporting of the details of the crime can cause distress to victims and often victims perceive that the details of the offence can make them identifiable to friends and acquaintances. A recent example highlighting these issues involves the abduction of a child who, while detained, was subjected to degrading sexual acts. The descriptions of the crime have been reported in salacious detail, including details of child abuse material depicting the complainant found on the accused's telephone. This reporting has caused the complainant and her family a great deal of distress. Further the family perceives that details published about ethnicity and location tend to identify the family.
>
> An application by the Crown before the Trial Judge pursuant to the Suppression Act to supress these details was rejected. We consider that this example suggests that the

prohibition in section 8 (3) carries too much weight and its effect should be ameliorated.

A further issue arises in this example in relation to details about a tendency witness who is now deceased. To date her name has not be published pursuant to section 578A of the Crimes Act. However, section 578A 4(f) provides that s578A (1) does not apply if the publication is made after the persons death. The witness before her death had made it clear that she did not wish family members to know about certain aspects of her life. As currently framed, it also seems that section 8 (1) (d) would not support an application on behalf of a deceased person.

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?

(2) If there was to be a requirement, how should it be expressed?

In our submission courts should be required to give reasons for a decision to make or refuse an order. It is not an insignificant decision and the decision will inevitably impact one of the parties, the media, or a witness in the proceedings. It is fundamental to open justice that the reasons for making an order are transparent.

Question 4.11: Interim orders

(1) Is the current provision in the *Court Suppression and Non-publication Orders Act 2010* (NSW) for interim orders appropriate and effective? Why or why not?

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

(3) What provision, if any, should be made for interim orders in other statutes that grant powers to make suppression or non-publication orders?

We confirm our suggestion in our preliminary submission that interim orders are renamed as postponement orders. Otherwise, we support the provision as currently drafted.

Question 4.12: Review and appeal of orders

(1) Are the existing provisions relating to the review and appeal of suppression and non-publication orders appropriate? Why or why not?

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

(3) To what extent should review and appeal provisions be available for suppression and non-publication orders that are not covered by the *Court Suppression and Non-publication Orders Act 2010* (NSW)?

The existing provisions in the CSNPO Act for appeals against suppression or non-publication orders are unclear and require revision.

Section 14 of the Act provides for an appeal by leave against the decision of a court to make, or not to make, an order under the Act. Pursuant to section 14(2) the 'appellate court' is defined as:

> (2) The ***appellate court*** for an appeal under this section is the court to which appeals lie against final judgments or orders of the original court or, if there is no such court, the Supreme Court

However, there may be more than one court to which 'appeals lie against final judgments or orders of the original court'. Further, the 'appellate court' as defined above may vary depending on the type of proceeding involved. Although there are authorities as to the effect of section 14(2) in various circumstances (set out at [4.113] of the Consultation Paper), they do not grapple with those issues.

For example, in *Australian Broadcasting Corporation v Local Court of NSW* (No 2) [2014] NSWSC 515 the Supreme Court held, without further analysis, that the Supreme Court was the 'appellate court' in relation to orders made in the Local Court under the Act. The court observed (at [19]):

> "19 The relevance of the *Criminal (Appeal and Review) Act 2001* (sic) to the present appeal is that, by Part 5, it makes provision for the court by which an appeal may be brought from a final order made by the Local Court. Section 14(2) of the *Court Suppression and Non-Publication Orders Act* makes this Court the "appellate court" for orders made in the Local Court under that Act. On an appeal to this Court from final orders of the Local Court, this Court has jurisdiction to order costs, including with respect to summary criminal proceedings: see, for example, *Director of Public Prosecutions (NSW) v Wililo* [2012] NSWSC 713."

However, appeals under the *Crimes (Appeal and Review) Act* (CAR Act) from final orders of the Local Court in summary proceedings lie to the District Court as well as to the Supreme Court (although on different grounds), and for the purposes of the CAR Act the term 'Local Court' includes the Children's Court (section 3 CAR Act).

On that basis the Supreme Court in *TR v Constable Cox* [2020] NSWSC 389 (at [110]) held that the 'appellate court' for the purposes of section 14(2) of the Act in relation to orders made in the Children's Court was the District Court. However, that analysis would have applied equally to the appeal rights against final orders of the Local Court or Children's Court to the Supreme Court (under sections 52 and 56 of the CAR Act).

A further issue is that section 14 does not specify any time limits, procedural requirements, or rules in relation to those appeals. In *Australian Broadcasting Corporation v Local Court of NSW* (No 2) [2014] NSWSC 515 the Supreme Court held that the provisions in relation to costs orders for appeals under the CAR Act to the Supreme Court from summary proceedings in the Local Court should also apply to the appeal under section 14 of the Act in that case. However, no reasons for that determination were provided.

To remove this confusion section 14 should be amended to:

- precisely specify the relevant 'appellate court' in relation to each original court in which orders under the Act may be made, and
- specify time limits, procedural requirements, and rules in relation to each appeal, either by way of adopting the procedure and rules for existing appeals under other provisions or otherwise.

Review and appeal provisions in similar terms should be available in relation to all non-publication and suppression orders made by courts.

Question 4.13: Framing effective orders

(1) How could the *Court Suppression and Non-publication Orders Act 2010* (NSW) provisions be amended to assist courts in framing more effective orders?

We agree that poorly framed orders are frequently made and that a poorly drafted order can frustrate the order being effective. The ways to address this seem to be more practical, rather than by amendment to the Act. For instance, the Regulations could specify a format or form for orders that would assist the court to frame orders. The Judicial Commission could publish guidance on framing orders. Also, the media should be able to apply to the court for clarification if the terms of the order are unclear or not able to be applied.

Question 4.14: Interaction between the Court Suppression and Non-publication Orders Act 2010 (NSW) and other statutes

(1) Should the *Court Suppression and Non-publication Orders Act 2010* (NSW) only apply to situations that are not subject to other automatic prohibitions or provisions that allow suppression and non-publication orders to be made? Why or why not?

(2) Which provisions for suppression and non-publication, if any, should be consolidated or standardised?

In the criminal law the statutory exceptions are based on public policy considerations, e.g., encouraging victims of sexual assault to come forward, the protection of children or witnesses in protection. It would be an unnecessary burden on the courts and parties to have to apply the CSNPO Act in every case. Accordingly, we do not support further consolidation of provisions that apply to criminal trials and appeals.

Chapter 5 Monitoring and Enforcing Prohibitions on Publication and Disclosure

Question 5.1: Sources of sanctions for breaches of prohibitions

(1) Is the current regime, in which some breaches of prohibitions on publication or disclosure of information are enforced through statutory offences and others are enforced by contempt proceedings, satisfactory? Why or why not?

(2) What changes, if any, should be made to the existing arrangements? To what extent should there be greater consistency in the statutory offences?

(3) In particular, what changes, if any, should be made in relation to:
(a) a mental element for any offence
(b) the definition of terms used for publication or disclosure

Yes, the current regime is satisfactory. If a statutory offence exists then it is generally preferable that that be utilised rather than common law contempt proceedings, and we understand that that policy is generally applied by the AG/CSO when considering potential contempt proceedings. However, situations may arise where contempt proceedings are a more practical alternative to a prosecution for a statutory offence for a variety of reasons, and there is no difficulty with that option remaining available.

The ODPP does however support the recommendations in Law Reform Commission Report 100 *'Contempt by Publication'* for the introduction of legislation to codify the law of sub judice contempt.

It is not necessarily desirable that there be greater 'consistency' between the various statutory offences. Although the physical elements of each offence may be similar, the seriousness of the offences may vary according to the nature of the information published and disclosed and the consequences of doing so, which may warrant varying elements and maximum penalties.

It is not necessarily desirable that the same mental element be required for all statutory offences. It may well be appropriate that more serious offences require proof of specific intent, or recklessness. However, the mental element should be clear from the terms of the offence provision. If the offence is to be one of 'strict liability' then that should be explicitly stated (as is the case for example in relation to the offence under s 105 of the *Children and Young Persons (Care and Protection) Act* 1998).

It is desirable, where possible, that the definitions of the terms 'publication' and 'disclosure' when used in provisions creating statutory offences of this type (including any future codification of 'sub judice contempt') be consistent.

Question 5.2: Monitoring prohibitions on publication and disclosure

(1) How should prohibitions on publication and disclosure of information be monitored?

(2) Is public transparency about the number of people who are proceeded against for offences involving breaches of the prohibitions necessary or desirable? Why or why not? How could public transparency about these numbers be improved?

The ODPP agrees that the monitoring of prohibitions on publication is best carried out by the interested parties rather than by the establishment of a formal body to perform this function. However, if those interested parties become aware of a breach then they should be able to refer it to an authority responsible for taking enforcement action (as to which see the answer to Q 5.3 below).

Question 5.3: Enforcing prohibitions on publication and disclosure

(1) Are the existing arrangements for managing breaches of prohibitions on publication and disclosure of information effective? Why or why not?

(2) If not, what changes should be made?

In the case of a breach of a non-publication or suppression order made by a court then the relevant court registry should be responsible for issuing a 'take down' notice and, if necessary, referring the matter to a relevant body for investigation and consideration of prosecution.

In the case of a breach of a statutory prohibition on publication there should be a body, perhaps the NSW Police Office of the General Counsel, that is responsible for taking that action. The status quo where there is no single agency responsible in this area is an undesirable state of affairs leading to a low rate of action being taken on breaches. The creation of a single agency may also lead to greater transparency and clarity for media organisations who would have a point of contact for inquiries about proposed publications. Moreover, the fact that the media a being contacted by a body such as the police, with the power to lay a charge, would operate to focus their attention on the legality of their actions,

Question 5.4: Challenges in enforcing prohibitions on publication or disclosure

(1) What changes, if any, could make it easier for justice agencies to identify and prosecute people who breach prohibitions on publication or disclosure of information?

(2) Should there be a scheme for mutual recognition and enforcement of suppression and non-publication orders across Australia? If so, what would the scheme entail?

(3) How should the law and/or justice agencies deal with situations where prohibitions on the publication or disclosure of information under NSW law are breached outside Australia?

(4) Should the time limits for enforcing the statutory offences considered in this Chapter be extended? Why or why not?

Since the ODPP's preliminary submission to the Open Justice Review (in which this amendment was suggested) the time limits for some of the statutory offences considered in this Chapter have been extended from 6 months to 2 years (being the offences under s 15A of the *Children (Criminal Proceedings) Act* 1987, s 578A of the *Crimes Act* 1900 and s 16 of the *Courts Suppression and Non-publication Orders Act* 2010). Similar extensions should be made to the time limits for other statutory offences of this type.

Chapter 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?

(3) What principles and rules should underpin a consolidated regime?

From our research it appears that comparable jurisdictions do not have a consolidated approach to the provision of information. It seems that each court manages their own business, for example the Supreme Court of Canada's policy is very similar to that of the Supreme Court of NSW.

In our view there is not a need for there to be consolidation of the provision between jurisdictions. Jurisdictions deal with different types and volumes of material and have differing capacity to respond to requests. There is also currently a difference in the degree of digitisation between jurisdictions. That is not to say that there should not be consistency in the way applications for court information are handled and the criteria applied. Merely that each jurisdiction should be able to manage its own information.

Question 6.2: Discretion to permit or deny access to information

(1) In what circumstances, if any, should courts have discretion to permit or deny access to court information?

(2) In what circumstances, if any, should information be available as of right?

We note that the Supreme Court of the United Kingdom considered the question of open justice in *Cape Intermediate Holdings Ltd V Dring* [2019] UKSC 38 and "about how much written material placed before the court in a civil action should be accessible to non-parties to the proceedings and how it should be made accessible to them"[2]
The decision distilled the principles, with which we agree, that should guide the Court's discretion in determining access by non-parties namely:

- It is for the person seeking access to explain why he seeks it, and how granting access will advance the open justice principle. [45]
- In this respect it may be that the media is better placed than others to show a legitimate interest in doing so. [45]
- On the one hand will be "the purpose of the open justice principle and the potential value of the information in question in advancing that purpose"[3] [45]
- On the other hand, will be "any risk of harm which its disclosure may cause the maintenance of an effective judicial process or to the legitimate interests of others" [46]. There may be very good reasons for denying access. The most obvious ones are national security, the protection of the interests of children or mentally disabled adults, the protection of privacy interests more generally and the protection of trade secrets and commercial confidentiality.
- Also relevant are the practicalities and the proportionality of granting the request. One consideration will be the timing of the request and its proximity of the hearing [47].
- Court records, and information available to give effect to open justice are different things [24].

We do not believe that any non-party should have access to court information as of right. An interest in the proceedings should be demonstrated. However, there is an obligation on courts to have freely available information about important cases through the publication of judgments.

Question 6.4: Types of court information available for access

(1) What types of court information should be available for access?

(2) Should different access rules apply to different types of information?

In principle we support access being provided to information that is on the public record such as exhibits, judgments and transcript. However, we have significant concerns about the

[2] Par [2]
[3] Dring citing Kennedy at 113 A v British Broadcasting Corpn [2014] UKSC 25 at 41

logistical and practical problems of providing access, noting that it can be onerous and resource-intensive to ensure that sensitive material and personal identification information has been redacted.

Our concerns arise from the fact that criminal cases are becoming increasingly complex and documents are increasingly relied on. Summaries, crown case statements and submissions will duplicate information. Police investigations routinely include data collected from mobile phones, which finds its way into subpoenaed material, summaries of calls and exhibits. Witness statements may be relied on as evidence in chief. Further documents may need to be relied on to make sense of these statements. Written submissions on sentence are now commonplace, and they outline the personal circumstances and background of the accused. In sexual assault cases many documents will refer to the victim, whose name is automatically subject to non-publication. There will be material produced on subpoena. Once the hearing commences there will be exhibits and MFI's.

Much of this material will find its way onto the court file, and court files accordingly must be carefully vetted before access can be granted. Given the breadth and variety of information, and the "sensitive" details that may permeate various records, we do not support blanket rules about certain types of information being "freely" accessible. Creating different rules for different types of information would complicate the situation even further.

Access also needs to be sought in a timely way. At conclusion of the proceedings the parties are in a position to assist the court with requests for access but as time goes on such requests are burdensome on parties because those with knowledge of the case become unavailable.

Question 6.5: Prohibiting access to court information

(1) Should access to court information be prohibited in certain circumstances? If so, when?

Yes, there are recognised categories of information where access must be prohibited for instance witness protection and sensitive evidence.

Question 6.7: Privacy protections for personal information

(1) How should the privacy of personal identification information contained in court information be protected?

Personal identification information should not be retained or if it is then it should not be accessed. We would favour automatic non-publication orders over personal identification information. Under no circumstances should persons not connected to the case have access to personal identification information.

When the personal information will be relevant to a fact in issue and therefore the record would be incomplete if the material was redacted, there should be no publication of the information.

Question 6.9: How access to court information should be provided

(1) By what methods should courts provide a person with access to court information?

(2) Should the available methods be different depending on the applicant and the situation? If so, how?

We expect that digitisation and use of web based and cloud technology will increase the options for non-parties to access transcript and exhibits without necessitating copying or inspection of court files.

Question 6.12: Public availability of judgments and decisions

(1) How could NSW courts and tribunals improve access to judgments and decisions?

Caselaw NSW is an excellent source of judgments, particularly for Court of Criminal Appeal and Supreme Court decisions, which is understandable because they are decisions of a superior courts and the use of precedent has, it would seem, been the driving policy behind the publication of judgments in NSW.

However, from an Open Justice perspective, the publication of reasons, sentences and other judgments is another way the public can access court information. There is little guidance or consistency on what decisions are published in the District and Local Courts. We do not suggest that everything decision needs to be published, but greater publication of judgments would inevitably serve the interests of open justice.

Greater use of live streaming of court cases would have a similar impact.

Chapter 7 Protections for Children and Young People

Question 7.1: Criminal proceedings – prohibition on the publication and disclosure of identifying information

(1) Should there continue to be a general prohibition on publishing or broadcasting the identities of children involved in criminal proceedings in NSW? Why or why not?

(2) What changes, if any, should be made to the existing prohibition and the exceptions to it?

Yes, we can see no reason for the public policy behind the protection of the identities of children to change.

Question 7.2: Criminal proceedings – closed court orders

(1) Should criminal proceedings involving children continue to be held in closed court as a rule? Why or why not?
(2) Are the current exceptions to the rule appropriate? If not, what changes should be made?

Governments of all hues have long recognised the particular vulnerability of children and accordingly have rightly put in place protections which ensure that proceedings against young person's occur *in camera*. This should continue.

Question 7.3: Criminal diversion processes

(1) Is the prohibition on publishing or broadcasting the identities of young offenders who take part in criminal diversion processes appropriate? Why or why not?

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

There is no reason to differentiate between criminal diversionary processes and criminal proceedings. The existing prohibitions should continue.

Question 7.4: Proceedings for apprehended domestic violence orders

(1) Is the prohibition on publishing the identities of children involved in apprehended domestic violence order proceedings appropriate? Why or why not?

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

The rationale for protecting children involved in domestic violence proceedings is similar to that for protecting children who face criminal proceedings. Their vulnerability and the associated risk of psychological harm from being identified in publications about domestic violence matters in which they are involved, either as a child in a family affected by domestic violence or otherwise, justifies the continuation of the existing prohibition.

Chapter 8 Victims and Witnesses: Privacy Protections and Access to Information

Question 8.1: General protections for victims and witnesses

(1) Are the general privacy protections for victims and witnesses in NSW appropriate? Why or why not?

(2) What changes, if any, should be made?

In our submission more could be done to protect the privacy protections for victims and witnesses. The digital age and the proliferation of information recoverable about a person creates many challenges in criminal justice.

For instance, the amount and breadth of information that may be collected by police from mobile phones and digital devices means that briefs of evidence, and the associated amount of evidence, which is disclosable, has increased exponentially. If the information is not disclosed, it is may be obtained on subpoena and practices vary as to which subpoenas are challenged on the basis of legitimate forensic purpose, and whether information is redacted. Material produced on subpoena is exempted from the *Privacy and Personal Information Protection Act* 1998. The prosecution, police, and courts in dealing with personal information in the context of criminal proceedings are exempted from many of the provision of that Act.

Victims are often concerned that their privacy is comprised by criminal proceedings. When their personal records, personal computer, mobile phone, social media account, school records or medical records are subpoenaed it is understandable that many would have a justifiable sense that their privacy is being compromised.

Many also feel that details of the case that are not caught by a non-publication order, such as the name of a school, church, or suburb, serves to identify them to people within their community.

It is our experience that in handling this additional information, whether it is used or unused, there are risks that information is not adequately protected. Dealing with this risk is time-consuming and, in our experience, courts would be loath to extend timetables to accommodate the care required to ensure material is redacted or sanitised. Our concern is that granting access to material to non-parties compounds the risk that the reasonable expectations of victims or witnesses to privacy will not be met.

We acknowledge that changes to privacy laws or rules making redaction of information or non-publication of it could become overly complex and unwieldy. It also may render evidence unintelligible and Open Justice is not being served if the evidence is overly sanitised.
By way of compromise, we suggest that guidelines could be formulated by the courts on the standard terms of non-publication and access orders and the type of information that should ordinarily be redacted. There should be procedures for the seeking of information which include standard forms for completion by the applicant which enable court staff to be clear about the standing of the applicant and about what is sought. The guidelines should prescribe standard timeframes. The court could require special reason to access documents other than standard ones.

It is important that courts are resourced to process these requests.

Those seeking information could be made to sign an undertaking not to publish personal information if it inadvertently is given to them. Penalties should apply to a breach of the undertaking.

Question 8.2: Current protections for specific types of victims and witnesses

(1) Are the privacy protections for specific types of victims and witnesses in NSW appropriate? Why or why not?

(2) What changes, if any, should be made?

For victims of sexual assault, non-publication of their name goes a long way to protecting their privacy. But this does not consistently follow through to other cases for instance victims of domestic violence and deceased persons, if they are not also the victim of a sexual assault do not get protection. If a victim of domestic violence has previously been sexually assaulted and that is referred to in evidence, that could be published unless a further order was made. In relation to deceased persons it is common for evidence relating to their sex lives and other intimate details to be adduced and published.

As noted in our preliminary submission, "from a public perception point of view we question why victims of some other serious and intimate crimes, where there are equally compelling policy reasons to encourage reporting, are not entitled to the same protection, an obvious example being domestic violence."[4] Section 45 (2) *Crimes (Domestic and Personal Violence) Act* 2007 provides some protection, but it is discretionary and only for the duration of the proceedings.

[4] ODPP preliminary submission to the LRC Open Justice Review May 2019 p6

Question 8.3: Protections for other types of victims and witnesses

(1) What privacy protections, if any, are needed for other types of victims and witnesses?

Vulnerable witnesses, among whom the legislation includes adults with a cognitive impairment, will in many cases have identical or analogous needs to those of a child in terms of the need for special protections. Under current laws, a cognitively impaired victim will only be entitled to a closed court if the accused is on trial for a prescribed sexual offence. Offences of violence are not covered. This is an anomaly which should be corrected by extending the mandatory rules regarding closure of the court to the evidence of a vulnerable person under the *Criminal Procedure Act*. The availability of CCTV as means of giving evidence will not remedy the situation for a vulnerable complainant who chooses not to avail themselves of CCTV, for example because they suffer from challenges in communication.

Question 8.4: Access to court information by victims

(1) Are the current arrangements governing access to court information by victims appropriate? Why or why not?

(2) What changes, if any, should be made?

ODPP regularly facilities the provision of information to victims of crime, for instance during proceedings they are consulted about and have the opportunity to see the agreed facts and these may be provided with a copy of their statement/s. Under the Charter of Victim's Rights, the ODPP also provides information about the court date, the charges which have been laid and bail. Currently there is a project within the Department of Communities and Justice to create an "App" that will automate the provision of this information in all cases including matters prosecuted by Police.

After matters are concluded, the ODPP regularly facilitates retrieval at the request of victims to their personal information from our records, such as statements and medical evidence. We also allow inspection of transcript and exhibits.

There are countervailing considerations governing whether victims and witnesses should be given access to court information particularly while the proceedings are current. For example, in a case involving a serial paedophile, the ODPP must exercise extreme care in cases involving several victims, to ensure that one victim's evidence is not contaminated by exposure to another witness's evidence by being informed about the other charges the accused faces. It will often be the case that the offender has prior court cases involving other victims. Allowing access to previous court records to a potential witness or victim in subsequent proceedings could create a similar problem

Accordingly, if special access to court information for victims is to be considered, we suggest that the concurrence of the prosecuting agency at least, should be obtained, as we may be aware of any sensitivities or issues.

Chapter 9 Protections for Sexual Offence Complainants

Question 9.1: The prohibition on publishing the identities of sexual offence complainants

(1) Is the prohibition on publishing the identities of complainants in sexual offence proceedings and the exceptions to the prohibition appropriate? Why or why not?

(2) What changes, if any, should be made?

The present prohibition and exceptions which apply to publishing the name of complainants in proceedings for prescribed sexual offences are appropriate and should remain in place. The ODPP is particularly well placed to observe that the existence of this prohibition since its introduction in the 1980's has operated to the great benefit of complainants in the matters we prosecute. The absolute nature of the prohibition means that it is one aspect of their criminal justice journey about which there is certainty.

Question 9.2: Closing courts during sexual offence proceedings

(1) Are the situations in which courts may be closed during sexual offence proceedings appropriate? Why or why not?

(2) What changes, if any, should be made?

The present legislative requirement for a court to be closed during the hearing of the evidence of a complainant in proceedings for prescribed sexual offences (and during the reading of a VIS) should remain in place. These protections are essential elements in the suite of protections designed to encourage and support the giving of evidence by sexual assault complainants. In enacting these provisions parliament was recognising the particular sensitivity involved in sexual assault proceedings, and the understandable reluctance of complainants to provide evidence of their experience often in excruciating detail to a court full of strangers. In our experience, complainants would in many cases be unwilling or unable to face the ordeal of giving evidence if they were required to do so in a fully open court context.

The present limited exceptions to the closed court requirement are appropriate and should remain in place.

The view that this protection should be watered down to permit the family and friends of the accused to remain in court during the evidence of the complainant is opposed. In these cases, the exclusion of certain persons from court is warranted in the public interest.

The rationale offered for this amendment is that these classes of person would otherwise be unaware of the nature of the allegations should the accused be convicted. This is no basis to justify the removal a valuable and essential protection for complainants. The information as to allegations is available from the accused themselves. It may well be that the friends or family of the accused are known to the complainant and that they are the very persons whose presence in support of the accused would most intimidate and cause distress to the complainant.

Chapter 10 Media Access to Information

Question 10.1: Media access to court information in NSW

(1) Are the current arrangements for the media to access court information in relation to both civil and criminal proceedings appropriate? Why or why not?

(2) Should the media have special privileges to access court information in relation to civil and/or criminal proceedings? Why or why not?

(3) What changes, if any, should be made to the current arrangements, including in relation to:

(a) the nature of the access provided

(b) the types of documents that may be accessed

(c) time limits on access, and

(d) application procedures?

In regard to criminal proceedings, we consider that the provisions in the *Criminal Procedure Act* 1986 should be reviewed to afford the media greater opportunity to access material once the proceedings have concluded.

Reporters should be able to access any material on the public record and, in relation to exhibits, should be able to access these, subject to our comments in the submission about personal identification information being removed or subject to an automatic non-publication order. There is not currently consistency between jurisdictions in respect to the media accessing exhibits during trial. In our view the exhibits should always be accessed through the Court's registry. However, judges and magistrates regularly refer journalists to the ODPP. It does not sit well with the ODPP's position as a party to the proceedings to be asked to distribute exhibits. In

our submission the courts need to devise a specific system which ensures that the media can always get the material to which they are given access through the court registry.

We have qualified support for accredited media to have privileged access to court information. Pragmatically, other than the court publishing judgments about everything, this is the best way to ensure that the open justice principle is served. We consider that as digitisation increases across the criminal justice system there will be opportunities to provide better access to for instance transcript and exhibits, that may be viewed for a fee, through a portal.

Question 10.2: Media access to court proceedings

(1) Is the current regime governing media access to proceedings appropriate and workable? Why or why not?

(2) What changes, if any, should be made to the current regime, including in relation to:
   (a) prescribed sexual offence proceedings
   (b) proceedings involving children
   (c) accessing "virtual courtrooms", and
   (d) orders excluding people under the *Court Security Act 2005* (NSW)?

The current system works well, and from the ODPP's perspective no changes are warranted.

Question 10.3: Broadcasting court proceedings

(1) Are the rules that apply to media recording and broadcasting of court proceedings appropriate? Why or why not?

(2) What changes, if any, should be made?

The current rules that apply to broadcasting proceedings work well from our perspective.

However, we would like to see more proceedings broadcast. COVID 19 has had a significant impact on families and supporters being able to travel to attend court or enter the court particularly for sentencing proceedings. Broadcasting avoids the problems of the virtual court where participants entering and leaving the room disrupt the proceedings. It avoids the problem of the AVL network being overloaded and allows everyone to conveniently observe the proceedings.

Question 10.4: Impact of publication restrictions on the media

(1) Are the laws that restrict the media from publishing or broadcasting information relating to court proceedings appropriate? Why or why not?

(2) What changes, if any, should be made?

(3) In relation to suppression and non-publication orders:

(a) are the interests of the media adequately reflected in the grounds for making such orders?
(b) is the list of people withstanding to be heard in applications for suppression or non-publication orders appropriate?
(c) are the current arrangements for communicating the existence of suppression and non-publication orders adequate?

(4) What changes, if any, should be made to the laws and procedures relating to the media and suppression and non-publication orders?

The current laws are informed and fair. Judges make considered decisions in court and allow for the media to be heard in many instances when non-publication is being sought by a party. We do not advocate for any changes.
From the ODPP perspective media interests are usually considered when an order is made, and the media can challenge any suppression order.

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?

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

(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?

The current definitions of media and news media organisation are not appropriate. Media now encompasses a variety of platforms. *YouTube* and the various purveyors of podcasts host hundreds of True Crime programs with (cumulatively) hundreds of thousands of followers. Take down orders have been issued to YouTube channels which have used published material about crimes before the court in the same way as traditional news outlet. Contributors to these different platforms are akin to journalists or use material gathered by journalists and should as such be in included in any legislation and requirements pertinent to journalists.
We suggest that revised provisions include internet publications, social media platforms, podcasts, and blogs. Media should be defined to include journalists publishing in a recognised news outlet and anyone who publishes opinion or news on an internet publication (website), a social media account or blog should be included as acting as a provider of or commentator on news.

Chapter 12 Digital Technology and Open Justice

Question 12.1: Online courts

(1) If virtual courtrooms are to be available, what provision, if any, should be made to ensure that:

(a) open justice principles are given effect to, where possible, and

(b) risks of prohibited disclosure or publication are managed effectively?

Virtual courtrooms in one sense provide the court with more control as to who is permitted into the courtroom.

Media representatives for instance should have ability to enter any virtual court the same way they could enter a physical court room. Participation is not intrusive as the microphone is muted and their camera turned off, but the court and parties should still be made aware that they are there.

Virtual court rooms can create challenges for supporters of the participants to watch the proceedings and provide support. The technology available to courts needs to be updated in order to cater for the reasonable needs of supporters and next-of-kin to routinely observe court proceedings. If a matter is to be heard virtually, then there needs to be an application process to allow interested persons to participate. It has been our experience during COVID 19 that the better option however, particularly where there are a lot of supporters, is for the court hearing to be broadcast. A broadcast can still accommodate some participants in the proceedings appearing by virtual means.

Question 12.2: Electronic access to court information

(1) What arrangements, if any, should be made for electronic access to court information?

(2) In particular, what should the arrangements be in relation to:

(a) the type of information that can be accessed

(b) who can access the information, and

(c) any necessary protections against unauthorised disclosure or publication of such information?

We consider digitisation of court records will greatly facilitate the access to material. Firstly, it will facilitate redaction of material where necessary, to give effect to non-publication and or suppression orders. Secondly, space in the registry will not need to be found, nor the retrieval of paper files. Thirdly there can be greater security of the information with material uploaded on to a platform where timed access to readers where they can't download or copy material. The ODPP uses this type of technology to provide the defence with access to certain types of sensitive evidence.

Question 12.3: Suppression and non-publication orders in the digital environment

(1) What, if anything, can be done to deal with situations where suppression and non-publication orders under NSW law are breached outside Australia?

(2) In particular, what, if anything can be done to minimise the risk of offending content affecting the fairness of a trial?

We accept that enforcement of NSW suppression and non-publication orders outside of Australia is highly problematic and a usually futile endeavour. We also accept the proposition that it is not necessary to eliminate all media coverage about a case. However, currently the onus is on the parties to address problem of publications that may influence a fair trial. It is resource and time consuming to monitor and enforce orders. The ODPP certainly does not have the capacity to address this in all cases, and frequently our attempts to have information taken down is not successful.

While the parties may have to reasonably assume some responsibility, we do not consider that the solution to this problem lies with the parties, as there will be litigants in whose interest it is to delay a trial for instance, and parties come to the court with unequal resources, authority, and capacity to implement an order. We think this issue is broader and the responsibility should lie with a prescribed authority. In this regard an independent authority or regulator would be of great assistance.

Chapter 13 Other proposals for change

Question 13.1: A register of orders

(1) Should there be a publicly accessible register of suppression and non-publication orders made by NSW courts? Why or why not?

(2) If so:

(a) who should be able to access the register,

(b) what details should be included in the register, and

(c) who should build and maintain the register?

An easily navigable register of NSW orders would assist by being a central point to search for orders, and if it could amalgamate and consolidate all relevant orders it would for instance overcome the problem where a matter has transferred to a different jurisdiction. However, the person who is seeking to publish material, should be aware of the court where the matter was heard, and accordingly it would make as much sense to check that court's website for information about orders. Having separate registers available on courts websites, would be a more manageably sized project.

Another question that would need to be addressed is whether to include matters where there is a statutory non-publication order in place. There are a high proportion of criminal cases involving prescribed sexual offences, it would probably not be necessary to include those or cases involving children in the registers. However, if the accused's name becomes subject to an order by reason of relationship to the victim's or child's name then the matter would need to be included.

A register should be available via a log in from an authorised user. It would be useful for parties to the proceedings as well as journalists and legal publishers, to ensure that they had accurate information about the extent of the order/s.

Consolidating the orders into a register, could also provide some oversight in terms of orders that are ambiguous or unable to be understood, and could possibly provide an avenue for the media to seek clarification of orders.

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?

(2) If so, what responsibilities should the advocate have?

We are concerned about the potential scope of work for an open justice advocate, and the practicalities of how this would work.

In criminal proceedings our experience is that the media are prepared to challenge orders in cases where there is a media interest.

The way criminal cases are run would frequently not allow for advance notice of an application. For instance, an accused may seek an order shortly after arrest, which is something that cannot be known about in advance. If an advocate is to be engaged it would usually mean that there would need to be a separate listing of the matter, possibly after the evidence has concluded. Accordingly, a temporary order would have to be made while the case was heard. Any

additional listing would necessarily increase the resources required and overall cost of running the proceedings.
The instances of an accused's name being suppressed is fairly infrequent, in circumstances other than where identification of the accused identifies the complainant. The prosecution would normally oppose any order unless there are very strong grounds that involve the safety of person/s or the integrity of the proceedings or related proceedings. Further, the threshold in the CSNOP Act to obtain an order is high.

Question 13.3: Education initiatives

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

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

The Sherriff should be responsible for providing online education for those summonsed for jury duty.

Jury duty responsibilities could be taught in schools as part of general studies, civic duties, or legal education.

A website dealing with contempt of court like the UK website would also be beneficial.

Question 13.4: Other ways to avoid juror prejudice

(1) Could the juror oath and affirmation be amended to better ensure jurors appreciate, and take seriously, the obligation not to seek or rely on potentially prejudicial information? If so, how could they be improved?

(2) Is the current *Jury Act 1977* (NSW) offence of making inquiries effective? If not, how could it be improved?

(3) Are the current jury directions about avoiding media publicity and making inquiries about the case appropriate? If not, what reforms are required?

(4) Could improving the way that juror questions are managed better ensure jurors do not conduct their own inquires? If so, what improvements could be made?

(5) Could more educational guidance be provided to jurors about avoiding media publicity and making inquiries prior to the trial? If so, what should this guidance say?

(6) Could pre-trial questioning of jurors be used more effectively to determine which potential jurors have been exposed to prejudicial information? If so, how?

(7) Should NSW adopt the Queensland approach of allowing judge alone trials where there has been significant pre-trial publicity that may affect jury deliberations? Why or why not?

(8) Are there any other ways in which current law or practice can be improved to prevent jurors from being influenced by potentially prejudicial information?

We consider that it is central to the jury system that jurors are trusted to follow to directions. However, it is our experience that the courts go to lengths to ensure that jurors are not contaminated or influenced by media reports, which results in trials being delayed or aborted. The reality of the modern media age is that information is everywhere and controlling the risk of juror knowing something about the accused or witness is nigh impossible.

We support the juror oath being amended to specifically agree to base their verdict solely on the evidence before the court and to seek to rely on other information. In our submission such a change would help to ensure that jurors understand that are not permitted to do their own investigation and put aside any additional published material or opinions they have encountered inadvertently about the case in their deliberations. The jury should be reminded about the oath and given directions about making inquiries repeatedly throughout the trial, (particularly in lengthy trials). We also support clearer directions being given to juries about how to submit a question to the judge.

We do not support any change to the offence of making an inquiry nor an increase in the penalty. Changing the oath of jurors however may make prosecution for an offence more viable.

Educational material for jurors should also emphasise this obligation and the possible consequences of not abiding by the directions.

We do not support publicity being a specific ground for a Judge alone trial. It is already a factor that may be taken into account, but courts in our view have rightly determined that adverse publicity can be cured by directions. Publicity signifies public interest in the matter, which is in our submission a factor that is in favour of a jury being the determiner of guilt.

Conclusion

Thank you for the opportunity to make a submission to this inquiry. The issues canvassed are extremely important and raise a number of complex and broadly ranging issues.
Any questions concerning this submission may be directed to Johanna Pheils, Deputy Solicitor (Legal) [redacted]

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