



THE CHIEF MAGISTRATE OF THE LOCAL COURT

8 March 2021

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

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Dear Mr Cameron

Re: Open Justice Review – Consultation Paper 22 ‘Court and tribunal information: access, disclosure and publication’

Thank you for your invitation to provide comment on the above consultation paper as part of the NSW Law Reform Commission’s Open Justice Review. While I do not propose to address all matters raised within the paper, I provide the following comments in relation to those areas which the Local Court considers require particular consideration.

Chapter 2 – The open court principle and its exceptions

I doubt it would come as a surprise to the Commission that the interaction of the various pieces of legislation which currently set out the various statutory requirements and discretionary powers to close courts form a complicated matrix which magistrates and parties find difficult to administer. When considered in light of the volume and necessary speed at which matters must be dealt with in the Local Court, the potential for inadvertent failure to properly apply these requirements is not insignificant.

Given the above, the Court maintains the view that some consolidation of existing legislation into a single regime would be of benefit, so long as appropriate consideration is given to the fact magistrates operate in a different environment to judicial officers sitting in higher jurisdictions. I note the Commission has given some consideration to such an approach, including setting out procedures to be adopted when courts exercise their discretionary powers to make an exclusion

order. Although the Court is not presently in a position to provide any guidance as to how to approach such a regime, the Court is willing to participate in consultations regarding possible options for reform.

One point I will highlight for further discussion is that the Australian Law Reform Commission's suggestion that '*courts be required to give a written statement of reasons for an order*' (discussed at [2.62]) would be disruptive and resource intensive in this jurisdiction, given magistrates generally deliver *ex tempore* reasons. Those reasons are sound recorded in this jurisdiction and a transcript would be available, albeit not immediately.

Chapter 3 – Non-disclosure and suppression: statutory prohibitions

In response to questions surrounding whether current statutory prohibitions on publishing or disclosing information are appropriate (Question 3.2), I raise the following issue for consideration. It has recently been brought to the Court's attention that an anomaly exists in AVO proceedings arising from a related charge for a prescribed sexual offence. While there is a prohibition on publishing any matter which identifies, or is likely to identify, a complainant in prescribed sexual offence proceedings (*Crimes Act 1900* (NSW) s 578A), there is no equivalent protection afforded to that same complainant in an application for an AVO arising from a charge for this offence. In practice this means that while the complainant is automatically de-identified by the Court in criminal proceedings (including on court lists), they are named in the AVO proceedings. Where the charge and AVO proceedings travel together in the Local Court, this means the two matters are listed together on its court lists and the complainant in the criminal proceedings can be identified by reference to the protected persons' name in the AVO proceedings.

While a magistrate may make a suppression order over the complainants name in the AVO proceedings (pursuant to either section 45 of the CDPV Act (limited duration) or section 7 of the *Court Suppression and Non-publication Orders Act 2010*), this power is only useful in circumstances where the above anomaly is brought to the Court's attention. The Court does not consider this to be an appropriate solution in circumstances where the complainant in criminal proceedings for a prescribed sexual offence is afforded an automatic protection.

This issue has been raised with the Department of Communities and Justice as part of the current Justice Miscellaneous Bill process. The Court has proposed an **urgent** amendment to the CDPV Act to insert a provision in similar terms to section 578A to ensure complainants in prescribed sexual offence proceedings are automatically de-identified in related AVO proceedings.

The Court notes Chapter 3 includes discussion of whether additional statutory prohibitions may be needed, including in relation to the identities of complainants in domestic violence (DV) proceedings. If these additional prohibitions were introduced, consideration would need to be given to ensuring the above situation does not arise. Specifically, any protections afforded to complainants in criminal proceedings for DV offences would need to be extended to AVO proceedings arising from such a charge.

Chapter 6 - Access to information

- *A consolidated regime and the Court Information Act 2010*

While the Court acknowledges access to court information is essential to the principle of open justice, the interaction of the multiple legislative regimes currently governing access can be confusing, and at times, contradictory. I note this Chapter revisits the *Court Information Act 2010* (the CI Act) and again raises the question of whether a further attempt should be made to introduce a consolidated access regime. The Court considers this a matter for government; however the concerns raised previously in relation to the operation of the CI Act remain unresolved. As the Commission has highlighted throughout this Chapter, the requirement to redact personal information from court records prior to granting access is an onerous and resource intensive task, with a potentially high risk of human error. Such concerns should remain central to any further attempt at reviving this regime.

At [6.120] it is suggested that one option to address such concerns 'could be to establish a set of principles and practices for dealing with privacy issues and allow different forums to adopt different approaches within that framework. A forum's approach could be guided by factors such as the types or volume of matter they deal with and their available resources'. I acknowledge and appreciate such a suggestion has been made in recognition of the distinct operating environments of the various jurisdictions. However, such an approach may be problematic in its application to Table offences as it may result in a different approach to the same offence depending on whether the prosecution elect to proceed on indictment in the District Court or whether the matter is dealt with summarily in the Local Court. Given the significant difference between the operating environments of these two jurisdictions, there is unlikely to be consistency of approach in any access regimes administered in accordance with the approach suggested above. This is of concern given consistency is a cornerstone of the modern judiciary.

- *Greater public availability of judgements and decisions*

This Chapter also includes a discussion of the open justice principle requiring reasons for decisions to be made publicly available, including an overview of the varying approaches to judgement publication on NSW Caselaw across the different jurisdictions. Specific reference is made to the fact only select written judgements from the Local Court are published, as most judgements are delivered orally. Although this is an accurate observation, I note there are a number of factors driving this approach, including the speed at which matters must be dealt with in high-volume jurisdictions, ever-increasing judicial caseloads, and the fact magistrates do not have **any** judicial support allocated to assist them compared to judicial officers in higher jurisdictions. Judges of the District Court and Supreme Court have associates, tip staff and researchers.

On the basis of the foregoing I take the view magistrates do not presently have the capacity or support necessary to change the practice of delivering majority of their reasons on an *ex tempore* basis. I note at [6.179] the consultation paper refers to a proposal to improve accessibility of decisions by introducing a presumption in favour of publication in certain forums and, where there is no presumption, a requirement for a minimum percentage of judgements to be published each year.

Such an approach would have significant resourcing implications for both the judiciary and court staff in the Local Court given the above.

I also make the observation that it is the judgments of higher jurisdictions which contain statements of legal principle; whereas Local Court magistrates generally restate these principles and apply them to the facts as relevant in the case before them. In this way, the Local Court is not considered to be a court of precedent. There will not be the same value placed on accessing its judgements when compared to other jurisdictions. That being said, the Local Court does endeavour to publish judgements which may have some precedent value, address a novel issue, or have a role to play in the community in terms of general deterrence on sentence.

Chapter 8 - Victims and witnesses: privacy protections and access to information

Chapter 8 contains a discussion of the protections in place for various types of victims and witnesses, most of which are relevant in Local Court proceedings. While the Court does not seek to comment on each of these areas, I do wish to highlight the implications of the protections afforded to DV complainants. At [8.51] the Commission discusses the recently commenced entitlement for complainants in criminal proceedings for a DV offence and related apprehended domestic violence order proceedings to give evidence in a closed court.

During consultations in relation to these changes the Local Court raised significant concerns regarding the introduction of a blanket requirement to close the court, given DV proceedings represent a significant percentage of the Court's overall caseload. While the underlying policy intent of these protections was never questioned, the Court anticipated facilitating these arrangements would likely be *'disruptive to court sittings, with inefficiencies created while the court room is closed (and reopened) by court officers'*. Advice was provided to the effect that the estimated *'time required to close/reopen the court translates to approximately 20 hours of additional sitting time or loss of capacity, or 4 complete magistrate sitting days, each week. Over a year (approximately 48.5 sitting weeks), this equals approximately 970 hours or 194 sitting days throughout the State consumed by just closing the court and then reopening it. Without adequate additional resourcing, the cumulative effect of these interruptions will introduce delays and increase time to justice in domestic violence and other proceedings, with implications for the Court's continuing ability to meet its Time Standards'*.

These changes have now been in place for approximately 3 months. Feedback received from magistrates and members of the legal profession indicates the anticipated impact of these concerns has now crystallised in practice. The requirement to conduct this portion of proceedings in camera is time-consuming and disruptive to the necessary flow of matters which is crucial to the efficient operation of this Court. No general discretion is vested in the magistrate to manage these impacts in the interests of justice; instead they are only able to direct proceedings be open on application, and only where there are special reasons in the interests of justice or the complainant consents.

I raise the above for the purpose of highlighting to the Commission that while the introduction of exceptions to the open justice principle may be necessary to afford protections for certain categories of witness, they can also be detrimental to efficient justice. I note the protections for DV complainants giving evidence, coupled with rising caseloads and the impact of COVID-19, was a factor which influenced my recent decision to increase the Time Standards for listing DV offences for

hearing. I cannot stress enough the introduction of new protections cannot be considered in isolation of the impact they have on the Court's operations.

Chapter 10 - Media access to information

▪ *Media access to court information*

As the Commission has highlighted in this Chapter, there are currently multiple regimes governing media access to court information which have created confusion, uncertainty and dissatisfaction. While the Court does not presently seek to put forward a view as to how this should be resolved, the Court highlights one particular issue which has been of ongoing concern and which has not necessarily been specifically addressed in this paper.

At [10.45] there is a discussion of the two separate avenues under which the media can apply for access under the *Criminal Procedure Act 1986* (the CP Act) and the *Local Court Rules 2009* (the LCR) in criminal proceedings in the Local Court. As is stated as part of this discussion, there are marked differences between the two regimes in terms of the types of information that can be accessed, the form of access, applicable time-limits for access and the framing of access as an entitlement or a discretionary matter for the Court.

In the context of this discussion, I note the implications of these two potentially contradictory regimes in the context of prescribed sexual offence proceedings. While section 314 of the CP Act sets out the media's entitlement to inspect certain documents in criminal proceedings, some courts impose a blanket ban on media access to court records in proceedings for prescribed sexual offences (as is acknowledged at [10.26]). This is as a result of the interaction of the prohibition on publishing material which identifies the complainant in these proceedings (*Crimes Act 1900* s 578A), with the exception to the media's access entitlement set out in section 314(4)(b) of the CP Act. The latter subsection provides the registrar must not make documents available to the media for inspection if a prohibition on publication or disclosure exists under another Act.

Where refused access, section 314(4A) of the CP Act permits the making of an application for media access to court records under LCR 8.10. Such access is permitted with leave of a registrar or magistrate. The Court is aware there are divergent views between registrars and magistrates as to how to reconcile the prohibition in section 578A of the Crimes Act with the broad discretionary considerations section out in LRC 8.10(5). The varying approaches to the complicated interaction of these dual regimes leads to inconsistent outcomes across Local Court locations. The Court would appreciate if the Commission specifically addressed this issue as part of its review.

▪ *Media access to court proceedings*

I note Chapter 10 discusses restrictions on media access to court proceedings during the COVID-19 pandemic under the *Court Security Act 2005*, and makes reference to the fact the orders which I issued (and which I continue to issue) do not give specific regard to the importance of the media's attendance at court. While I appreciate the media have not been explicitly referenced in these orders, guidance was provided to magistrates, court staff and sheriffs to the effect that media representatives are considered to have a legitimate reason to attend court for the purpose of the COVID-19 arrangements. It was never my intention that genuine members of the media be excluded.

Consultations with the NSW Local Court

[REDACTED]

Thank you for the opportunity to provide comments as part of this review. Should you require any further information in relation to the above matters, please do not hesitate to contact [REDACTED]

[REDACTED]

Sincerely,

[REDACTED]

Judge Graeme Henson AM
Chief Magistrate