AUSTRALIA'S RIGHT TO KNOW SUBMISSION TO NEW SOUTH WALES LAW REFORM COMMISSION'S OPEN JUSTICE REVIEW

COURT AND TRIBUNAL INFORMATION: ACCESS, DISCLOSURE AND PUBLICATION CONSULTATION PAPER No. 22

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CHAPTER 1 – INTRODUCTION

Australia's Right to Know (ARTK) coalition of media companies welcomes the opportunity to make a submission to the New South Wales Law Reform Commission's (the Commission) *Open Justice: Court and tribunal information: access, disclosure and publication* Consultation Paper (the Paper).

ARTK is comprised of the majority of Australian media broadcasters, publishers and their representative organisations. We employ thousands of journalists who produce thousands of news reports every day, covering all walks of Australian life.

ARTK regards court coverage as being one of the most important functions we collectively provide. We are an important means by which members of the public are afforded access to court proceedings they are unable to attend in person. Our reports give the public *"from the comfort of their living room…plain English explanations of legal decisions"* allowing the community *"to appreciate how judges make decisions and therefore trust in those decisions and the people that make them"*.[1]

The openness of the administration of justice is significantly diminished in circumstances which restrain our reporters from doing what they do best. ARTK members invest significant resources every year on training and legal advice to ensure our journalists are given appropriate support to report what occurs in court fairly, accurately and within the scope of the law, in each and every Australian jurisdiction.

We are avid proponents of a free media. We also acknowledge and understand this is not, and should not be, unfettered. We accept that there are some circumstances – arising either from the common law or from a common legislative approach to a particular area of law – which reasonably limit the reporting of Australian court proceedings.

It is not possible to make a true comparison of the state of open justice between Australian jurisdictions due to the scope of what such a consideration incorporates. For example:

- The ACT has comparatively fewer automatic statutory prohibitions than NSW but obtaining information about non-publication and suppression orders from its court registries is difficult and it is one of only two jurisdictions that doesn't push notifications about such orders to the media via an email distribution list (WA being the other);

- Unlike NSW, Queensland has what purports to be a completely open access system with anyone able to apply to access and copy both criminal and civil court files.[2] However, that system has been curtailed by the application of a flawed Practice Direction applicable in the Supreme and District Courts[3] and a surplus of automatic statutory prohibitions some of which are difficult to comprehend[4];

- The NT provides excellent notification of non-publications orders but recently decided to retain its automatic statutory prohibition on the identification of the defendant in sexual offence cases prior to committal.[5] That historic restraint – which SA repealed in 2019 and only Queensland now shares

[1] To paraphrase the Honourable Chief Justice TF Bathurst, 2021 Opening of Law Term Address "Trust in the Judiciary" 3 February 2021 at [34].

[2] *Uniform Civil Procedure Rules 1999* (Qld) rr 980, 981; *Criminal Practice Rules 1999* (Qld), rr 56, 56A, 57.

[3] Supreme Court Practice Direction 15 of 2013; and, District Court Practice Direction 13 of 2013.

[4] For example, when the parties to an apprehended violence order application can and cannot be identified: *Domestic and Family Violence Protection Act 2012* (Qld) and *Domestic and Family Violence Protection Regulation 2012* (Qld) r 3.

[5] *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 7

with the NT – is based on an assumption that the complainant in such a case could be lying and that the reputation of the accused should, consequently, be safeguarded until the evidence in the case can be tested. Given statistics universally indicate that women form the majority of sexual assault victims, the publishing restraint relies on the outdated and sexist assumption that women lie; and

- Victoria recently introduced the most progressive statutory consent provision in Australia for complainants in sexual offences cases, allowing survivors to tailor consent to their needs.[6] However, conversely, Victoria remains the jurisdiction which consistently makes the most non-publication and suppression orders each year.

NSW has a number of automatic statutory prohibitions in relation to which it is an outlier, provides minimal access to court documents to journalists in certain criminal cases – despite legislation which suggests otherwise – and civil cases, cannot confirm the number of non-publication/suppression orders made each year, does not push notification of such orders in all jurisdictions to the media (who run the risk of being found in contempt if they breach such an order) but still takes a leadership role in relation to law reform around the country.

We trust that the information set out in this submission which addresses Chapters 1 to 4 of the Consultation Paper – and additional submissions in response to chapters 5 to 13 – is of use to the Commission and sets the ball rolling towards meaningful reform which throws the doors of NSW courtrooms open wider than ever to manifest open justice.

Key Terms

ARTK adopts the definition of automatic statutory prohibition applied in the Paper. In addition, in this Response:

CSNPO Act means the *Courts Suppression and Non-Publication Orders Act 2010* (NSW);
EDL means email distribution list; and
NCAELO means the News Corp Australia Editorial Legal Office.

[6] *Judicial Proceedings Reports Act 1958* (Vic) *s 4*

CHAPTER 2 – THE OPEN COURT PRINCIPLE AND ITS EXCEPTIONS

Preliminary Comments

ARTK appreciates the thoroughness of the Paper and we have endeavoured to meet that ambit in this Response.[7]

Due to the extensive nature of the Paper, some of the legislation referred to in Chapter 2 is examined more closely in later chapters. For that reason, ARTK's response to Chapter 2 does not address *Adoption Act 2000* (NSW) s 119*, Children and Young Persons (Care and Protection) Act 1998* (NSW) ss 104, 104B, 104C, *Children (Criminal Proceedings) Act 1987* (NSW) s 10, *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 41, 41AA, 58(1), *Status of Children Act 1996* (NSW) s 24(1) and *Surrogacy Act 2010* (NSW) s 47 (each of which is dealt with in Chapter 7), *Criminal Procedure Act 1986* (NSW) ss 289U which is dealt with in Chapter 7 or *Criminal Procedure Act 1986* (NSW) ss 291 through 291C which are dealt with in Chapter 9.

We note that the Paper focuses on what we agree to be the legislative provisions that most commonly impact the work of ARTK members. For that reason, for the most part we do not address legislation that is not expressly referred to in the Paper. We also make no comment about the provisions allowing for a closed courts, or the discretion to close a court, as part of NSW suite of policing tools on the basis that such provision a generally consistent throughout each Australian jurisdiction.[8] While they are not referred to in the Paper, ARTK notes that the same applies to legislation which closes proceedings which will disclose criminal intelligence.[9] If the Commission would like us to comment on any legislation that is not directly addressed, please let us know.[10]

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[7] For the sake of that completeness, ARTK notes that none of the following Acts are addressed in this Response because each prescribes open court proceedings: *Constitution Further Amendment (Referendum) Act 1930* (NSW) s 30; *Criminal Procedure Act 1986* (NSW) s 191 (summary proceedings to be heard in open court subject to the effect of any other Act or law); *Dust Disease Tribunal Act 1989* (NSW) s 13(1) (noting that none of the *Dust Diseases Tribunal Rules 2019* (NSW) currently allow the Tribunal to close); *Electoral Act 2017* (NSW) s 226; *Jury Act 1977* (NSW) ss. 48, 49; *Local Court Act 2007* (NSW) s 54; and, *Racing Appeals Tribunal Act 1983* (NSW) s 16. ARTK also has no comment in relation to *Criminal Procedure Act 1986* (NSW) s 57 since committal proceedings ceased being part of NSW criminal procedure in NSW in April 2018.

[8] *Crimes (Criminal Organisations Control) Act 2012* (NSW) s 28K; *Law Enforcement and National Security (Assumed Identities) Act 2010* (NSW) s 11(3), s 14(3), 34(1)(a); *Law Enforcement (Controlled Operations) Act 1997* (NSW) s 28(1)(a); *Surveillance Devices Act 2007* (NSW) s 17(6), s 25(6), s 33(5); *Terrorism (Police Powers) Act 2002* (NSW) s 26P(2), s 27Y; or, *Witness Protection Act 1995* (NSW) s 26(1)–(2), 31E.

[9] *Births, Deaths and Marriages Registration Act 1995* (NSW) s 31L; *Crimes (Criminal Organisations Control) Act 2012* (NSW) s 28K; *Commercial Agents and Private Inquiry Agents Act 2004* (NSW) s 20; *Firearms Act 1996* (NSW) s 75; *Liquor Act 2007* (NSW) s 144; *Motor Dealers and Repairers Act 2013* (NSW) s 176; *Pawnbrokers and Second-Hand Dealers Act 1996* (NSW) s 39; *Security Industry Act 1997* (NSW) s 29; *Tattoo Parlours Act 2012* (NSW) s 27; *Tow Truck Industry Act 1998* (NSW) s 45; and, *Weapons Prohibition Act 1998* (NSW) s 35.

[10] By way of example, we do not discuss the closure provisions in *Apprenticeship and Traineeship Act 2001* (NSW) s 44; *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW) ss 14, 16H; *Crime Commission Act 2012* (NSW) s 21; *Government Information (Information Commissioner) Act 2009* (NSW) s 23; *Guardianship of Infants Act 1916* (NSW) s 21; *Health Practitioners Regulation National Law* (NSW) Sch 5B s 8; *Independent Pricing and Regulatory Tribunal Act 1992* (NSW) s 24GG; *Judicial Officers Act 1986* (NSW) ss 18, 39C; *Passengers Transport Act 1990* (NSW) s 46BE; *National Electricity (NSW) Law* s 137; *National Gas (NSW) Law* s 196; and *Privacy and Personal Information Protection Act 1998* (NSW) s 38. We also do not discuss the discretion to close or non-publication order making powers in *Biological Control Act 1985* (NSW) s 39; *Casino Control Act 1992* (NSW) s 143; *Crime Commission Act 2012* (NSW) ss 45, 45A; *Crimes (Administration of Sentences) Act 1999* (NSW) Sch 1 s 11; *Electricity Supply Act 1995* (NSW) s 43EE; *Fisheries Management Act 1994* (NSW) s 86; *Independent Commission Against Corruption Act 1988* (NSW) ss 31, s 70, s 112; *Independent Pricing and Regulatory Tribunal Act 1992* (NSW) s 21, 24GJ; *Judicial Officers Act 1986* (NSW) s 24; *Legislation Review Act 1987* (NSW) s 12; *Ombudsman Act 1974* (NSW) s 31H; *Passengers Transport Act 1990* (NSW) s 46BE; *Protection of the Environment Operations Act 1997* (NSW) s 313; *Public Finance and Audit Act 1983* (NSW) s 58;

As the Commission is aware, Australian court procedures are complicated by the fact that they are determined by legislation that is prescribed on a state or territory basis. While laws in each Australian jurisdiction often regulate the same subject matter, the approaches taken by each state and territory are not uniform. That said, the mechanisms by which people or proceedings are protected by legislation are similar namely:

(a) The automatic closure of proceedings or a discretionary closure power;
(b) Automatic statutory prohibitions (Chapter 3); and/or
(c) The ability to make suppression or non-publication orders (Chapter 4).

Question 2.1(1): Are the current laws that require certain proceedings to be closed to the public appropriate? Why or why not?

Appeals on a Question of Law Not Affecting an Acquittal (Double Jeopardy Exception)

Crimes (Appeal and Review) Act 2001 (NSW) s 108 provides that in any proceeding in which a person was acquitted following a trial on indictment, or in any proceedings tried in the summary jurisdiction of the Supreme Court or the Land and Environment Court, the Attorney General or the Director of Public Prosecutions may submit any question of law arising at, or in connection with, the trial to the Court of Criminal Appeal (CCA) for determination. The hearing of such an application must occur in camera. However, the CCA decision will usually be published subject to the automatic statutory prohibition which prohibits the accused from being identified unless the court orders otherwise, there is no longer any step that could be taken which would lead to the acquitted person being retried or the acquitted person is retried and that trial concludes.[11]

There is no true equivalent to s 108 in any other Australian jurisdiction. However, the four Australian jurisdictions with most similar legislation do not hear proceedings in camera.[12]

ARTK consequently submits s 108 should be amended to allow the media to be present to report the proceedings, subject to compliance with the automatic statutory prohibition.

Public Health Act Offences

They are various closed proceedings prescribed by the *Public Health Act 2010* (NSW). Firstly, a registered medical practitioner who reasonably suspects a patient has a Category 2 condition is required to notify the Secretary.[13] However, if that Category 2 condition is also a Category 5 condition[14] any notification by the registered medical practitioner cannot include the patient's name or address.[15] The Secretary can apply to the District Court for a Category 5 patient's name and address in which case the proceedings are heard in closed court.[16]

Special Commissions of Inquiry Act 1983 (NSW) ss 7, 8; or *Statutory State Owners Corporations Act 1989* (NSW) Sch 10 s 9.

[11] *Crimes (Appeal and Review) Act 2001* (NSW) s 111. For example, see *R v IL* [2016] NSWCCA 51.

[12] However, they do each have an automatic statutory prohibition: NT does not appear to have equivalent legislation and nothing in the *Criminal Procedure Act 1921* (SA) Part 6 or the *Criminal Procedure Act 2009* (Vic) require proceedings where double jeopardy might be surmounted to be heard in camera or prescribe an automatic statutory prohibition (accepting, however, that the *Open Courts Act 2013* (Vic) applies to such proceedings and allows for the court to be closed). None of the Queensland, Tasmania or Western Australia have an equivalent of NSW s. 107 but *Supreme Court Act 1933* (ACT) s 68Z, *Criminal Code 1899* (Qld) s 678K, *Criminal Code Act 1924* (Tas) s 397AF and *Criminal Appeals 2004* (WA) s 46L are each substantially similar to NSW s 111.

[13] *Public Health Act 2010* (NSW) s 54

[14] At present the only overlap is HIV: *Public Health Act 2010* (NSW) Schedule 1

[15] *Public Health Act 2010* (NSW) s 56

[16] *Public Health Act 2010* (NSW) s 58

Secondly, each of the following offences against the Act are heard in closed court:

(a) Failure by a registered medical practitioner (RMP), without reasonable excuse, to record the prescribed information about a Category 1 or 2 condition and/or give appropriate notice to the Secretary;[17]

(b) Failure by a RMP, without reasonable excuse, to keep the particulars of a Category 1 or 2 condition for the prescribed time period and/or give the Secretary further information about the patient's condition and transmission and risk factors as requested;[18]

(c) Failure by a RMP, without reasonable excuse, to provide the Secretary with such information is necessary to complete or correct notification that is incomplete or incorrect;[19]

(d) Failure by a pathology lab that registered a positive test result to a Category 3 condition to notify the Secretary;[20]

(e) Failure by a RMP to furnish sufficient information to a pathology lab required to report a Category 3 condition to enable the lab to make that report, within 72 hours of a request of that information;[21]

(f) Failure by a RMP, on request by the Secretary, to provide such information as is necessary to complete or correct a deficient pathology lab report and/or provide such information about the patient's medical condition and transmission and risk factors as is available;[22]

(g) Including the name and address of a Category 5 patient in any notification by a RMP to the Secretary and/or failure by a RMP protect the confidentiality of such a patient;[23]

(h) Failure by a RMP who suspects that a patient has a sexually transmitted infection to provide the patient with the prescribed information about the infection, without a reasonable excuse;[24]

(i) Failure by a person who knows he or she has a sexually transmissible notifiable disease or scheduled medical condition to take reasonable precautions against spreading the disease/condition;[25] and

(j) An owner or occupier of a building or place who knowingly permits another person to have sexual intercourse contravening (i) above at that location for the purpose of prostitution is guilty of an offence.[26]

None of the Acts in the other Australian jurisdictions which are most alike allow for closed proceedings, but both Tasmania and Victoria have prescribed a discretionary power to close.[27]

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[17] *Public Health Act 2010* (NSW) ss 54(2), 59

[18] *Public Health Act 2010* (NSW) ss 54(3) and (3A), 59

[19] *Public Health Act 2010* (NSW) ss 54(3A), 59

[20] *Public Health Act 2010* (NSW) ss 55(2), 59

[21] *Public Health Act 2010* (NSW) ss 55(3), 59

[22] *Public Health Act 2010* (NSW) ss 55(4) and (5), 59

[23] *Public Health Act 2010* (NSW) ss 56, 59

[24] *Public Health Act 2010* (NSW) ss 78, 80

[25] *Public Health Act 2010* (NSW) ss 79(1), 80

[26] *Public Health Act 2010* (NSW) s 79(2)

[27] Having considered the *Crimes Act 1900* (ACT), *Public Health Act 1997* (ACT) and *Sex Work Act 1992* (ACT); *Criminal Code Act 1983* (NT) and *Public and Environmental Health Act 2011* (NT); *Criminal Code Act 1899* (Qld) and *Public Health Act 2005* (Qld); *South Australian Public Health Act 2011* (SA); and , *Public Health Act 2016* (WA). In Tasmania, the court has a discretionary power to close in relation to any proceeding concerning a notifiable disease if it is in the best interest of a party or a witness to do so: *Public Health Act 1997* (Tas) s 62. In Victoria, there is a closure power applicable where the proceedings will hear evidence about any matter relating to HIV or any other prescribed disease or because of the socioeconomic consequences to a person if the information is disclosed. The power is otherwise at the court's absolutely discretion: *Public Health and Wellbeing Act 2008* (Vic) s 133.

Given NSW is an outlier in this area, ARTK recommends that *Public Health Act 2010* (NSW) ss 58, 59 and 80 be amended to allow the media to remain in the courtroom for the purposes of preparing a report of the proceedings even if the general public is excluded. In making this recommendation, ARTK notes that CSNPO Act orders can also be made should the proceedings require them.

Questions of Law Arising From an Acquittal For Contempt

Supreme Court Act 1970 (NSW) s 101A is substantially similar to *Crimes (Appeal and Review) Act 2001* (NSW) s 108 but applies only to questions of law arising from proceedings in which an alleged contemnor is found not to have committed contempt. The proceedings are conducted in closed court and no reports may be made of the proceedings which identify the acquitted contemnor.[28] It would appear that s 101A is unique to NSW as ARTK was unable to find an equivalent in any other Australian jurisdiction.

Ideally, ARTK would like to see this provision repealed. However, if this is not repealed, alternatively we submit that the media should be able to remain in the courtroom to report the proceedings even if the general public is excluded, subject to compliance with the automatic statutory prohibition.

Victim Impact Statement (VIS), Prescribed Sexual Offences

Crimes (Sentencing Procedure) Act 1999 (NSW) s 30I provides that any survivor of a prescribed sexual offence who would be entitled to give evidence in closed court[29] is also entitled to read his or her VIS in closed court unless the court orders otherwise. Subsection 30I(2) provides that the open justice principle "does not of itself constitute special reasons in the interests of justice requiring the part of the proceedings to be held in open court".

NSW is an outlier in this area of law because no other Australian jurisdiction distinguishes between the reading of a VIS in a sexual offence case as opposed to any other crime and no other Australian jurisdiction has prescribed a closed court as the starting point when a VIS is read. [30]

The Second Reading Speech for the bill which inserted s 30I explains the amendment was brought about due to a 2017 review of victims' involvement in the sentencing process performed by the NSW Sentencing Council with the recommendations aimed at "[improving] the victim impact statement system so that victims' voices can be heard and any trauma when engaging with the process is minimised". That being the case it is hardly surprising that s 30I expressly excludes the open justice principle and has resulted in s 30I being inconsistent with *Criminal Procedure Act 1986* (NSW) s 291C in that it fails to provide for any alternative media access to the proceedings.

ARTK submits that given NSW is an outlier, s 30I should be repealed. In the circumstances, ARTK recommends that media should have the same entitlements of access provided for by *Criminal*

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[28] *Supreme Court Act 1970* (NSW) ss 101A (7) and (8)

[29] *Criminal Procedure Act* (NSW) s 291

[30] NT (*Sentencing Act 1995* (NT) s 106B and *Youth Justice Act 2005* (NT) s 78), SA (*Sentencing Act 2017* (SA) s 14 and *Evidence Act 1929* (SA) s 13A), Tasmania (*Sentencing Act 1997* (Tas) s 81, *Criminal Rules 2006* (Tas) and *Justice Rules 2003* (Tas)) and WA (*Sentencing Act 1995 (WA)*) do not distinguish between victim impact statement's given for different crimes and do not allow the court to close when one is read. *Penalties and Sentences 1992* (Qld) Part 10B and *Sentencing Act 1991* (Vic) Part 3, Division 1C do not distinguish between VIS's given for different crimes but do authorise the court to close at its absolute discretion (*Penalties and Sentences 1992* (Qld) s 179N(2)(b) and *Sentencing Act 1991* (Vic) s 8R). The ACT allows the court to treat a vulnerable person giving a VIS in the same way as if he or she were giving evidence at trial which includes a discretion to close the court. However, if exercised, that discretion does not prohibit "a person who attends the proceeding to prepare a news report of the proceeding and is authorised to attend for that purpose by the person's employer" from remaining in the proceedings: *Crimes (Sentencing) Act 2005* (ACT) s 52 and Evidence (Miscellaneous Provisions) Act 1991 (ACT) s 102.

Procedure Act 1986 (NSW) s 291C in relation to the reading of a VIS.

Question 2.1(2): What changes, if any, should be made to these laws?

Crimes (Appeal and Review) Act 2001 (NSW) s 108, *Public Health Act 2010* (NSW) ss 58, 59, 80 and *Supreme Court Act 1970* (NSW) s 101A should all be amended to allow the media to remain in generally closed courtrooms for the purpose of reporting the proceedings. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30I should be repealed or *Criminal Procedure Act 1986* (NSW) s 291C amended to apply to the reading of a VIS in camera.

Question 2.1(3): Are the current statutory exceptions to the requirement to hold proceedings in private appropriate? Why or why not?

No. Very few NSW prescribing a closed court recognised the importance of the media and exempt them from the general restraint on entering closed proceedings. ARTK submits that all closed courts legislation should be amended to allow reports of those proceedings to occur, particularly where the relevant legislation also includes an automatic statutory prohibition on identifying those involved in the proceedings.[31]

Questions 2.1(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?

Yes. ARTK submits that all closed courts legislation should be amended to allow journalists to report the proceedings.

Question 2.2(1): Are the existing laws that give courts discretionary powers to make exclusion orders appropriate? Why or why not?

Civil and Administrative Tribunal

The Civil and Administrative Tribunal (NSWCAT) is open to the public unless the Tribunal orders otherwise which it may do of its own motion, or on application by party, if it is satisfied that it is desirable to close due the confidential nature of any evidence or matter before it or for any other reason.[32] Each equivalent Australian Tribunal is also open to the public unless contrary orders are made and while the specific circumstances in which each Tribunal can close differ, the jurisdiction prescribes a wide discretion in exercising that power similar to that afforded to the NSWCAT.[33] Since

[31] Although keeping in mind that even where there is no automatic statutory prohibition, an order made pursuant to the Courts Non-Publication and Suppression Orders Act 2010 (NSW) may also provide additional protection for those involved in such proceedings.

[32] *Civil and Administrative Tribunal Act 2013* (NSW), s 49

[33] *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 38, 39: can close if the tribunal is satisfied the right to a public hearing is outweighed by competing interests; *Northern Territory Civil and Administrative Tribunal Act 2014* (NT) s 60, 62: closure if it is in the interest of justice, necessary due to the confidential nature of the evidence or to expedite proceedings of the Tribunal or for any other reason; *Queensland Civil and Administrative Tribunal 2009* (Qld), s 90: may close to avoid interfering with the proper administration of justice, endangering the physical or mental health or safety of a person, offending public decency or morality, the publication of confidential information or information whose publication would be contrary to the public interest or for another reason in the interests of justice; *South Australian Civil and Administrative Tribunal Act 2013*, s 60: can close in the interest of justice, by reason of the confidential nature of the evidence to be given before the Tribunal, to expedite proceedings of the Tribunal or for any other reason that the Tribunal thinks sufficient; *Tasmanian Civil and Administrative Tribunal Act 2020* (Tas) is silent on this point; *Open Courts Act 2013* (Vic), s 30: allows the VCAT to close if closure is necessary to prevent a real and substantial risk of prejudice to the proper administration of justice that cannot be prevented by other reasonably available means; to

the NSWCAT's general closure power is consistent with the rest of Australia, ARTK makes no comment about it.

The NSWCAT also has a separate closure power in relation to certain complaints made about health practitioners which can be exercised if the Tribunal is satisfied it is desirable, in the public interest, to close for reasons connected with the subject-matter of the proceedings or the nature of the evidence to be heard.[34] Tasmania and NSW are outliers in this area of law. Rather than appoint the state's Civil and Administrative Tribunal as the responsible tribunal for the purposes of the national health practitioner regulation legislation[35], Tasmania has a stand-alone Health Practitioners Tribunal Act with its own closure powers.[36] Of the remaining six Australian jurisdictions, none of them have an equivalent of *Health Practitioners Regulation National Law* (NSW) s 165K.[37]

That being the case, ARTK submits that section should be repealed noting the *Civil and Administrative Tribunal Act 2013* (NSW) s 49 would continue to provide a closure power should one be required.

Civil Proceedings

Each court of NSW sitting in their respective civil jurisdictions may close:

(a) On the hearing of an interlocutory application, except while a witness is giving oral evidence;
(b) If the presence of the public would defeat the ends of justice;
(c) If the business concerns the guardianship, custody or maintenance of a minor;
(d) If the proceedings are not before a jury and are formal or non-contentious;
(e) If the business does not involve the appearance before the court of any person;
(f) If, in proceedings in the Equity Division of the Supreme Court, the court thinks fit; or
(g) If the uniform rules so provide.[38]

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prevent prejudice to the interests of the Commonwealth or a State or Territory in relation to national or international security; to protect the safety of any person; to avoid causing undue distress or embarrassment to a complainant or witness in any criminal proceeding involving a sexual offence or a family violence offence; to avoid causing undue distress or embarrassment to a child who is a witness in any criminal proceeding; if the order is necessary to avoid the disclosure of confidential information or information the subject of a certificate under ss 53 (cabinet documents) or 54 (Crown privilege) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic); or, for any other reason in the interests of justice; and, *State Administrative Tribunal Act 2004* (WA), s 61: closure permitted to avoid endangering the national or international security of WA or Australia, damaging inter-governmental relations, prejudicing the administration of justice, endangering the physical or mental health or safety of any person, offending public decency or morality, endangering property or to avoid the publication of confidential information or information the publication of which would be contrary to the public interest; or, for any other reason in the interests of justice.

[34] *Health Practitioners Regulation (Adoption of National Law) Act 2009* (NSW) s 6C (which declares the NSWCAT to be the Tribunal for the purposes of NSW's adoption of the National Health Practitioners legalisation) and *Health Practitioners Regulation National Law* (NSW) s 165K.

[35] See *Health Practitioner Regulation National Law* (ACT) Act 2010 s 8; *Health Practitioners Regulation (Adoption of National Law) Act 2009* (NSW) s 6C; *Health Practitioner Regulation (National Uniform Legislation) Act 2010* (NT) ss 3, 6; *Health Practitioner Regulation National Law Act 2009* (Qld) s 6; *Health Practitioner Regulation National Law (South Australia) Act 2010* (SA) s 6; *Health Practitioner Regulation National Law (Victoria) Act 2009* (Vic) s 6; *Health Practitioner Regulation National Law (WA) Act 2010* s 6.

[36] *Health Practitioner Regulation National Law (Tasmania) Act 2010* (Tas); *Health Practitioners Tribunal Act 2010* (Tas) s 30

[37] *Health Practitioner Regulation National Law* (ACT); *Health Practitioners Act 2004* (NT); *Health Practitioner Regulation National Law* (Qld); *Health Practitioner Regulation National Law (South Australia) Act 2010* (SA); *Health Practitioner Regulation National Law (Victoria) Act 2009* (Vic); *Health Practitioner Regulation National Law (WA) Act 2010.*

[38] *Civil Procedure Act 2005* (NSW) s 71. At present, the UCPR At present the UCPR allows the following matters to be heard in the absence of the public: an order referring a litigant to the Registrar for referral to the barrister or solicitor

Since this section appears to be unique to NSW, ARTK submits it should be amended to allow journalists to remain in the courtroom for the purpose of reporting the proceedings.[39]

Coroners' Court[40]

Coroners proceedings are to be conducted in public unless:

(a) "Special circumstances" make it necessary or desirable for the proceedings to be conducted in a room or building that is not open to the public, such as a room or building in a correctional centre, hospital, private residence or other place not normally open to the public; or

(b) It is in the public interest to order any or all persons (including witnesses in the proceedings) to remain outside the room or building in which the proceedings are being heard, taking into account:

(i) the principle that coronial proceedings should generally be open to the public;

(ii) national security; and

(iii) the personal security of the public or any person.[41]

Other than WA, legislation in each other Australian jurisdiction expressly states that Coroners hearings are to be open to the public unless ordered otherwise. The only real difference between jurisdictions are the reasons why a coronial hearing can be closed (although, again, there are commonalities) and the penalties applicable for breaching closed hearings orders.[42] Apart from the

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on the Pro Bono Panel for legal assistance (r 7.36); an application to the Registrar by the Pro Bono Panel barrister or solicitor to cease providing legal assistance (r 7.40); any question arising from the acceptance of an Offer to Make Amends issued pursuant to the *Defamation Act 2005* (NSW) (r 29.16); delivery of a reserved judgment (r 36.3); the examination a person subject to a winding up order for examination (r 38.5); an application for orders for the recovery of assessed costs in the Supreme Court (r 42.31); applications for concurrent hearings in an appeal or cross-appeal (r 51.14); application for leave to appeal or cross-appeal (r 51.15); an application for an appeal or other proceedings to be heard during the court's fixed vacation (r 51.57); an application for an expedited hearing (r 51.60); application to register a judgment under the *Foreign Judgments Act 1991* (Cth) (r 53.2); adoption orders (r 56.4); parentage orders under the *Surrogacy Act 2010* (NSW) (r 56A.4); applications for the registration of an interstate proceeds of crime order (Sch 10, Part 1, "Confiscation of Proceeds of Crime Act 1989", clause 7); application for a debt certification (Sch 10, Part 1, "Contractors Debts Act 1997", clause 1); and, registration of certain orders pursuant to the *International War Crimes Tribunals Act 1995* (Cth) (Sch 10, Part 1, "International War Crimes Tribunals Act 1995", subsection(3)).

[39] ACT, NT and SA do not have civil procedure Acts and there are no equivalent provision in the *Civil Proceedings Act 2011* (Qld); *Supreme Court Civil Procedure Act 1932* (Tas), *Civil Procedure Act 2010* (Vic) (noting that but the *Open Courts Act 2013* (Vic) would applies); or the *Civil Procedure Act 1833* (WA).

[40] *Coroners Act 2009* (NSW) ss 47, 74

[41] See *Crimes (Sentencing Procedure) Act 1999* (NSW), s 17 for the value of a penalty unit

[42] *Coroners Act 1997* (ACT), s 40: all or part of a hearing may occur in private if it is desirable in the public interest or in the interests of justice; *Coroners Act 1993* (NT), s 42: any or all people may be ordered to leave an inquest if the order is required for the administration of justice, national security or personal security; *Coroners Act 2003* (Qld), s 31: may be ordered closed while particular evidence is given; *Coroners Act 2003* (SA), s 19: any or all persons may be ordered to absent themselves from a hearing if an order is desirable in the interests of the administration of justice, to prevent hardship or embarrassment to any person, national security, where the evidence or a child sexual assault victim is to be heard or if child exploitation material adduced (when read with the *Evidence Act 1929* (SA) s 69); *Coroners Act 1995* (Tas), s 56: any or all people may be excluded from a hearing if it is in the interests of the administration of justice, national security or personal security; *Open Court Act 2013* (Vic), ss 28, 30: can only close if "the specific circumstances of a case make it necessary to override or displace the principle of open justice and the free communication and disclosure of information which require the hearing of a proceeding in open court". Additionally, the Coroners Court can only close if the Coroner reasonably believes that an order is necessary in the public interest, having regard to the matters specified in Part 2 of the Coroners Act 2008 (ss 30(3)); and, *Coroners Act 1996* (WA), s 45: the Coroner may order the exclusive of all or any person if reasonably believing it is in the interests of any person, of the public or of justice.

Open Courts Act 2013 (Vic) there is no acknowledgement elsewhere around Australia of the importance of the media being permitted to report coronial proceedings.

ARTK submits that the Coroner's Act should be amended to allow a journalist to remain in closed proceedings.

Drug and Alcohol Treatment

Drug and Alcohol Treatment Act 2007 (NSW) s 37(4)(a) allows the court to close when reviewing a dependency certificate pursuant to which a person can be involuntary detained in a treatment centre[43]. While other Australian jurisdictions have legislation dealing with mandatory drugs and/or alcohol treatment,[44] Victoria appears to be the only other jurisdiction with a prescribed closure power. The *Severe Substance Dependence Treatment Act 2010* (Vic) s 19 allows the court making a detention and treatment order to order that the whole, or any part, of the proceedings be heard in closed court but does not expressly grant that same power when the court is considering revoking an order.[45] Given the NSW legislation is unique, ARTK submits the media should be entitled to remain in such proceedings for the purpose of reporting them even if the general public is excluded.

Industrial Relations Commission (IRC)

The IRC is empowered to determine its own procedures including an absolute discretion to sit in public or in private.[46] While there is no national uniformity in this area of law all of the equivalent commissions have a closure power, most with a wide discretion.[47] ARTK, therefore, makes no comment about the IRC's closure power.

Interstate Courts Taking Evidence in NSW

A recognised court taking evidence in NSW by means of audio or audio-visual links can direct that the proceeding, or any part thereof, occur in private or that at a particular person leave the place where the hearing will take place.[48] As each other Australian jurisdiction except Victoria has an almost identical legislation, ARTK makes no submissions about this closure power.[49]

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[43] See *Drug and Alcohol Treatment Act 2007* (NSW) s 6

[44] Neither the ACT nor the NT appear to have current legislation compelling drugs/alcohol treatment (see this report in relation the NT although note *Volatile Substances Abuse Prevention Act 2005* (NT) s 39 requires closed hearings). There is no equivalent to *Drug and Alcohol Treatment Act 2007* (NSW) s 37(4)(a) in Part 8A of the *Penalties and Sentences Act 1992* (Qld), the *Controlled Substances Act 1984* (SA), *Alcohol and Drug Dependency Act 1968* (Tas) or the *Alcohol and Other Drugs Act 1974* (WA).

[45] Noting, however, that the closed court provisions in the *Open Courts Act 2013* (Vic) would also apply.

[46] *Industrial Relations Act 1996* (NSW) s 162

[47] The ACT, NT, Victoria refer industrial disputes to the Fair Work Commission (*Fair Work (Commonwealth Powers) Act 2009* (Vic)) which can close if it is satisfied that it is desirable to do so due to the confidential nature of any evidence or for any other reason: *Fair Work Act 2009* (Cth) s 593; the Queensland IRC can sit in private if information about a person's trade secrets or financial position are given in evidence: *Industrial Relations Act 2016* (Qld) s 580, SA Employment Tribunal hearings are public unless the Tribunal determines it is desirable to close in the interest of justice, by reason of the confidential nature of the evidence to be given, in order to expedite the proceedings or for any other reason that the Tribunal thinks sufficient (*South Australian Employment Tribunal Act 2004* (SA) s 55); the Tasmanian IRC holds public proceeding unless the Commission of its own motion, or on the application of a party, orders otherwise (*Industrial Relations Act 1984* (Tas) s 26); and, proceedings of the WA IRC are public unless in the Commission's opinion the objects of the Act will be better served by conducting the proceedings in private (*Industrial Relations Act 1979* (WA) s 27).

[48] *Evidence (Audio and Audio-Visual Links) Act 1998* (NSW) s 15

[49] *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 25; *Evidence Act 1939* (NT) s 49X; *Evidence Act 1977* (Qld) s 39J; *Evidence Act 1929* (SA) s 59IK; *Evidence (Audio and Audio-Visual Links) Act 1999* (Tas) s 14; ; *Evidence Act 1906* (WA) s 125 noting that the *Open Courts Act 2013* (Vic) might also apply.

Land and Environment Court

The Land and Environment Court sits in public unless the court orders otherwise in its absolute discretion.[50] Queensland and SA are the only jurisdictions with an equivalent court. In Queensland, the Land Court has all the powers of the Supreme Court including an absolute discretion to close[51] while the SA Environment, Resources and Development Court has public hearings unless the Court determines it is desirable to close in the interest of justice, by reason of the confidential nature of the evidence to be given, in order to expedite the proceedings or for any other reason that the Tribunal thinks sufficient.[52] We submit the closure power should be amended to allow the media to remain in the courtroom even if the general public is excluded.

Mental Health Review Tribunal (MHRT)

Proceedings of the MHRT are held in public unless the Tribunal is satisfied it is desirable for the welfare of a person who has a matter before it, or for any other reason, that a hearing should be heard in private. The Tribunal may make such an order either on the application of a person appearing before it or of its own motion.[53] Apart from SA[54], the equivalent mental health legislation in all other Australia jurisdictions starts from the position that such proceedings are held in private unless ordered otherwise.[55] Given NSW has clearly taken a more progressive view than other jurisdictions in relation to this area of law, ARTK has no comment to make.

Order and Security of the Court

Court Security Act 2005 (NSW) s 7 allows a judicial officer to close the court generally, or to specified members of the public, if the order is required to secure order and safety in the court premises or part thereof. The media has no right of access to report the proceedings if such an order is made. The ACT[56], NT[57] and Tasmania[58] have each legislated in substantially similar terms to NSW. In the jurisdictions that do not have a general court security act:

- The business of each of the Queensland Magistrates, District and Supreme Courts is to be conducted in open court unless the public interest or the interests of justice require an order otherwise[59];
- The SA Magistrates Court must be open to the public unless the rules provide otherwise[60] and the District and Supreme Courts must also be open to the public unless the rules or any Act provides otherwise[61];

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[50] *Land and Environment Court Act 1979* (NSW) s 62

[51] *Land Court Act 2000* (Qld) s 7A; and, *Supreme Court of Queensland Act 1991* (Qld) s 8.

[52] *Environment, Resources and Development Court Act 1993* (SA) s 20

[53] *Mental Health Act 2007* (NSW) s 151

[54] There is nothing in the *Mental Health Act 2009* (SA) which requires proceedings under the Act to be held in open or closed court. However that may be because *Mental Health Act 2009* (SA) s 107 prescribed a complete ban on reports of proceedings under the Act.

[55] *Mental Health Act 2015* (ACT) s 194; *Mental Health and Related Services Act 1998* (NT) s 135; *Mental Health Act 2016* (Qld) s 741 and the proceedings are the subject of a complete reporting ban without leave from the Tribunal (*Mental Health Act 2016* (Qld) s 790); *Mental Health Act 2013* (Tas) Sch 4, cl 9; *Mental Health Act 2014* (Vic) s 193; and, *Mental Health Act 2014* (WA) s 456

[56] *Court Procedures Act 2004* (ACT) s 50 noting that the *Magistrates Court Act 1930* (ACT) s 310 has an additional power to close if it is desirable in the public interest or the interests of justice with no media right of access.

[57] *Court Security Act 1998* (NT) s 17 and noting that for the purposes of the Act "Judge" includes a Supreme Court Judge, a Local Court Judge and a justice of the peace.

[58] *Court Security Act 2017* (TAS) s 9

[59] *Magistrates Court Act 1921* (Qld) s 14A; *District Court of Queensland Act 1967* (Qld) s 126; *Supreme Court of Queensland Act 1991* (Qld) s 8.

[60] *Magistrates Court Act 1991* (SA) s 18.

[61] *District Court Act 1991* (SA) s 23 and *Supreme Court Act 1935* (SA) s 46A.

- Subject to a power contained in any other Act, Victorian courts may close if an order is necessary to:
  (a) prevent a real and substantial risk of prejudice to the proper administration of justice that cannot be prevented by other reasonably available means (eg, other reasonably available means may include directions to the jury, making a proceeding suppression order, or orders excluding only certain persons or a more limited class of persons from the court or tribunal);
  (b) prevent prejudice to the interests of the Commonwealth or a State or Territory in relation to national or international security;
  (c) protect the safety of any person;
  (d) avoid causing undue distress or embarrassment to a complainant or witness in any criminal proceeding involving a sexual offence or a family violence offence; or
  (e) avoid causing undue distress or embarrassment to a child who is a witness in any criminal proceeding[62]; and

– WA courts sitting in their criminal jurisdiction may close if it is in the public interest to do so[63].

ARTK would welcome recognition in the *Court Security Act 2005* (NSW) of the importance of the media, including an amendment permitting journalists to remain in the courtroom for the purpose of reporting the proceedings even in the face of an order made under s 7.

Protected Confidences and Protected Identity Information

A protected confidence is any confidential communication occurring in the course of a relationship in which the confidant was acting in a professional capacity and was under an express or implied obligation not to disclose its contents of the confider's communication, whether the obligation arises under law or can be inferred from the nature of the relationship between the two people.[64] Protected identity information is information about, or enabling a person to ascertain, the identity of the confider of a protected confidence.[65] Any court hearing evidence of a protected confidence or protected identity information may hear the evidence in camera and make non-publication orders in relation to it.[66] The Evidence Acts in each other Australian jurisdiction except for Victoria[67] also allow the court to close in similar circumstances.[68] Given the national uniformity in this area ARTK makes no submissions about this closure discretion.

Receivers (Appointment of)

Conveyancers Licensing Act 2003 (NSW) s 107(1) and *Property and Stock Agents 2002* (NSW) s 140 allow the Supreme Court to close proceedings for the appointment of a receiver to any or all of the property of licensees under each Act. There is no consistent Australian approach to court proceedings concerning the appointment of a receiver in conveyancing legislation (although the

[62] *Open Court Act 2013* (Vic) s 30

[63] *Criminal Procedure Act 2004* (WA) s 171

[64] *Evidence Act 1995* (NSW) s 126A

[65] Ibid

[66] *Evidence Act 1995* (NSW) s 126E

[67] In which the *Open Courts Act 2013* (Vic) could apply with the same effect

[68] The equivalent legislation in the ACT and Tasmania is substantially similar to NSW (*Evidence Act 2011* (ACT) s126E and *Evidence Act 2001* (Tas) s 126E); in Queensland, the closure power is limited to protected counselling information in sexual assault case in which the court may make any order appropriate to limit the harm to the confider (*Evidence Act 1977* (Qld) s 14N); SA prescribes a closed court with no public access to transcript of proceedings (*Evidence Act 1929* (SA) s 67F); and, NT and WA offer the court a broader range of options to control proceedings in similar circumstances (*Evidence Act 1939* (NT) s 56G and *Evidence Act 1906* (WA) s 19J)

Victorian legislation is substantially similar to NSW[69]) while it seems there is no directly equivalent legislation to *Property and Stock Agents 2002* (NSW) s 140 anywhere else in Australia.[70] ARTK submits that given the lack of a uniform approach, both Acts should be amended to allow the media to remain in the courtroom even if the general public is excluded for the purpose of reporting the proceedings.

Royal Commissions

All Australian Royal Commissions Acts allow for proceedings to be held in private. What differs is why:

- In the ACT, the starting point for a Commissioner is "the principle that it is desirable that hearings be in public and that evidence given before…the commission should be made available to the public and to all people present at the hearing" but "must pay due regard to any reasons given to the commission why the hearing should be held in private"[71];
- A NSW, South Australia and Western Australia, a Royal Commissioner may direct that any part of inquiry take place in private at his or her absolute discretion[72];
- In the NT, it must be desirable in the public interest to order that the whole or part of an inquiry be held in private[73];
- In Queensland, inquiries must be held in public unless in the Commissioner's opinion, it is in the public interest to order otherwise given due to the subject matter of the inquiry or the nature of the evidence to be given[74];
- A Tasmanian Royal Commissioner may refuse to admit the public if satisfied "that the public interest in an open hearing is outweighed by any other consideration, including public security, privacy of personal or financial affairs or the right of any person to a fair trial" but must announce the intention to hold a private hearing "during a previous hearing which is open to the public" and state why the hearing is to be held in private in general terms[75];
- In Victoria any person may be excluded from a Royal Commission if:
  - (a) prejudice or hardship might be caused to any person, including harm to their safety or reputation;
  - (b) the nature and subject matter of the proceeding is sensitive;
  - (c) there is a possibility of any prejudice to legal proceedings;
  - (d) the conduct of the proceeding would be more efficient and effective;
  - (e) the commissioner otherwise considers the exclusion appropriate.

None of these acts provide for the media to remain in the Commission in the event that it is generally closed to the public. ARTK would welcome recognition in the *Royal Commissions Act 1923* (NSW) of the importance of the media, including an amendment permitting the media to remain in the Commission even if the general public is excluded.

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[69] The ACT and Queensland do not allow for licensed conveyancing. There is no equivalent provision in any of the *Agents Licensing Act 1979* (NT), the *Conveyancers Act 1994* (SA), the *Conveyancing Act 2004* (Tas) or the *Settlement Agents Act 1981* (WA). Victoria has an equivalent power to close the court (*Conveyancers Act 2006* (Vic) s 112) and non-publication order making power in relation to evidence given and/or orders made (s 113).

[70] Taking into account the *Agents Act 2003* (ACT); *Agents Licensing Act 1979* (NT); *Agents Financial Administration Act 2014* (Qld); *Land Agents Act 1994* (SA) and *Land and Business (Sale and Conveyancing) Act 1994* (SA); *Property Agents and Land Transactions Act 2016* (Tas); *Estate Agents Act 1980* (Vic); and *Real Estate and Business Agents Act 1978* (WA).

[71] *Royal Commission Act 1991 (ACT) s 28*

[72] *Royal Commissions Act 1923* (NSW) s 12B(2), *Royal Commissions Act 1917* (SA) s 6 and *Royal Commissions Act 1968* (WA) s 19A

[73] *Inquiries Act 1945* (NT) s 16

[74] *Commissions of Inquiry Act 1950* (Qld) s16A

[75] *Commissions of Inquiry 1995* (Tas) s 13

Sentencing, Community Correction Orders

A sentencing court considering imposing a community correction order in lieu of a custodial sentence has an unfettered discretion to consider the application in the absence of the public.[76] NSW is an outlier in this area of law as no other Australian legislation prescribing the same – or a similar – sentencing order has this power arising from sentencing legislation.[77] That being the case ARTK submits the Act should be amended to allow the media to remain in the courtroom even if the general public is excluded for the purpose of reporting the proceedings.

Sentencing, Local Court Annulment of a Conviction or Sentence

Crimes (Appeal and Review) Act 2001 (NSW), ss 4 and 4A allow the Local Court to annul a conviction or sentence on application or on its own motion in the interest of justice. Such an application may be dealt with in public or private at the court's absolute discretion.[78] As there are no equivalent provisions in any other Australian jurisdiction[79] ARTK submits that the discretion should not be exercised to include the media from the courtroom.

Thoroughbred Racing Appeals Panel (TRAP)

A TRAP constituted under Part 4 of the *Thoroughbred Racing Act 1996* (NSW) may sit in public or in private if it considers it necessary to do so in the public interest or to protect the safety of any person.[80] There do not appear to be equivalent provision either the Queensland or SA legislation[81] and the Racing Penalties Appeals Tribunal of WA does not have a closure power but can direct that evidence, documents, reports and/or exhibit before it not be published.[82] The remaining four Australian jurisdictions have prescribed a discretionary power in similar terms as NSW with the only real difference being the basis upon which it can be exercised.[83] Therefore ARTK makes no submissions about this closure power.

Victim Impact Statement, Offences Other Than Prescribed Sexual Offences

The victim of any offence other than a prescribed sexual offence can request leave to read his or her VIS in closed court or by CCTV.[84] In determining whether to grant leave, the court is to consider whether it is reasonably practicable to exclude the public, whether special reasons in the interests of justice require the VIS to be read in open court and any other matter the court deems relevant. However, the open justice principle "*does not of itself constitute special reasons in the interests of*

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[76] *Crime (Sentencing) Act 1999* (NSW) s 91

[77] Tasmania and Victoria also have community correction orders but no equivalent closure power (*Sentencing Act 1997* (Tas) and *Sentencing Act 1991* (Vic)). In the ACT, Queensland and SA, the equivalent is an intensive correction orders but there are no equivalent closures powers (*Crimes (Sentencing) Act 2005* (ACT) and *Crimes (Sentencing Administration) Act 2005* (ACT), *Penalties and Sentences Act 1992* (Qld), *Sentencing Act 2017* (SA). Neither the NT nor WA have express closure powers in relation to community based orders or community custody orders - in the *Sentencing Act 1995* (NT) – or community based orders, intensive supervision orders, suspended imprisonment orders or conditional suspected imprisonment orders: *Sentencing Act 1995* (WA).

[78] *Crimes (Appeal and Review) Act 2001* (NSW), s 7

[79] Including, but not limited to, the *Annulled Convictions Act 2003* (Tas)

[80] *Thoroughbred Racing Act 1996* (NSW) s 43

[81] *Racing Integrity Act 2016* (Qld), *Racing Act 2002* (Qld) and *Racing Act 1976* (SA).

[82] *Racing Penalties (Appeals) 1990* (WA) s 17.

[83] The Racing Appeals Tribunal ACT sits in public unless the Tribunal, for good reason, directs otherwise (*Racing Act 1999* (ACT) s 54); the NT Racing Appeals Tribunal sits in public unless the Tribunal determines otherwise at its absolute discretion (*Racing and Betting Act 1983* (NT) s 145S); the Tasmanian Racing Appeal Board may hear evidence in camera at its absolute discretion but otherwise sits in public (*Racing Regulation Act 2004* (Tas) s 30); and, the Victorian Racing Tribunal sits in public but may conduct private hearings if it is in the public interest or the interest of justice to do so (*Racing Act 1958* (Vic) s 50Q).

[84] *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30K

justice requiring the statement to be read in open court".

Elsewhere, four Australian jurisdictions provide no express power to close the court during the reading of a VIS; Queensland and Victoria have prescribed a closure power which, in each state, is entirely at the court's discretion with no express provision for the media to remain in the courtroom should it close; and, the ACT allows the court to close to hear a VIS read by a vulnerable witness but authorises "a person who attends the proceeding to prepare a news report of the proceeding and is authorised to attend for that purpose by the person's employer" to remain in the proceedings.[85] There is very little in the Second Reading Speech for *Crimes Legislation Amendment (Victims) Bill 2018* (NSW) explaining why this closure provision was deemed necessary and – in particular – why the open justice principle has been expressly overridden.[86] ARTK submits there is no justification for such an extraordinary departure from the open justice principle and s 30K should be repealed. If this is not agreed, we ask instead that Criminal Procedure Act 1986 (NSW) s 291C be amended to apply to s 30K.

Question 2.2(2): What changes, if any, should be made to these existing laws?

ARTK recommends that *Health Practitioner Regulation National Law* (NSW) s 165K should be repealed, that *Criminal Procedure Act 1986* (NSW) s 291C should be amended to apply to the in camera reading of a VIS pursuant to *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30K and that each of the following provisions should be amended to allow the media to remain in the courtroom if the general public are excluded: *Civil Procedure Act 2005* (NSW) s 71; *Conveyancers Licensing Act 2003* (NSW) s 107(1); *Coroners Act 2009* (NSW) ss 47, 74; *Court Security Act 2005* (NSW) s 7; *Crimes (Appeal and Review) Act 2001* (NSW) s 7; *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 30K, 91; *Drug and Alcohol Treatment Act 2007* (NSW) s 37; *Land and Environment Act 1979* (NSW) s 62; *Property and Stock Agents Act 2002* (NSW) s 140; and, *Royal Commissions Act 1923* (NSW) s 12B.

Question 2.2(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?

As noted in the Paper[87], the *Open Courts Act 2013* (Vic) requires court in determining whether to exercise a discretion to close to "have regard to the primacy of the principle of open justice and the free communication and disclosure of information which require the hearing of a proceeding in open court" and the court can only close if "the specific circumstances of a case make it necessary to override or displace the principle of open justice and the free communication and disclosure of information which require the hearing of a proceeding in open court".[88] Victoria is the only Australian jurisdiction to have legislated such a standard ground.

ARTK does not object to the introduction of a similar provision in NSW. However, our Victorian lawyers inform us that apart from a few notable exceptions (for example, the Lawyer X case hearings) closed courts were not a significant issue in Victoria before the introduction of the Act; nor have they become more

[85] See Footnote 15.

[86] After discussing the new provisions in relation to survivors of prescribed sexual offence, the Attorney General states: "In the case of all other victims, there will be instances where it is not reasonably practicable for these arrangements to be made. The bill will provide for victims who are not currently entitled to such arrangements to ask the court to make them available, subject to considerations such as the availability of necessary facilities, the reasonable practicability of granting the request and any other matter the court considers relevant".

[87] At paragraphs [2.50] – [2.58]

[88] *Open Courts Act 2013* (Vic) s 28

problematic since the Act was passed.[89] ARTK does not have sufficient data to know how much of an issue discretionary closure is in NSW, if – in fact – it is a significant problem at all. That being the case, ARTK would prefer to focus on changes to the law which would see an immediate, practical improvement to journalists' abilities to access the courts and court documents as recommended in subsequent chapters of this response.

Question 2.2(4): Should there be standard procedures by which an exclusion order could be made in all (or most) circumstances? If so, what should they be and in what circumstances should they apply?

See answer above.

Question 2.2(5): Should there be a standard offence for breaching an exclusion order in most (or all) circumstances? If so:

(a) what should be the elements of the offence and in what circumstances should it apply, and

(b) what should be the penalty?

ARTK is not aware of journalist/s breaching a discretionary exclusion order in NSW. Moreover, it would generally be unusual for an ARTK member/their staff to such an order since journalists have an understanding of how court orders work, are able to make inquiries with the media office of each court to confirm what (if any) orders exist in relation to proceedings and have the benefit of legal advisers experienced in this area of law. If a breach were to occur in the future, ARTK submits the most likely causes would be that the order was not sufficiently brought to the journalist's attention, either because court media staff were not being notified that an order had been made and/or the order was not posted outside the courtroom.

That said, ARTK submits that any offence should require that the breach be intentional, not merely reckless, and a fine is the appropriate penalty. It is untenable that journalists should be put at risk of contempt of court merely for doing their jobs well: a risk no other professional routinely faces.

[89] The biggest impediment to reporting court proceedings in Victoria is the sheer number of non-publication and suppression orders made every year – see comments in Chapter 4.

CHAPTER 3 – NON-DISCLOSURE & SUPPRESSION: STATUTORY PROHIBITIONS

Preliminary Comments

As was the case in Chapter 2, ARTK makes no comment about automatic statutory prohibitions prescribed in policing legislation referred to in Chapter 3 of the Paper.[90] ATRK also notes that NSW has deployed a drafting style in most of the Acts referred to in the Chapter which is unique to the jurisdiction. A principle section will provide that it is an offence to "name" a particular class of people and a subsequent subsection will elaborate that "name" is defined as including any particulars that identify, or which are reasonably likely to identify, the subject person. ARTK implores the Commission to recommend that this drafting practice cease. It makes for legislation replete with redundancy and is unnecessarily confusing.

Question 3.1: Statutory prohibitions on publishing or disclosing certain information
As a matter of principle, should there ever be automatic statutory prohibitions on publishing or disclosing certain information? Why or why not?

As a matter of principle, automatic statutory prohibitions should not exist. However, we acknowledge and accept that there are recognised circumstances in which all Australian jurisdictions restrain the identification of certain people and/or the disclosure of certain information.

ARTK submits that NSW legislation should not unnecessarily encroach upon the free reporting of court proceedings to ensure open justice. It is a particular concern to ARTK that automatic statutory prohibitions should never interfere with a journalist obtaining access to information from the court and/or court documents which is discussed in detail in Chapters 6 and 10 in our next submission.

Question 3.2(1): Are the current statutory prohibitions on publishing or disclosing certain information appropriate? Why or why not?

As these statutes have particular significance to ARTK members we have dealt with this question in some detail:

Acquitted Persons

Crimes (Appeal and Review) Act 2001 (NSW) prescribes three automatic statutory prohibitions:

(a) As discussed in Chapter 2 of this response, *Crimes (Appeal and Review) Act 2001* (NSW) s 108(6)(a) prohibits any report of a submission made before the Court of Criminal Appeal in relation to a question of law referred to it by the Attorney General or the Director of Public Prosecutions which arose at, or in connection with, the trial of a person acquitted in any proceedings tried on indictment or in the summary jurisdiction of Supreme Court or the Land and Environment Court;

(b) *Crimes (Appeal and Review) Act 2001* (NSW) s 108(6)(b) prohibits the identification of any person charged at the trial or affected by the decision given at the trial which led to the question of law referral; and

(c) *Crimes (Appeal and Review) Act 2001* (NSW) s 111 prohibits the identification of an acquitted person who is:

  (i) the subject of reinvestigation by police pursuant to *Crimes (Appeal and Review) Act 2001* (NSW) s 109;

  (ii) the subject of an application for a retrial under Part 8, Division 2 or an appeal under Part 8, Division 3 of the Act;

[90] Including *Crimes (Criminal Organisations Control) Act 2012* (NSW) s 28T, *Law Enforcement and National Security (Assumed Identities) Act 2010* (NSW) ss 33, 34, *Terrorism (Police Powers) Act 2002* (NSW) s 27ZA and *Witness Protection Act 1995* (NSW) s 32.

(iii) the subject of an order for retrial under Part 8 of the Act; or
(iv) being retried under Part 8 of the Act.

The only exception to this automatic statutory prohibition is a court order permitting identification which can only be made if it is in the interests of justice. s 111 lapses when there is no longer any step that could be taken which could lead to the acquitted person being retried or, if the acquitted person is retried, the conclusion of the trial.

ARTK has recommended that s 108(6)(a) be repealed but s 108(6)(b) retained. As noted in Chapter 2, the NT, SA and Victoria do not have equivalent legislation[91] but *Supreme Court Act 1933* (ACT) s 68Z, *Criminal Code 1899* (Qld) s 678K, *Criminal Code Act 1924* (Tas) s 397AF and *Criminal Appeals 2004* (WA) s 46L are each substantially similar to s 111. ARTK makes no further comments regarding s 111.

Adoption

As discussed in Chapter 7, it is an offence to identify a child in relation to whom an adoption application is made, a person who makes an adoption application, the mother and father of the child in relation to whom an adoption application is made and any other person having parental responsibility for the child when an adoption application is made (an Affected Person).[92] The ARTK relevant exceptions to this automatic statutory prohibition are a publication/broadcast of identifying information:

(a) Authorised by a court order;[93] or
(b) After the proceedings have finally been disposed of with the consent of the Affected Person (or the person having parental responsibility for any minor wanting to consent to be identified) provided no other Affected Person is identified, or is reasonably likely to be identified, by the publication/broadcast.

The difficulties with this consent provision are discussed in our response to Chapter 7 together with ARTK's recommendations in relation to amendment of the Act.

Apprehended Violence Orders (AVOs)

Before AVO proceedings are commenced, or after proceedings have been commenced and before they are disposed of, it is an offence to identify any child[94]:

(a) For whose protection or against whom an AVO is sought;
(b) Who appears, or is reasonably likely to appear, as a witness before a court in any AVO proceedings; or
(c) Who is, or is reasonably likely to be, mentioned or otherwise involved in any AVO proceedings.

The court has a non-publication order making power in relation to any person who fits the descriptions above but is not a child which is discussed in Chapter 4. The only exception to this automatic statutory restraint relevant to ARTK members is the publication/broadcast of identifying information made with the person's consent.[95]

Because the AVO legislation is a crimes act – and AVO proceedings are, therefore, criminal

[91] To recap, NT does not appear to have equivalent legislation and nothing in the *Criminal Procedure Act 1921* (SA) Part 6 or the *Criminal Procedure Act 2009* (Vic) require proceedings where double jeopardy might be surmounted prescribe an automatic statutory prohibition. None of Queensland, Tasmania or Western Australia have an equivalent of s 108.

[92] *Adoption Act 2000* (NSW) s 180

[93] *Adoption Act 2000* (NSW) s 180A

[94] A child being a person under 16 years of age: *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 3.

[95] *Crimes (Domestic and Personal) Violence Act 2007 (NSW) s 45*

proceedings – this automatic statutory prohibition overlaps with *Children (Criminal Proceedings) Act 1987* (NSW) s 15A. However, that would no longer be the case if the amendments ARTK recommends in Chapter 7 of the Paper are adopted. Chapter 7 also recommends that greater clarity be introduced into this legislation in relation to the effect of the automatic statutory prohibition when read in conjunction with *Crimes (Domestic and Personal Violence) Act 2008* (NSW) s 38(2).[96]

Associates of an Accused or an Offender

Bail Act 2013 (NSW) s 89 prohibits the publication/broadcast of the identity of any person stated to be a prohibited associate of an accused person in his or her bail conditions. There are no exceptions to this automatic statutory prohibition which are relevant to ARTK members. None of the other Australian bail acts include an automatic statutory prohibition.[97] There is nothing in the Second Reading Speech for the *Bail Bill 2013* (NSW)[98] about s 89 but ARTK notes that it is in substantially similar terms to *Bail Act 1978* (NSW) s 36C and was most likely transferred from the 1978 Act to the 2013 Act without review. Unfortunately, there is also nothing in either the Second Reading Speech or Explanatory Memorandum for the bill which inserted s 36C into the 1978 Act which explains why an automatic statutory prohibition was deemed necessary at the time.[99]

An automatic statutory prohibition also applies to non-association orders made at the point of sentencing. *Crimes (Sentencing Procedure Act) 1999* (NSW) s 100H prohibits the identification of any person other than the offender who is specified in a non-association order and there are no exceptions to this restraint that are relevant to ARTK members. The ACT and NT are the only two jurisdictions to prescribe similar automatic statutory prohibitions.[100]

Given no other Australian jurisdiction has a provision similar to *Bail Act 1978* (NSW) s 36C and NSW is in the minority of jurisdictions having a law akin to *Crimes (Sentencing Procedure Act) 1999* (NSW) s 100H, ARTK recommends that both provisions should be repealed. In making that recommendation, ARTK notes that CSNPO Act orders could still apply to such proceedings, should the necessity test be met on a case-by-case basis.

Case Conferences

As noted in Chapter 2, committal hearings are no longer part of NSW criminal procedure having been replaced by case conferences. Included amongst the provisions inserted to effect this change is *Criminal Procedure Act 1986* (NSW) s 80 which provides that is an offence to publish, or permit publication of, any case conference material, namely:

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[96] That section requires that any order for the protection of an adult must extend to any child with whom the adult has a domestic relationship.

[97] Although the *Bail Act 1980* (Qld) s 12, *Open Courts Act 2013* (Vic) and *Bail Act 1982* (WA) s 20 prescribe suppression order making powers.

[98] https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/HANSARD-1323879322-74874

[99] s36C was inserted into the 1978 Act by the *Justice Legislation Amendment (Non-Association and Place Restriction) Act 2001 (NSW)* the EM for which is at https://www.parliament.nsw.gov.au/bill/files/1559/Ex%20note%20Justice%20Legislation%20Amendment%20(Non-association%20and%20Place%20Restriction)%20Bill%202001.pdf and the Second Reading Speech at https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/HANSARD-1323879322-25843/HANSARD-1323879322-25860

[100] *Crimes (Sentencing) Act 2005* (ACT) s 26 and *Sentencing Act 1995* (NT) s 97H. There are no similar automatic statutory prohibitions in any of *Penalties and Sentences Act 1992* (Qld); *Criminal Procedure Act 1921* (SA); *Sentencing Act 1997* (Tas); *Sentencing Act 1991* (Vic); or, *Sentencing Act 1995* (WA).

(a) A case conference certificate;
(b) Evidence of anything said between the parties, or of any admission made, during a case conference; or
(c) Evidence of anything said between the parties, or of any admission made, during negotiations after a case conference concerning a plea or offers made to or by the accused.[101]

No other Australian jurisdiction has an equivalent provision.

To date, ARTK is not aware of any particular issues with (b) and (c) above but (a) has resulted in a distinct chilling effect on court reporting. In particular, *Criminal Procedure Act 1986* (NSW) s 75(1) requires case conference certificates to include:

…
(e) The offence(s) for which the prosecution will seek committal for trial or sentence;
…
(g) If an offer made to/by the accused to plead guilty to an offence has been accepted, the agreed facts and details of the facts (if any) in dispute.

The offences proceeding to trial or sentence and the agreed facts form the most fundamental elements of any criminal case. That fact is already acknowledged in the legislation granting the scant access journalists have to criminal proceedings which draws a distinction between the police facts submitted on a non-guilty plea (which the media has no entitlement to seek from the court) or a guilty plea, in which the media has an entitlement to receive the police facts from the court on application.[102] The net result is a contradiction between ss 80 and 314 whereby proceedings for minor offences can be the subject of fulsome reporting on a guilty plea because s 314 provides the media with an entitlement to the statement of facts but the agreed facts in the most serious offences under NSW law cannot be reported.

ARTK members first became aware of the effect of this change in the law when Anthony Sampieri agreed to plead guilty to raping a seven-year old girl in the bathroom of a Kogarah dance studio. ARTK submits that the public interest in reporting Sampieri's criminal proceedings is self-evident. Yet when our journalists approached the court for copies of the agreed facts their applications were refused on the basis of s 80. To date, publication/broadcasting of the facts as stated during sentencing has not drawn condemnation but on the face of it, there is no reason why even a report of that kind could not fall foul of s 80. ARTK was not consulted before this change was effected and we hope that it was an unintended effect of the implementation of the new system. However, ARTK submits that it must be fixed and fixed quickly. We comment on an appropriate remedy in our response to Chapter 6 of the Paper.

Children and Young People, Care and Protection Proceedings

Children and Young Persons (Care and Protection) Act 1998 (NSW) s 105 prohibits the identification of a child or young person[103]:

(a) Who appears, or is reasonably likely to appear, as a witness in any Children's Court proceedings;
(b) Who is involved, or is reasonably likely to be involved, in any capacity in any non-court proceedings;
(c) With respect to whom proceedings before the Children's Court are brought or who is reasonably likely to be the subject of proceedings before the Children's Court;

[101] *Criminal Procedure Act 1986* (NSW) s 78(5)

[102] *Criminal Procedure Act 1986* (NSW) s 314

[103] A child being a person under 16 years of age and a young person being a person who is 16 years of age or older but not yet 18: *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 3.

(d) Who is, or is reasonably likely to be, mentioned or otherwise involved in any proceedings before the Children's Court or in any non-court proceedings; or
(e) Who is the subject of a report under any of six prescribed sections of the Act.[104]

The restraint applies before any proceedings have commenced, during the proceedings or after they are disposed of and while s 105 does not expressly state that the automatic statutory restraint is applicable only to proceedings under the Act, ARTK submits that as a matter of statutory interpretation the section should be read in that way. Since 2018, it has also been offence to identify a child or young person as having been under the parental responsibility of the Minister or in out-of-home care, however expressed, which effectively prohibits a child or young person being identified as a foster child or a ward of the State.[105]

Section 105 expires when the protected person turns 25 or dies, whichever occurs first, and is subject to the following relevant exceptions:

(a) A publication/broadcast identifying a child made with the consent of the Children's Court;
(b) A publication/broadcast identifying a young person made with the young person's consent;
(c) If the child or young person is under the Minister's parental responsibility, an identifying publication/broadcast made with the consent of the Secretary (which can only be granted if the Secretary is of the opinion that the publication/broadcast is to the benefit of the child/young person); or
(d) In the case of a child/young person whose suspected death is the subject of an inquest by the Coroner's Court, an identifying publication/broadcast made with the Coroner's consent (which can only be granted if it is in the public interest).

There is no express capacity for a person who is between the ages of 18 and 25 to consent to being identified. ARTK's recommendations in relation to this automatic statutory restraint are set out in our response to Chapter 7 of the Paper.

As noted in the Paper at paragraph 3.27, *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 29 also prohibits the identity of any person who reports that a child or young person is at risk of harm from being disclosed by anyone. As confidentiality regimes in relation to notifiers are common to all Australian jurisdictions ARTK does not take issue with s 29. [106]

Children and Young People, Criminal Proceedings

While all Australian jurisdictions have automatic statutory prohibitions in relation to children's involved in Children's Court criminal proceedings[107], the much maligned *Children (Criminal Proceedings) Act 1987* (NSW) s 15A is unique in its breadth. While the s 15A is discussed at length in

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[104] s 24 (a report to the Secretary of a reasonable suspicion that a child or young person is at risk of significant harm), s 25 (a report to the Secretary of a reasonable suspicion that a child yet to be born is at risk of significant harm after birth), s 27 (mandatory reporting provision), s 120 (report to the Secretary of a child's homelessness), s 121 (report to the Secretary of a young person's homelessness) or s 122 (mandatory reporting of a child who lives away from home without parental permission).

[105] Inserted by the *Children and Young Persons (Care and Protection) Amendment Act 2018 (NSW)*.

[106] *Children and Young People Act 2008* (ACT), ss 365, 775, 777, 863C, 866, 867; *Care and Protection of Children Act 2007* (NT) s 27; *Child Protection Act 1999* (Qld) s 186; *Children and Young People (Safety) Act 2017* (SA) s 163; *Children, Young Persons and Their Families Act 1997* (Tas) s 16; *Children, Youth and Families Act 2005* (Vic) ss 41 (in particular), 191, 209, 213; *Children and Community Services Act 2004* (WA) ss 124F, 240.

[107] *Criminal Code 2002* (ACT) s 712A; *Youth Justice Act 2005* (NT) s 50(1)(b); *Youth Justice Act 1992* (Qld) s 301; *Young Offenders Act 1993* (SA) s 63C; *Youth Justice Act 1997* (Tas) s 31, s 108; *Children, Youth and Families Act 2005* (Vic) s 534, s 534A, 534B; *Children's Court of Western Australia Act 1988* (WA) s 35, 36A

Chapter 7, for the sake of completeness, it prohibits the identification of:

(a) A person to whom proceedings relate who was a child[108] when the offence was allegedly committed;
(b) Any witness in the proceedings, whether an adult or a child, who was a child when the offence to which the proceedings relate was committed;
(c) Any person is mentioned in proceedings in relation to something that occurred when the person was a child;
(d) Any person otherwise involved in the proceedings and was a child when so involved; or
(e) The sibling of a victim of the offence to which the proceedings relate if both the sibling and the victim were children the offence was committed.

The automatic statutory prohibition applies before or after the proceedings concerned are disposed of, even if the relevant person is no longer a child and even if the relevant person is deceased at the time of the publication or broadcast. The exceptions to this restraint relevant to ARTK members are:

(a) A court order authorising identification made at sentencing for a serious children's indictable offence;[109]
(b) A publication/broadcast that identifies a child under the age of 16 with the consent of the court (which it cannot give unless it is in the public interest);[110]
(c) A publication/broadcast that identifies a person who is above 16 years of age with that person's consent which, if the person is a child, must be given in the presence of an Australian legal practitioner of the child's choosing;[111]
(d) The child is deceased, permission to identify the child is granted by his or her senior available next of kin and the other conditions set out in *Children (Criminal Proceedings) Act 1987* (NSW) s 15E are complied with; and
(e) The proceedings concern a traffic offence and are not in the Children's Court.[112]

As an aside, ARTK notes that in practice, exception (f) can result in reporting that may seem to some readers or viewers to lack fairness. For example, a parent who gets pulled over doing the school run and charged with a prescribed concentration of alcohol offence can be identified, and the fact that the children were in the car at the time can be reported, because those offences are all in the *Road Transport Act 2013* (NSW) s 110 and will be heard in Local Court. On the other hand, a parent who drives to the casino, parks and leaves a child in the car cannot be identified because that offence falls under the *Children and Young Person (Care and Protection) Act 1998* (NSW) s 231. ARTK's recommendations in relation to s 15A are set out in Chapter 7.

Children and Young People, Youth Justice Alternatives

The *Young Offenders Act 1997* (NSW) provides for criminal allegations against children to be dealt with

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[108] A child being a person under 18 years of age: *Children (Criminal Proceedings) Act 1987* (NSW) s 3.

[109] *Children (Criminal Proceedings) Act 1987* (NSW) s 15C. Namely homicide, an offence punishable by life imprisonment or 25 years, aggravated sexual assault where the victim is 16 years of age or older or attempting that offence, assault with intent to have sexual intercourse or attempting that offence, a *Firearms Act 1996* (NSW) offence relating to the manufacture or sale of firearms punishable by 20 years imprisonment and sexual assault by forced manipulation if the victim is under 10 years of age: *Children (Criminal Proceedings) Act 1987* (NSW) s 3 and Children (Criminal Proceedings) Act 1986 (NSW) r 4. In making such an order the sentencing court is required to have regard to the seriousness of the relevant offence; the effect of the offence on any victim (or in the case of an offence that resulted in the victim's death, the victim's family); the weight to be given to general deterrence; the subjective features of the offender; the offender's prospects of rehabilitation; and, any other such matters as the court considers relevant having regard to the interests of justice.

[110] *Children (Criminal Proceeding) Act 1987* (NSW) ss 15D(1)(a) and (2)

[111] *Children (Criminal Proceeding) Act 1987* (NSW) ss 15D(1)(b) and (3)

[112] *Children (Criminal Proceedings) Act 1987* (NSW) s 15F

by way of warnings, cautions and/or youth justice conferences rather than by issuing criminal proceedings. ARTK addresses the substance of the automatic statutory prohibition in *Young Offenders Act 1997* (NSW) s 65 in Chapter 7. However, for the sake of completeness, that provision prohibits the identification of any child[113] dealt with under the Act before or after the matter involving the child is finally dealt with. The only exception to this automatic statutory prohibition relevant to ARTK members is the publication/broadcast of identifying information about a child who is 16 years of age or older and who consents to being identified. There is no express capacity for a person who is no longer a child, but was previously dealt with under the Act, to consent to being identified.

Child Protection

The *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW) allows for orders to be made prohibiting certain offenders who pose a risk to the lives or sexual safety of children from engaging in specified conduct.[114] A registrable person for the purposes of the Act is anyone who has committed a serious sex or violence offence against a child.[115] Once engaged, the Act allows for child protection prohibition orders[116] or contact prohibition, either of which can be made if the Commissioner for Police has reasonable ground to believe a registrable person will attempt to contact a victim or a co-offender.[117] It is an offence for any publication/broadcast about proceeding under the Act to identify:

(a) A registrable person against whom any order is sought or made;
(b) The victim of a registrable offence committed by a registrable person; or
(c) Any particular person referred to as a person at risk because of the conduct proposed to be prohibited.[118]

The automatic statutory prohibition does not apply to a publication/broadcast made with the authority of a court order.[119]

Elsewhere:

- The NT and WA legislation is almost identical to NSW[120], as is the ACT legislation except that the ACT also allows adults subject to the automatic statutory prohibition to consent to being identified;[121]
- In Queensland, it is only an offence for a person who is not engaged in the administration of the act to disclose identifying information if it is done with intention to incite anyone to intimidate or harass an offender;[122]
- SA directs its automatic statutory prohibition to identifying information published by the Commissioner in the event that a registrable person has either failed to comply with requirements under the Act, or given false or misleading information, and his or her whereabouts is unknown.[123] In such circumstances the Commissioner can publish

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[113] A child being a person between the ages of 10 and 18: *Young Offenders Act 1997* (NSW) s 4.

[114] *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW) Long Title

[115] See definitions of "registerable person", "registered offences", "Class 1 offence" and "Class 2 offence in *Child Protection (Offenders Registration) Act 2000* (NSW) ss 3, 3A.

[116] Which can prohibit a registrable person from associating with or contacting specified persons/kinds of people, being in specified locations, engaging in specified behaviour or working with children: *Child Protection (Offender Prohibition Orders) Act 2004* (NSW) s 8

[117] *Child Protection (Offender Prohibition Orders) Act 2004* (NSW) s 16B

[118] *Child Protection (Offender Prohibition Orders) Act 2004* (NSW) s 18 (1)

[119] *Child Protection (Offender Prohibition Orders) Act 2004* (NSW) s 18 (2)

[120] *Child Protection (Offender Reporting and Registration) Act 2004* (NT) s 88 and *Community Protection (Offender Reporting) Act 2004* (WA) s 206

[121] *Crimes (Child Sex Offenders) Act 2005* (ACT) s 132ZH

[122] *Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004* (Qld) s 51C

[123] *Child Sex Offenders Registration Act 2006* (SA) s 66F

identifying information about a registrable person on a website but it is an offence to republish any such information without the Minister's approval.[124] The SA legislation also has a standard confidentiality requirement applicable to people engaged in the administration of the Act[125] but, additionally, it is an offence for any person to publish information disclosed in contravention of that confidentiality requirement in the media;[126]

- Tasmania has closed hearings and restrains access to information about the register but does not impose an automatic statutory prohibition;[127] and
- Victoria's automatic statutory prohibition prohibits publication of:
  (a) Any evidence given in a proceeding before a court under the *Serious Offenders Act 2018* (Vic);
  (b) The content of any report or other document put before a court in a proceeding under that Act;
  (c) Any information that is submitted to a court under the Act identifying a person (other than the offender) who has attended or given evidence in a proceeding; or
  (d) Any information submitted under the Act to a court identifying a victim of a serious sex offence or a serious violence offence committed by the offender.[128]

  That said, Victoria also makes such a large number of non-publication orders pursuant to the Act each calendar year that they operate, for all practical purposes, as an additional automatic statutory restraint.[129]

Given the NSW approach is in the majority in this area of law, ARTK makes no submissions about this automatic statutory prohibition.

Community Services, Administrative Review of Decisions

A person aggrieved by decision in relation to the community services set out in *Community Services (Complaints, Review and Monitoring) Act 1993* (NSW) s 28 can apply to the NSWCAT for administrative review. In any such application, including an internal appeal against such a decision, *Civil and Administrative Tribunal Act 2013* (NSW) s 65 prohibits the identification of witnesses before the Tribunal, the people to whom the proceedings relate or anyone otherwise mentioned or involved in the Tribunal proceedings.[130] The restraint applies before and after the proceedings are disposed of and the only exception relevant to ARTK members is an identifying publication/broadcast made with the Tribunal's consent. As there is no equivalent legislation in any other Australian jurisdiction ARTK recommend the repeal of this automatic statutory prohibition, noting that the non-publication order making power provided by *Civil and Administrative Tribunal Act 2013* (NSW) s 64 – or in the CSNPO Act if ARTK's Chapter 4 recommendation about s 64 is adopted – would still apply to such proceedings where appropriate.[131]

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[124] *Child Sex Offenders Registration Act 2006* (SA) s 66J and ARTK notes that *Community Protection (Offender Reporting) Act 2004* (WA) s 85M is substantially similar

[125] *Child Sex Offenders Registration Act 2006* (SA) s 67

[126] *Child Sex Offenders Registration Act 2006* (SA) s 68

[127] *Community Protection (Offender Reporting) Act 2005* (Tas)

[128] *Serious Offenders Act 2018* (Vic) s 277

[129] For example, in 2020 497 Victorian non-publication orders were reported to NCAELO (to date) of which 320 orders were made by the courts and not by the VCAT. 89 of those 320 orders were *Serious Offenders Act 2018* (Vic) orders. These orders are always the same in that they prohibit the identification of an offender and his or her whereabouts.

[130] Noting that there are currently no additional classes of proceedings prescribe by the *Civil and Administrative Tribunal Regulations 2013* (NSW).

[131] Including in the *Health and Community Services Complaints Act 1998* (NT); *Community Services Act 2007* (Qld); and, the *Health and Community Services Complaints Act 2004* (SA).

Coronial Inquests and Self-Inflicted Death

Once a NSW Coroner makes a finding at an inquest that a death was self-inflicted, no report of the proceedings, or any part of the proceedings, can be published unless the Coroner orders otherwise. Such an order can only be made if the Coroner forms the view that it is desirable in the public interest to permit reporting of the proceedings.[132] NSW is an outlier in this area of law as no other Australian jurisdiction has legislated an automatic statutory prohibition in relation to a suicide finding.[133]

ARTK recommends that s 75(5) of the Act be repealed and that the section be otherwise amended to remove all references to that subsection.

As discussed at paragraph 3.43 of the Paper, it is also an offence to publish:

(a) Questions asked of a witness that the Coroner has forbidden or disallowed;
(b) Warnings that a witness is not compelled to answer a question;
(c) Objections made by a witness to giving evidence due to self-incrimination; or
(d) Submissions made by, or for, a person appearing or represented at an inquest or inquiry, or Counsel Assisting, about whether the inquest/inquiry should be suspended under s 78 of the Act, because:
    (i) it appears to the Coroner that a person has been charged with an indictable offence raising the issue of whether the person caused the death, suspected death, fire or explosion with which the inquest/inquiry is concerned; or
    (ii) the Coroner forms the view that the evidence is capable of satisfying a jury beyond reasonable doubt that a known person has committed an indictable offence, there is a reasonable prospect such a jury would convict and the indictable offence would raise the issue of whether the known person caused the death, suspected death, fire or explosion with which the inquest/inquiry is concerned.

The only exception to this restraint is a publication/broadcast made with the Coroner's express permission.[134]

The only other Australian jurisdiction with legislation on point is Queensland where disallowed questions or answers are the subject of an automatic statutory prohibition[135] but the publication/broadcast of self-incriminating information is merely one of the suggested circumstances in which the Queensland Coroner's non-publication order making power may be exercised.[136]

As NSW is also an outlier in this area of law, ARTK recommends that s 76 of the Act be repealed noting that the discretionary non-publication order making power in *Coroners Act 2009* (NSW) s 74 would remain should the circumstances of the case require that power to be exercised (or, alternatively, a CSNPO Act order could be made if ARTK's Chapter 4 recommendation about s 74 is adopted).

Declaration of Parentage or Annulment of Declaration of Parentage

It is an offence to name or identify any person by, or in relation to whom, an application for a declaration of parentage is made or an annulment of declaration of parentage order is sought.[137] There are no exceptions to this automatic statutory prohibition. As discussed in Chapter 7, there is no

[132] *Coroners Act 2009* (NSW) s 75

[133] *Coroners Act 1997* (ACT); *Coroners Act 1993* (NT); Coroners Act 2003 (Qld) but expressly noted as a basis for which a non-publication order may be made under s 41; *Coroner Act 2003* (SA); *Coroners Act 1995* (Tas); *Coroners Act 2008* (Vic); and, *Coroners Act 1996* (WA).

[134] *Coroners Act 2009* (NSW) s 76

[135] *Coroners Act 2003* (Qld) s 41(3)

[136] *Coroners Act 2003* (Qld) s 41(1)

[137] *Status of Children Act 1996* (NSW) s 25

uniform Australian approach to this area of law and ARTK recommends amendments which would allow journalists to report on these proceedings (which are currently heard in closed court) while retaining the automatic statutory prohibition.

Drugs and Alcohol Treatment

Drugs and Alcohol Treatment Act 2007 (NSW) s 41 prohibits the identification of a person to whom proceedings under the Act relate, who appears as a witness in such proceedings or who is mentioned or otherwise involved in such proceedings, whether before or after the proceedings are completed. The only ARTK relevant exception to this automatic statutory prohibition is an identifying publication/broadcast made with the Magistrate's consent. Amongst the other Australian jurisdictions, SA and Victoria are the only two with reporting restraints in this area of law.[138] The Victorian legislation is the most similar to NSW, prohibiting the identification of the person who is the subject of the application under the relevant act, the applicant for the order and a person who appears as a witness at a hearing.[139] The SA legislation arguably bans all reports of proceedings under the relevant act because it prohibits reports of any information obtained in the course of the administration of the Act whether by the person making the disclosure or any other person.[140]

ARTK has recommended in Chapter 2 that the discretionary power the court has to close when hearing applications under the Act be amended to allow the media to remain and report the proceedings.[141] ARTK also recommends that as NSW is only one of two jurisdictions to have enacted one, the automatic statutory prohibition in s 41 should be repealed, noting that the CSNPO Act would still allow a non-publication order to be made in drugs and alcohol proceedings should the necessity test be met.

Forensic Procedures Testing Orders

The *Crimes (Forensic Procedures) Act 2000* (NSW) provides the power to carry out forensic procedures on certain people, provides for the DNA database system and legislates various related crime and justice provisions.[142] It is an offence under the Act to identify a suspect on whom a forensic procedure is carried out or proposed to be carried out in a report of proceedings under the Act if that suspect has not been charged with the offence for which the procedure is required or the Magistrates orders otherwise.[143] This provision is not commonly triggered but from time to time it does restrain reporting. NSW is one of four jurisdictions with legislation of this kind and they all have substantially similar automatic statutory prohibitions.[144] Given where this law exists it is uniform, ARTK has no comment to make.

Guardianship Proceedings in the NSWCAT

For proceedings in the Guardianship Division of the NSWCAT (including internal appeals against decision made in that division), *Civil and Administrative Tribunal Act 2013* (NSW) s 65 prohibits the identification of witnesses, people to whom the proceedings relate and anyone otherwise mentioned

[138] Neither the ACT nor the NT appear to have current legislation compelling drugs/alcohol treatment and there are no equivalent provisions in Part 8A of the *Penalties and Sentences Act 1992* (Qld); *Alcohol and Drug Dependency Act 1968* (Tas); or, *Alcohol and Other Drugs Act 1974* (WA).

[139] *Severe Substance Dependence Treatment Act 2010* (Vic) s 19(5)

[140] *Controlled Substances Act 1984* (SA) s 60A

[141] *Drug and Alcohol Treatment Act 2007* (NSW) s 37(4)(a)

[142] *Crimes (Forensic Procedures) Act 2000* (NSW), Long Title

[143] *Crime (Forensic Procedures) Act 2000* (NSW), s 43

[144] *Crimes (Forensic Procedures) Act 2000* (ACT) s 48 (ACT); *Criminal Law (Forensic Procedures) Act 2007* (SA) . 51 (SA); and, *Forensic Procedures Act 2000* (TAS) s 24.

or involved in proceedings.[145] The restraint applies before and after the proceedings are disposed of and the only exception relevant to ARTK is an identifying publication/broadcast made with the NSWCAT's consent. Elsewhere, only WA is aligned with the NSW position.[146] There is no automatic statutory prohibition in the relevant ACT legislation;[147] in NT, Queensland and Tasmania the automatic statutory prohibition is limited to the identification of the person to whom the proceedings relate[148]; and, in Victoria the restraint is on identifying any party to the proceedings.[149] SA has the most rigorous restraint prohibiting all reports of guardianship proceedings without an order from the body or court hearing the matter. If such an order is granted, any resulting report cannot identify the person to whom the proceedings relate.[150]

ARTK recommends that s 65 be amended to become consistent with the NT, Queensland and Tasmanian approach and only prohibit the identification of the person to whom the guardianship proceedings relate. In making this recommendation ARTK notes that once amended in this way, in practice, s 65 would most likely continue to restrain the identification of many of the people who currently fall under the automatic statutory prohibition where identifying such a person would tend to identify the person the proceedings concern. Family and possibly close friends of the subject person still would not be able to be identified but the amendment would permit the identification anyone else appearing in guardianship proceedings whose identities do not inherently contribute to the identification of the person for whom an order is being sought. The NSWCAT could also apply the non-publication order making power prescribed by *Civil and Administrative Tribunal Act 2013* (NSW) s 64 to such proceedings where appropriate or, if ARTK's Chapter 4 recommendation is taken up, a CSNPO Act order could be made.

Jurors

All Australian jurisdictions restrain the identification of jurors. In NSW, the relevant offence includes publishing/broadcasting any matter or information likely to lead to the identification of a juror or former juror in a particular trial or inquest.[151] The only relevant exception to the automatic statutory prohibition is publication/broadcast of identifying matter/information with a former juror's consent. It is also an offence to solicit or harass a juror or former juror for information about the deliberations of a jury[152], or how a jury formed an opinion or conclusion, in relation to any issue arising at a trial/inquest and to disclose such information for a fee, gain or reward.[153] While the terminology adopted differs, the same automatic statutory restraints apply around the country and, that being the case, ARTK has no comment about this restraint.[154]

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[145] Noting that there are currently no additional classes of proceedings prescribe by the *Civil and Administrative Tribunal Regulations 2013* (NSW).

[146] *Guardianship and Administration Act 1990* (WA) Sch 1 s 12

[147] *Guardianship and Management of Property Act 1991* (ACT) and the *ACT Civil and Administrative Tribunal Act 2008 (ACT)*

[148] *Guardianship of Adults Act 2016* (NT) ss 80, 90; *Guardianship and Administration Act 2000* (NT) s 114A; and, *Guardianship and Administration Act 1995* (Tas) s 13.

[149] *Victorian Civil and Administrative Tribunal Act 1998* (Vic) Sch 1 cl 37

[150] *Guardianship and Administration Act 1993* (SA) s 81

[151] *Jury Act 1977* (NSW) s 68

[152] Which includes statements made, opinions expressed, arguments advanced or votes cast by members of the jury in the course of their deliberations.

[153] *Jury Act 1977* (NSW) s 68A

[154] *Juries Act 1967* (ACT) s 42C; *Juries Act 1962* (NT) ss 49A, 49B; *Jury Act 1995* (Qld) s 70; *Criminal Law Consolidation Act 1935* (SA) s 246; *Juries Act 2003* (Tas) ss 57, s 58; *Juries Act 2000* (Vic) ss 77, 78; and, *Juries Act 1957* (WA) ss 56C, 56D.

MHRT and *Mental Health (Forensic Provisions) Act 1990* (NSW)

It is an offence to identify a person to whom MHRT proceedings relate, who appears as a witness in any MHRT proceedings or who is mentioned or otherwise involved in any proceedings under the *Mental Health (Forensic Provisions) Act 1990* (NSW).[155] Elsewhere:

- In the ACT, a child or young person the subject of a forensic mental health order or a forensic community care order cannot be identified but there are no restraints on identifying an adult the subject of mental health proceedings; [156]
- In the NT, Tasmania and Victoria it is an offence to identify the person the subject of mental health proceedings;[157]
- Queensland prescribes an offence to publish a report of proceedings in the Mental Health Review Tribunal, an appeal from the Tribunal to the Mental Health Court or an application to the Mental Health Court to review a person's detention without leave where leave can only be given on the condition that the report does not identify the subject of the proceedings, any witness or any person mentioned or otherwise involved in the proceeding.[158] It is also an offence to identify a minor who is a party of proceeding under the Act in any judicial body without leave of the relevant judicial body;[159]
- In SA all reports of proceedings under the *Mental Health Act 2009* (SA) in the South Australian Civil and Administrative Tribunal are prohibited without authorisation by the Tribunal and even if authorisation is granted it remains an offence to identify the person to whom the proceedings relate;[160] and
- In WA, it is an offence to publish information about a proceeding under the relevant Act that identifies a party; a person who is related to or associated with a party; a witness; or, a person who is or is alleged to be concerned in any other way in a matter to which the proceeding relates. It is also an offence to publish a list of proceedings giving the names of the parties except in limited circumstances.[161]

In summary, four jurisdictions prescribe more lenient automatic statutory prohibitions than NSW but the restraints prescribed in the other three jurisdictions are more severe.

ARTK notes that paragraph 3.24 of the Paper states:

> *There is some confusion about the purpose of the prohibition and the specific information it covers. Some victims of forensic patients have felt that they cannot share their experiences without being in breach of the prohibition.*

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[155] *Mental Health Act 2007* (NSW) s 162

[156] *Criminal Code 2002* (ACT) s 712A

[157] NT, it is an offence to identify any person the subject of a review or involuntary detention application (*Mental Health and Related Services Act 1998* (NT) s 138); Tasmania, it is an offence for a person who publishes information for financial or other to publish the fact that another person is or has been a forensic or an involuntary patient; any photograph or other image of a forensic or an involuntary patient that relates to that status of the person; person's status as a forensic or an involuntary patient; any information that could reasonably be expected to identify a person as being or as having been a forensic or an involuntary patient; or, any information pertaining to a person's treatment or care as a forensic or an involuntary patient. Publication is permitted if the relevant forensic or an involuntary patient consents (*Mental Health Act 2013* (Tas) s 133); and, Victoria, the name and identity of a person who is the subject of a proceeding before the Mental Health Tribunal cannot be published without the President's written consent (*Mental Health Act 2014* (Vic) s 194).

[158] *Mental Health Act 2016* (Qld) 2016 s 790

[159] *Mental Health Act 2016* (Qld) 2016 s 791

[160] *Mental Health Act 2009* (SA) s 107

[161] *Mental Health Act 2014* (WA) s 468

As noted elsewhere in this Response, ARTK is always concerned by automatic statutory prohibitions that impede the ability of any consenting person to tell their story in their own name. Given the concern raised in the Paper, ARTK recommends that *Mental Health Act 2007* (NSW) s 162 be amended to allow for those affected by the automatic statutory prohibition to consent to be identified.

The Paper also notes at paragraph 3.17 that neither registered victims nor any other person can publish information contained in the Victims Register without the consent of the Tribunal or the court.[162] NSW appears to be the only Australian jurisdiction with a victim's register arising under mental health legislation. Given that unique status – and the fact that the automatic statutory restraint set out above would also apply to and restrain reporting of some of the information kept on the register[163] – ARTK recommend that *Mental Health (Forensic Provisions) Regulation 2017* (NSW) r 13F be repealed.

Prohibited or Disallowed Questions

As noted at paragraphs 3.40 and 3.41 of the Paper, improper or disallowed questions – and any questions the court refuses leave to ask in cross-examination about a defendant's credibility – cannot be published without a court order.[164] The ACT, NT, Tasmania and Victoria all have identical provisions;[165] WA also prohibits publication of prohibited questions but the restraint is not as broad as NSW;[166] and, neither Queensland nor SA appear to have equivalent provisions.[167] ARTK makes no submissions about this automatic statutory prohibition.

Question of Law Arising From an Acquittal For Contempt

Supreme Court Act 1970 (NSW) s 101A(8) prohibits the identification of an alleged contemnor acquitted in underlying proceedings, in relation to which a question of law has been referred to the Court of Appeal by the Attorney General. The automatic statutory prohibition does not apply if the person consents to being identified. As noted in Chapter 2, s 101A appears to be unique to NSW and ARTK has submitted that the section should be amended to allow the media to remain in the courtroom to report the proceedings even if the general public is excluded, subject to compliance with the automatic statutory prohibition.

Sexual Offences

All Australian jurisdictions prohibit the identification of sexual offence complainants.[168] The only differences between the jurisdictions are the offences to which the automatic statutory prohibition applies and the circumstances in which consent can be obtained from a complainant who wants to be identified. Given the uniformity in this area of law, ARTK makes no submissions about *Criminal Proceedings Act 1900* (NSW) s 578A.

Surrogacy

It is an offence to identify any person as being affected by a surrogacy arrangement, namely the relevant child, the birth mother, a birth mother's partner (if any), another birth parent (if any), the

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[162] *Mental Health (Forensic Provisions) Regulation 2017* (NSW) r 13F

[163] See *Mental Health (Forensic Provisions) Regulations 2017* (NSW) r 13A

[164] *Evidence Act 1995* (NSW) s 195

[165] *Evidence Act 2011* (ACT) s 195; *Evidence (National Uniform Legislation) Act 2011* (NT) s 195 ; *Evidence Act 2001* (Tas) s 195; *Evidence Act 2008* (Vic) s 195.

[166] *Evidence Act 1906* (WA) s 27

[167] *Evidence Act 1977* (Qld); *Evidence Act 1929* (SA).

[168] *Evidence (Miscellaneous Provisions) Act 1991 (ACT)* s 74; *Criminal Proceedings Act 1900* (NSW) s 578A; *Sexual Offences (Evidence and Procedure) Act* (NT) s 6; *Criminal Law (Sexual Offences) Act 1978* (Qld) s 6; *Evidence Act 1929* (SA) s 71A; *Evidence Act 2001* (Tas) s 194K; *Judicial Proceedings Reports Act 1958* (Vic) s 4; *Evidence Act 1906* (WA) ss 36A – 36C

intended parents, a party to any proceedings under the Act other than the Attorney General or a person whose consent to a surrogacy arrangement, or the making of a parentage order, is required under the Act.[169] There is a consent exception to this automatic statutory prohibition but ARTK has concerns that it is not always effective. ARTK has recommended amendments to this Act in Chapter 7.

Question 3.2 (2): What changes, if any, should be made to the current statutory prohibitions?

Each of *Bail Act 2013* (NSW) s 89, *Civil and Administrative Tribunal Act 2013* (NSW) s 65(1)(b), (2)(a) and (2)(c), *Community Services (Complaints, Review and Monitoring) Act 1993* (NSW) s 28, *Coroners Act 2009* (NSW) s 75(5), (6) and (7)(b) and 76, *Crimes (Sentencing Procedure Act) 1999* (NSW) s 100H, *Drugs and Alcohol Treatment Act 2007* (NSW) s 41 and *Mental Health (Forensic Provisions) Regulation 2017* (NSW) r 13F should be repealed; *Criminal Procedure Act 1986* (NSW) s 80 amended to allow the media to remain in proceedings closed to the general public for the purposes of reporting them; and, *Mental Health Act 2007* (NSW) s 162(2) should be amended to allow for those affected by that provision to consent to be identified.

Question 3.3: What further information, if any, should be protected by automatic statutory prohibitions on publication or disclosure?

ARTK does not support the addition of any new automatic statutory prohibitions. As the comments above demonstrate, the NSW approach is largely consistent with the rest of Australia. Any further automatic statutory prohibitions would cause NSW to become an outlier in that area of law which ARTK strongly discourages.

Question 3.4

(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
(c) when should it apply?

The Paper at paragraphs 3.59 to 3.61 points to the differences in terminology deployed by NSW's automatic statutory restraints from prohibiting publishing, printing or publishing, publishing or broadcasting, use, disclosure or suppression of information. ARTK notes the more recent restraints tend to refer to "publishing or broadcasting" which would apply to most – if not all – of the activities ARTK members engage in (as would "use" or "disclosure").

Question 3.5(1): Should the statutory prohibitions on publishing or disclosing certain information always specify the duration of the prohibition? Why or why not?

ARTK submits that if it is intended that an automatic statutory prohibition should lapse or have an exemption triggered by the passage of time the legislation should clearly state so. However, given the wide variety of proceedings such restraints apply to ARTK does not believe a one-size fits all duration can apply.

Question 3.5(2): What changes, if any, should be made to the existing duration provisions attached to statutory prohibitions on publishing or disclosing information?

[169] *Surrogacy Act 2010* (NSW) s 52

Where appropriate ARTK has addressed amendments to duration above or in the following chapters.

Question 3.5 (3): What prohibitions, if any, should include a duration provision that do not already? What should these duration provisions say?

Where appropriate ARTK has addressed amendments to duration above or in the following chapters.

Question 3.6: In what circumstances, if any, should statutory prohibitions that protect the identities of people involved in proceedings apply in appeal or other related proceedings?

ARTK does not support the extension of any existing automatic statutory prohibitions to appeal or related proceedings. The examples given at paragraphs 3.30 to 3.33 of the Paper all concern proceedings moving from a Tribunal to the Supreme Court. Should it prove necessary the court can rely both on the *Courts Non-Publication and Suppression Orders Act 2010* (NSW) and/or its inherent powers to restrain publication/broadcast of the identity of any person before it, including the people raised in the LegalAid submissions.

Question 3.7(1): Are the existing exceptions attached to statutory prohibitions on publishing or disclosing information appropriate? Why or why not?

Not always: See answer to question 3.2 above.

Question 3.7(2): What changes, if any, should be made to the existing exceptions?

As noted in the Paper at paragraph 3.8 to 3.42, where automatic statutory prohibitions do not allow for affected people to consent to be identified that should be amended.

Question 3.7(3): What prohibitions, if any, should include exceptions that do not already? What should these be?

ARTK opposes the introduction of any further automatic statutory prohibitions.

Question 3.7(4): Should standard exceptions apply to all (or most) statutory prohibitions on publishing or disclosing information? If so, what should they be and in what circumstances should they apply?

See answer to Question 3.7(2).

Question 3.7(5): Where exceptions allow a court to permit disclosure of protected information, what criteria, if any, should guide that court?

ARTK rarely seeks consent from the court to publish or broadcast information that would otherwise be restrained by an automatic statutory prohibition (although see the Robert Webber Case Study in our response to Question 7.1(1)). The main issue for ARTK members is no matter what criteria apply to the exercise of such a discretion, it remains a discretion. There is no certainty that even if an application is made that the ARTK member will succeed. For that reason, the amendments we have recommended in the various chapters of this response are preferred.

CHAPTER 4: NON-DISCLOSURE AND SUPPRESSION, DISCRETIONARY ORDERS

Preliminary Comments

In Australia today, hundreds of orders are made every year. Two jurisdictions have enacted stand-alone Acts in this area of law – Victoria and NSW – in addition to retaining the express powers in certain statutes that are discussed in this Chapter and any inherent power of the court to make such orders. ARTK also notes that *Evidence Act 1929* (SA) Part 8, Division 2 provides a high degree of clarity about the making of, and notification of, SA orders. The rest of Australia relies on statutory powers and the common law to authorise making non-publication orders.[170]

The principle difference between statutory order powers and the common law is the test applicable to determine whether an order should be made. Both the common law – and in NSW, the CSNPO Act – apply the well-established test of necessity. As noted in the Paper[171] what is "necessary" is the subject of extensive precedent and, as a result, the test is a robust one. ATRK takes the view that the necessity test should apply across the board and there should be no statutory powers to make non-publication orders which prescribe a lesser test. In practice, it is commonly the case amongst the Australian jurisdictions that a test other than necessity is used in relation to a non-publication order making power in a particular area of law.

The fact that even the Commission was unable to access data on the number of orders currently made by NSW courts is of significant concern to ARTK [172]. To assist the Commission's deliberations, these are the numbers of orders reported to the NCAELO between 2017 and 2020 in all Australian jurisdictions:

[170] ARTK uses the term non-publication order rather than suppression order when describing discretionary order making powers because the majority of NSW legislation in which they are prescribed allow a non-publication order, rather than a suppression order, to be made noting the difference between the two set out at paragraphs 4.10 to 4.12 of the Paper.

[171] At [4.60] to [4.71]. Also see Rinehart v Welker [2011] NSWCA 403 at [32] – [38]; Wilson v Basson [2020] NSWSC 512 at [9] – [20].

[172] See paragraph 4.5 of the Paper.

MASTER COUNT 2017	
ACT	0
FED/HIGH	0
NSW	181
NT	43
QLD	10
SA	179
TAS	2
VIC	444
VIC excluding VCAT	422
WA	0
TOTAL (incl all VIC orders)	**859**

MASTER COUNT 2018	
ACT	1
FED/HIGH	2
NSW	189
NT	69
QLD	18
SA	179
TAS	1
VIC	443
VIC excluding VCAT	387
WA	1
TOTAL (incl all VIC orders)	**903**

MASTER COUNT 2019	
ACT	1
FED/HIGH	8
NSW	161
NT	89
QLD	30
SA	143
TAS	6
VIC	470
VIC excluding VCAT	328
WA	5
TOTAL (incl all VIC orders)	**913**

MASTER COUNT 2020	
ACT	7
FED/HIGH	9
NSW	155
NT	54
QLD	12
SA	165
TAS	8
VIC	514
VIC excluding VCAT	350
WA	4
TOTAL (incl all VIC orders)	**928**

In relation to NSW, while our data gathering is improving, we do not believe these numbers are a complete tally of orders made in the jurisdiction and note as follows:

- The Supreme and District Courts both maintain media offices from which journalists – and occasionally their lawyers – can obtain information about non-publication or suppression orders. In addition, the Department of Communities and Justice (**DCJ**) also has a media office whose staff provide information about orders made in the Local Court and who circulate information about Coronial proceedings to an EDL;

- We believe it is likely that the above count includes all orders made in the Supreme Court or, if it does not, that there is not a substantial number missing. The Supreme Court maintains an EDL of journalists and their lawyers to whom information is sent about non-publication/suppression orders. Generally speaking, that information is usually provided on the same day as an order is made or shortly thereafter and will include who made the order, its terms, the reason the order was required and any information available about when the order terminates. For example:

SUPREME COURT EXAMPLE 1

SCO - Media (Shared Mailbox)
Mon, 14 Dec 2020 14:52
To: [Media EDL]

Hi everyone

Justice [Name Withheld], NSW Supreme Court, today made the following non-publication order in R v [Name Withheld]:

"1. Pursuant to s 7 of the Courts Suppression and Non-Publication Act 2010, on the grounds given in s 8(1)(c) and (e), order that there be no publication of Exhibit J from the proceedings R v [Name Withheld]. For clarity, it is noted that this order does not prevent publication of Exs. VD1 and VD2, being the transcripts of Ex. C (to which a separate Non-Publication Order applies) and Ex. J respectively."

For your information.
[Name & Title Withheld]
Office of the Chief Justice l Supreme Court of NSW

SUPREME COURT EXAMPLE 2

SCO - Media (Shared Mailbox)
Fri, 11 Dec 2020, 14:56
To: [Media EDL]

Hi everyone

Justice [Name Withheld], NSW Supreme Court, today made the following non-publication order in R v [Name Withheld] & [Name Withheld]:

"[Name Withheld] will be known as [Pseudonym] and that any reporting in relation to him will be in the name of [Pseudonym]."

For your information.
[Name & Title Withheld]
Office of the Chief Justice l Supreme Court of NSW

SUPREME COURT EXAMPLE 3

SCO - Media (Shared Mailbox)
Wed, [Date Withheld] 2020, 10:43
To: [Media EDL]

Hi everyone

Justice [Name Withheld], NSW Supreme Court, today made the following non-publication order in R v [Name Withheld]:

"The Court orders:

(1) Pursuant to s 7 of the Court Suppression and Non-publication Orders Act 2010 (NSW) the publication or disclosure of any information revealing or tending to reveal that [Name Withheld] has made or will make a fitness to be tried application be prohibited.
(2) Order (1) does not prevent the disclosure of any information to and between the following people:
(a) any judicial officer or employee of a Court;
(b) any legal representative of [Name Withheld];
(c) an officer or legal representative of the Commonwealth Director of Public Prosecutions or any officer or legal representative of the Commonwealth Government or any person retained on behalf of the Commonwealth Director of Public Prosecutions in relation to any application to be made including, without limitation, a psychiatrist;
(d) an officer or employee of the New South Wales Government.
(3) Order (1) shall apply:
(a) to all media including but not limited to print, radio, television, internet and social media;
(b) to all persons present in the court whether in person or electronically for the purposes of this hearing;
(c) anywhere in the Commonwealth;
(d) until further order or the completion of [Name Withheld] trial, whichever shall come first.
(4) Order (1) is made on the ground under s 8(1)(a) of the Court Suppression and Non-publication Orders Act 2010 (NSW) that the order is necessary to prevent prejudice to the proper administration of justice.'

For your information.

[Name & Title Withheld]
Office of the Chief Justice l Supreme Court of NSW

- We believe it is likely that many District Court orders are not included in the tally. The District Court does not routinely push notifications to the same EDL used by the Supreme Court[173]. For example, during Jack de Belin's November 2020 trial the only reason the NCAELO became aware that three non-publication orders had been made, and the terms of those orders, is

[173] A review of our records suggests that the last occasion the NCAELO received an email notification directly from the District Court media office was on 7 May 2020.

because they were notified to some of the journalists who were covering the proceedings by the District Court media office and the journalists forwarded the details to their lawyers. In addition, when information is received from the District Court is it usually limited to what cannot be published/broadcast and, unless it is self-evident from the facts of the case, further inquiries may need to follow to ascertain why the order was deemed necessary if any ARTK member is considering making an application to review the order. For example:

DISTRICT COURT EXAMPLE 1

From: **Media Co-ordinator**
Date: Wed, 22 Jul 2020 at 17:00
Subject: RE: [Name Withheld] and [Name Withheld]
To: [Journalist]

Hi [Journalist]

Re: [Name Withheld]

A non-publication order is in place in relation to the identity of the complainant and the enterprise in which the complainant and the accused were engaged.

The order was made on 10 Feb 2020 by a different Judge and confirmed yesterday by the presiding Judge at the request of the Crown.

Could you please ensure this order is known by your editors and any colleagues reporting on this case

Thank you,

[Name Withheld] -- DC media

DISTRICT COURT EXAMPLE 2

From: [Name Withheld]
Date: Wed, 8 Jul 2020 at 13:05
Subject: NPO made today RE: [Name Withheld] 2019/00###### 2020/000##### 2020/000#####
To: [Journalist]

Hi [Journalist],

His Honour made the following NPO this morning:

***NON PUBLICATION ORDER IN RELATION TO NAME OF COMPLAINANT [Name Withh
INCLUDING THE COMPLAINANTS INITIALS AND ANY MATERIAL THAT MAY IDENTIFY OR TO IDENTIFY THE COMPLAINANT***

STATUTORY NON PUBLICATION ORDER IN RELATION TO CHILDREN PURSUANT TO s15A CHILDREN (CRIMINAL PROCEEDINGS) ACT 1987

DISTRICT COURT EXAMPLE 3

From: [Name Withheld]
Date: Thur, 7 May 2020 at 11:54
Subject: Non-publication orders – 2018/00###### R v [Name Withheld] – NSW District Court
To: [Media EDL]

Dear All,

A non-publication order has been made today by His Honour Judge [Name Withheld] SC in the matter of R v [Name Withheld], as follows:

"I make an order that any evidence by the complainant referring to any prior sexual abuse or sexual assault or sexual misconduct is not to be published, pursuant to section 293 of the Criminal Procedure Act."

(If you received a previous version of the order referring to the Evidence Act there is a correction to the Criminal Procedure Act)

Other orders remaining in place are as follows:

"PURSUANT TO S 8 AND S 11 OF THE COURT SUPPRESSION AND NON-PUBLICATION ORDERS ACT 2010, I MAKE A NON PUBLICATION ORDER IN RELATION TO THE COMPLAINANT (KNOWN BY THE NAMES OF [Name Withheld] AND [Name Withheld]). THIS ORDER APPLIES TO THE COMMONWEALTH OF AUSTRALIA. CLOSED COURT FOR THE EVIDENCE OF THE COMPLAINANT.

Crown applies for a non-publication/support person order for witness [Name Withheld]. NOM and statement handed up. INTERIM NON PUBLICATION ORDER MADE PENDING DECISION."

Thank you

[Name Withheld]
District Court of NSW |Department of Communities & Justice

- We also believe that Local Court orders are likely to be significantly under-accounted. Journalists who suspect an order may have been made in Local Court proceedings can contact the DCJ's media office and will be provided with any details about an order that have been entered into the court computer system. They are rarely circulated via the EDL the Department maintains. For example:

LOCAL COURT EXAMPLE 1

From: Local Court Enquiries
Date: Mon, 18 Nov. 2019, 5:08 pm
Subject: RE: [Name Withheld]
To: [Journalist]

Hi [Journalist]

As discussed, please see below –

Date of Listing: 18 Nov 2019 before Magistrate [Name Withheld] at Local Court - Crime, Katoomba

Appearances:
[Name Withheld], Accused , [Name Withheld] , For/With (Solicitor)
NSW Police, Prosecuting Authority , Sgt [Name Withheld], Police Prosecutor

2019/00######-001 / Seq 1 - Actual offence - Procure child for unlawful sexual activity-T1 / ########

2019/00######-002 / Seq 2 - Actual offence - Agg indecent assault- victim under authority of offender-T1 / ########

2019/00######-003 / Seq 3 - Actual offence - Aggravated - sexually touch another person-T1 / #########

2019/00######-004 / Seq 4 - Actual offence - Aggravated - sexually touch another person-T1 / #########

2019/00######-005 / Seq 5 - Actual offence - Aggravated - sexually touch another person-T1 / ########

2019/00####-001 / Seq 1 - Actual offence - Agg indecent assault- victim under authority of offender-T1 / #########

A plea of not guilty is entered.

This matter is listed for Mention (Police) on 17 January 2020 9:30 AM before the Local Court - Crime at Penrith.
Estimated duration: 5 Minutes
Penrith matters.
DPP may elect.

Non Publication order made 18.11.19.
No identification to be permitted of alleged victims or alleged defendant.

Thank

[Name Withheld]
Department of Communities and Justice

LOCAL COURT EXAMPLE 2

From: **Local Court Enquiries**
Date: Thu, 21 Nov 2019 at 16:47
Subject: RE: Suppression order for [Name Withheld]
To: [Journalist]

It's as per the orders. Here are the outcomes from today, that confirm this –

Date of Listing: 21 Nov 2019 before Local Court Judge [Name Withheld] at Local Court - Crime, Sydney Downing Centre

Appearances:
[Name Withheld], Accused , [Name Withheld] , For/With (Solicitor)
Director of Public Prosecutions, Prosecuting Authority , [Name Withheld] , DPP

2018/00######-001 / Seq 1 - Actual offence - Murder-SI (Certified) / ########

This matter is listed for Further Mention (Committal) on 28 November 2019 9:30 AM before the Local Court - Crime at Sydney Downing Centre. Bail to Continue (Not Varied)
Estimated duration: 5 Minutes
Listed for Bail Review on 28/11/2019 before Downing Centre Local Court

This matter is listed for Arraignment on 6 December 2019 9:30 AM before the Supreme Court - Crime at Supreme Court Sydney. Bail to Continue (Not Varied)
Estimated duration: 10 Minutes

Suppression and Non Publication orders continued until further order of Supreme Court

Thanks

[Name Withheld]
Department of Communities and Justice

More information about this is provided in our response to Chapters 6 and 10.

- We believe it is likely that most, if not all, Coroners orders are included in the count. Some notifications are provided by the DCJ by email when orders are made during an inquest or inquiry. However, all of the Coroner's decisions are supplied by the DCJ to their EDL and those decisions state whether a non-publication order has been made and – sometimes – what the terms of the orders are.[174] More information about this is provided in our response to Chapters 6 and 10; and

- We only receive notice of orders made in other courts and tribunals if a journalist is either present at the time the order was made or makes inquiries with the relevant court/tribunal after the fact and notifies the NCAELO of the terms of an order upon becoming aware that one exists: if the journalist is able to obtain the terms of the order at all.

[174] Noting that on some occasions decisions are circulated with the terms of the non-publication order heavily redacted. If you would like an example, please let us know.

Taking all of the above into account, ARTK agrees with the Commission's estimate[175] that it is likely that as many as 250 orders are made in NSW each year. We also agree that there has likely been an increase in the number of orders being made over the past few years. Whether that increase is best attributed to the CSNPO Act sparking a surge in applications[176], to the steady increase in the number of criminal matters in NSW courts each year, to other factors or all three is difficult to determine.

That said, it has been the experience of ARTK members that the CSNPO Act at the very least significantly encourages parties to apply for interim orders regardless of whether they have a sound justification. Since the necessity test does not have to be met in relation to making an interim order[177], once asked for, such an order will almost always be made only for it to be revoked at the next (or a subsequent) hearing because the applicant cannot put on sufficient evidence to establish the order is necessary.

Before turning to the Commission's questions, ARTK provides the following information in relation to non-publication order making powers set out in the legislation that was referred to in Chapters 2 and 3:[178]

AVOs

While the identities of children affected by AVO proceedings are the subject of an automatic statutory prohibition, the *Crimes (Domestic and Personal) Violence Act 2007* (NSW) s 45 prescribes a non-publication order making power in relation to anyone who is 16 years of age or older and:

(a) For whose protection or against whom an AVO sought;
(b) Who appears, or is reasonably likely to appear, as a witness before a court in any AVO proceedings; or
(c) Who is, or is reasonably likely to be, mentioned or otherwise involved in any AVO proceedings.

The power is exercisable at the court's absolute discretion. The equivalent NT and Tasmanian legislation is similar[179] as is the Victorian legislation dealing with restraining orders outside the context of family violence.[180] The ACT, Queensland and SA and the Victorian family violence legislation each prescribe an automatic statutory prohibition and, consequently, do not require a non-publication order making power.[181] WA is an outlier with no express non-publication order making power and the only automatic statutory prohibition being in relation to disclosing the whereabouts of a prescribed person involved in the proceedings.[182] ARTK does not recommend that the NSW Act be amended.

Coroner

The NSW can prohibit publication of any evidence given in the proceedings or any submissions made in the proceedings concerning whether a known person may have committed an indictable offence. The threshold for an order being made is that it would be in the public interest to make it and in forming that opinion, the Coroner may take into account (without limitation) the principle

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[175] Paper at [4.5]

[176] Ibid per P Bateman, "The Rise and Rise of Suppression Orders", *Gazette of Law and Journalism* (14 March 2013).

[177] CSNPO Act s 10

[178] As was the case with previous Chapters, ARTK makes no comments about the non-publication/suppression order making powers in the following policing legislation: *Law Enforcement (Controlled Operations) Act (NSW)* s 28; *Terrorism (Police Powers) Act 2002* (NSW) s 26P; *Witness Protection Act 1995* (NSW) s 26.

[179] *Domestic and Family Violence Act 2007* (NT) s123; and, *Family Violence Act 2004* (Tas) s 32.

[180] *Personal Safety Intervention Orders Act 2010* (Vic) s 123, although noting the *Open Court Act 2013* (Vic) would also apply and allow a non-publication order to be made in relation to adults affected by proceedings under this Act.

[181] *Family Violence Act 2016* (ACT) s 149; *Domestic and Family Violence Protection 2012* (Qld) ss 158, 159; *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 33; and *Family Violence Protection Act 2008* (Vic) s 166.

[182] *Restraining Orders Act 1997* (WA)

that coronial proceedings should generally be open to the public; where an order pertains to a witness, the likelihood that the witnesses evidence might be influenced by other evidence given in the proceedings if the witness is present when that other evidence is given; national security; or the personal security of the public or any person.[183] Elsewhere, the basis for the Coroners of other Australian jurisdictions to make a non-publication order varies widely but only Victoria imposes a necessity test.[184]

ARTK submits that *Coroners Act 2009* (NSW) s 74 should be repealed and a Courts Suppression and Non-publication Orders Regulation be prescribed[185] that states that for the purposes of *Courts Suppression and Non-Publication Orders Act 2010* (NSW) s 3, "court" includes "any person appointed pursuant to Chapter 2, and who is conducting a hearing contemplated by Chapter 6, of the *Coroners Act 2009* (NSW)".

Drugs and Alcohol Treatment

As noted in Chapter 2, a Magistrate may close a court when considering an application to review or extend a dependency certificate pursuant to which a person is involuntarily detained in a treatment centre. The Magistrate is also empowered to prohibit or restrict the publication/broadcasting of any report of the proceedings, evidence given in the proceedings or matters contained in documents that have been filed or tendered, if such an order is desirable to make for the welfare of the dependent person or for any other reason, on the motion of any person appearing in the proceedings or on the Magistrate's own motion.[186]

Neither the ACT nor the NT appear to have current legislation compelling drugs/alcohol treatment (although there is a power in *Volatile Substances Abuse Prevention Act 2005* (NT) s 59 to prohibit publication of the whole or any part of the proceedings, and the name and address of any witness, if the proceedings are in respect of an offence under *Volatile Substances Abuse Prevention Act 2005* (NT) ss 52 (unlawful supply of volatile substances) or 53 (contravention of a management plan). The court can only make such a prohibition order after having regard to the safety of any person; the extent to which the detection of offences of a similar nature may be affected; and, the need to guarantee the confidentiality of information given by an informer.

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[183] *Coroners Act 2009* (NSW) s 74

[184] *Coroners Act 1997* (ACT) s 40, the Coroner may prohibit or restrict the publication or disclosure of evidence if it is desirable in the public interest or in the interests of justice; *Coroners Act 1993* (NT) s 43 and *Coroners Act 1995* (Tas) s 57, a Coroner must order that a report of an inquest, or part thereof, or of evidence given at an inquest, not be published if the coroner reasonably believes publication would be likely to prejudice a person's fair trial; be contrary to the administration of justice, national security or personal security; or, involve the disclosure of details of sensitive personal matters including, where the senior next of kin of the deceased have so requested, the name of the deceased; *Coroners Act 2003* (Qld) s 41, the Coroner may make an order prohibit the publication of information relating to, or arising at, an inquest or pre-inquest conference. While the examples suggest the power could be exercised where the evidence indicates a deceased person's death was, or may possibly have been, self-inflicted or would tend to incriminate the witness, it is an absolute power with no nominated threshold; *Coroners Act 2003* (SA), s 19, SA Coroner may exercise the suppression powers in Part 8 of the *Evidence Act 1929* (SA) if he or she considers it desirable to do so in the interests of national security but has no other non-publication order making power; *Open Courts Act 2013* (Vic), s 30, the Victorian Coroner can prohibit or restrict publication of a report of whole or any part of a proceedings or any information derived from a proceeding (*Open Courts Act 2010* (Vic) s 17) if the Coroner reasonably believes the order is necessary because disclosure would be likely to prejudice the fair trial of a person or be contrary to the public interest (*Open Courts Act 2010* (Vic) s 18); and, *Coroners Act 1996* (WA) s 49, the Coroner must order that there be no report of an inquest, or part thereof, or of any evidence given at an inquest is the Coroner reasonably believes publication would be likely to prejudice the fair trial of a person or be contrary to the public interest.

[185] Pursuant to CSNPO Act s 18

[186] *Drug and Alcohol Treatment Act 2007* (NSW) s 37

There are no relevant provisions in Part 8A of the *Penalties and Sentences Act 1992* (Qld), the *Controlled Substances Act 1984* (SA), *Alcohol and Drug Dependency Act 1968* (Tas) or the *Alcohol and Other Drugs Act 1974* (WA). NSW is an outlier in this area of law. ARTK consequently recommend

Interstate Courts Taking Evidence in NSW

As discussed in Chapter 2, a recognised court may take evidence in NSW by means of audio or audio-visual links. In doing so, the recognised court may prohibit or restrict the publication of evidence given in the proceeding or of the name of a party to or witness in the proceeding, in its absolute discretion.[187] As the same power applies in each other Australian jurisdiction ARTK does not cavil with this non-publication making order power.[188]

NSWCAT

The NSWCAT can prohibit or restrict disclosure of the identity of party to or witness in Tribunal proceedings, the publication/ broadcast of any report of proceedings in the Tribunal, publication of evidence given before the Tribunal or of matters contained in documents that have been filed or tendered. Such orders may be made if the NSWCAT is satisfied that it is desirable to do so by reason of the confidential nature of any evidence or matter or for any other reason.[189]

"Desirable to do so" is a much less robust test than necessity.[190] SA's legislation[191] is substantially similar to NSW but in the other equivalent Acts:

- The ACTCAT can prohibit publication of evidence or matters contained in documents that have been filed or tendered if is satisfied that the relevant material should be kept private to protect morals, public order or national security in a democratic society; the parties privacy; or, is privacy is strictly necessary in special circumstances of the application, because publicity would otherwise prejudice the interests of justice;[192]
- The NTCAT can restrain publication of the name and address of a witness or prohibit or restrict the publication of evidence given before the Tribunal. There is a necessity test but the grounds of necessity include for any other reason;[193]
- The QCAT can prohibit publication of the contents of a document or other thing produced to the Tribunal, evidence or information that may enable witnesses or people affected by the proceedings to be identified. It applies a stricter necessity test than NT: an order can only be made if it is necessary to avoid interfering with the proper administration of justice; to avoid endangering the physical or mental health or safety of a person; to avoid offending public decency or morality; to avoid the publication of confidential information or information whose publication would be contrary to the public interest; or, for any other reason in the interests of justice;[194]

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[187] *Evidence (Audio and Audio-Visual Links) Act 1998* (NSW) s 15

[188] *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 25; *Evidence Act 1939* (NT) s 49X; *Evidence Act 1977* (Qld) s 39J; *Evidence Act 1929* (SA) s 59IK; *Evidence (Audio and Audio-Visual Links) Act 1999* (Tas) s 14; and, *Evidence Act 1906* (WA) s 125 noting that the *Open Courts Act 2013* (Vic) would also apply in Victoria.

[189] *Civil and Administrative Tribunal Act 2013* (NSW) s 64

[190] For example, see CYL v YZA [2017] NSWCATAP 105 at [101] – [102]

[191] The SACAT can prohibit publication of a witness's name and address, any evidence given before the Tribunal or of the contents of any document produced to the Tribunal. Such an order must be "desirable" due to the interests of justice; due to the confidential nature of the evidence to be given before the Tribunal; in order to expedite the Tribunal proceedings; or for any other reason that the Tribunal thinks sufficient: *South Australian Civil and Administrative Tribunal Act 2013* (SA) s 60.

[192] *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 39

[193] *Northern Territory Civil and Administrative Tribunal Act 2014* (NT) s 62

[194] *Queensland Civil and Administrative Tribunal 2009* (Qld) s 66

- VCAT can prohibit or restrict publication of a report of whole or any part of a proceedings or any information derived from a proceeding. A necessity test applies requiring that an order be necessary:
    (a) to prevent a real and substantial risk of prejudice to the proper administration of justice that cannot be prevented by other reasonably available means;
    (b) to prevent prejudice to the interests of the Commonwealth or a State or Territory in relation to national or international security;
    (c) to protect the safety of any person;
    (d) to avoid causing undue distress or embarrassment to a complainant or witness in any criminal proceeding involving a sexual offence or a family violence offence;
    (e) to avoid causing undue distress or embarrassment to a child who is a witness in any criminal proceeding;
    (f) to avoid the publication of confidential information or information the subject of a certificate under *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ss 53 or 54; or
    (g) for any other reason in the interests of justice;[195] and
- The SAT in WA can prohibit publication of evidence given before the Tribunal, the contents of any documents produced to the Tribunal and any information that might enable a person who has appeared before the Tribunal to be identified. The power can be exercised if it is necessary to avoid endangering the national or international security of WA or Australia; to avoid damaging inter-governmental relations; to avoid prejudicing the administration of justice; to avoid endangering the physical or mental health or safety of any person; to avoid offending public decency or morality; to avoid endangering property; to avoid the publication of confidential information or information the publication of which would be contrary to the public interest; or for any other reason in the interests of justice.[196]

In summary, four jurisdictions prescribe a necessity test of various kinds and four do not.

There is nothing in the Explanatory Memorandum[197] or the Second Reading Speech for the Act which inserted *Civil and Administrative Tribunal Act 2013* (NSW) s 64 which explains why a desirability test was adopted.[198] However, ARTK submits it is worth noting the following passages from the Second Reading Speech:

> *The Government is establishing the NSW Civil and Administrative Tribunal to provide the citizens of this State with a cost-effective, informal and efficient forum for resolving disputes and other matters. While the legislation gives the president of the NSW Civil and Administrative Tribunal flexibility to run the tribunal's day-to-day business, the legislation also gives clear guidance to the tribunal regarding the need to deliver fast and effective services to its users…. The guiding principle requires the tribunal, and any person appearing before it, to facilitate the just, quick and cheap resolution of the real issues in proceedings. The guiding principle also requires the tribunal to ensure that the cost of proceedings remains proportionate to the importance and complexity of the matter that is in dispute….*

[195] *Open Courts Act 2010* (Vic) ss 17, 18

[196] *State Administrative Tribunal Act 2004* (WA), s 62

[197] https://www.parliament.nsw.gov.au/bill/files/1476/XN%20Civil%20and%20Admin%20Tribunal.pdf

[198] *Civil and Administrative Tribunal Amendment Act 2013* (NSW)

> *The NSW Civil and Administrative Tribunal represents a new era of accessible justice in this State. It is part of the Government's broader commitment to improving public services for the people of New South Wales. The NSW Civil and Administrative Tribunal will simplify the complexity of the existing tribunal system, providing the citizens of this State with a one-stop shop for almost all tribunal services for the first time. The NSW Civil and Administrative Tribunal is a unique opportunity to improve the way that tribunal services are delivered in this State. It is an opportunity to identify centres of excellence within our tribunal network and to expand them. It is also an opportunity to raise community awareness and confidence in our tribunal system. Most of all, the NSW Civil and Administrative Tribunal is an opportunity to make sure that the people of New South Wales receive the benefit of a consistent and coordinated approach to the delivery of tribunal.*[199]

ARTK submits there is nothing about replacing the current desirability test with the necessity test that would impede any of the outcomes stated above. What it would achieve, however, would be to make proceedings in the NSWCAT significantly more transparent and accountable by raising the bar on when a non-publication order can be granted. Therefore ARTK submits that *Civil and Administrative Tribunal Act 2013* (NSW) s 64 should be repealed and a Courts Suppression and Non-publication Orders Regulation be prescribed that states that for the purposes of CSNPO Act s 3, "court" includes the NSWCAT.

MHRT

The MHRT may prohibit or restrict the publication/broadcasting of any report of the Tribunal's proceedings, evidence given before it and matters contained in documents that have been filed or tendered. Before doing so the MHRT must be satisfied such an order is desirable to make for the welfare of a person who has a matter before the Tribunal or for any other reason, on the motion of any person appearing in the proceedings or on the Magistrate's own motion.[200] Elsewhere, none of the NT, Queensland, SA, Victorian or WA equivalent legislation includes a non-publication order making power because each of those jurisdictions has prescribed closed proceedings with either an automatic statutory prohibition on identifying certain people connected with the proceedings or a bar on any reporting of the proceedings.[201] There is no non-publication order making power in the *Mental Health Act 2015* (ACT)[202] and *Mental Health Act 2013* (Tas) Sch 4, cl 11 prescribes closed proceedings.[203] As noted in Chapter 2, given NSW has clearly taken a more progressive view than other jurisdictions in relation to this area of law, ARTK has no comment to make.

Protected Confidences and Protected Identity Information

The meanings of a protected confidences and protected identity information are discussed in Chapter

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[199] https://www.parliament.nsw.gov.au/bill/files/1476/2R%20Civil%20and%20Admin.pdf

[200] *Mental Health Act 2007* (NSW) s 151

[201] *Mental Health and Related Services Act 1998* (NT), *Mental Health Act 2016* (Qld), Mental Health Act 2014 (Vic) or the *Mental Health Act 2014* (WA) all allow for closed proceedings and include an automatic statutory prohibition on identifying certain people (see references in Chapters 2 and 3); and, *Mental Health Act 2009* (SA) s 107 prescribes a complete ban on reports of proceedings under the Act.

[202] Although the *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 39 would apply and that allows the Tribunal can make directions prohibiting or restricting the publication of evidence given at a hearing or of matters contained in documents that have been filed or tendered and directions if is satisfied that the relevant material should be kept private to protect morals, public order or national security in a democratic society; because the interest of the private lives of the parties require the privacy; or, to the extent privacy is strictly necessary, in special circumstances of the application, because publicity would otherwise prejudice the interests of justice.

[203] Noting that if the President of the Tribunal does publish a report it must suppress information that could reasonably be expected to disclose the identity of any patient or former patient and may suppress any other information that could reasonably be expected to prejudicially identify any other person.

2. Where either will be disclosed during evidence, the court may make whatever orders suppressing publication of all or any part of the evidence as are necessary in its opinion to protect the safety and welfare of the protected confider and to limit the possible harm, or extent of harm, the disclosure would likely cause.[204] Elsewhere, ACT, Tasmania, the NT and WA also allows an order to be made where it is necessary to protect the safety and welfare of at least a confider.[205] Given that degree of similarity – and the fact that the necessity test is already part of this legislation – ARTK makes no further comment.

Receivers (Appointment of)

In addition to the closure powers discussed in Chapter 2, when considering the appointment of a receiver to a conveyancer, property or stock licensee the Supreme Court may, on its own motion or on the motion of a party, prohibit publication of any report relating to the evidence, any part of the proceedings or any order made on the hearing.[206] The only similar interstate provision is *Conveyancers Act 2006* (Vic) s 113 which also allows the Supreme Court, on its own motion or on the motion of a party, to make an order prohibiting publication of any report relating to the evidence, or of any order made, on the hearing of an application under the relevant Division of the Act.[207]

Given NSW is an outlier, ARTK recommends that *Conveyancers Licensing Act 2003* (NSW) s 107 and *Property and Stock Agents Act 2002* (NSW) s 140 be repealed leaving the CSNPO Act to do its work.

Royal Commissions

A NSW Royal Commission may give directions preventing or restricting the publication of evidence or information given, or of matters in documents produced, to or before the Commission at the Commissioner absolute discretion.[208] In the ACT, Queensland, SA, Tasmania and WA, Commissioners

[204] *Evidence Act 1995* (NSW) s 126E

[205] ACT and Tasmania are substantially similar to NSW (*Evidence Act 2011* (ACT) s126E and *Evidence Act 2001* (Tas) s 126E); in Queensland, the order making power is limited to protected counselling information in sexual assault case in which the court may make any order appropriate to limit the harm to the confider (*Evidence Act 1977* (Qld) s 14N); SA doesn't need a primary order making power because it prescribes a closed court with no public access to transcript of proceedings. However, if the discretionary power of the court is exercised to allow a party to adduce evidence a protected communication, the court may also make ancillary orders to prevent further publication or dissemination of the evidence at its absolute discretion (*Evidence Act 1929* (SA) s 67F); an NT court may make an order suppressing publication of all or part of the evidence of a confidential communication if it is necessary in the opinion of the court to protect the safety and welfare of the victim, the counsellor or any other person who was a party to the confidential communication (*Evidence Act 1939* (NT) s 56G); and, WA is substantially similar to the NT with its courts empowered to make any orders relating to the suppression of publication of all or part of the evidence given before the court that, in its opinion, are necessary to protect the safety and welfare of any protected person (*Evidence Act 1906* (WA) s 19J).

[206] *Conveyancers Licensing Act 2003* (NSW) s 107; *Property and Stock Agents Act 2002* (NSW) s 140.

[207] Taking into account *Agents Act 2003* (ACT); *Agents Licensing Act 1979* (NT); *Agents Financial Administration Act 2014* (Qld); *Conveyancers Act 1994* (SA); *Land Agents Act 1994* (SA); *Land and Business (Sale and Conveyancing) Act 1994* (SA); *Conveyancing Act 2004* (Tas); *Property Agents and Land Transactions Act 2016* (Tas); *Estate Agents Act 1980* (Vic); *Real Estate and Business Agents Act 1978* WA); and, *Settlement Agents Act 1981* (WA).

[208] *Royal Commissions Act 1923* (NSW) s 12B

have similarly broad powers[209] while the NT does not have an equivalent Act.[210] Victoria prescribes a series of thresholds, one of which must be met before its non-publication making order can be exercised, but these include the power to make a non-publication order if "the commissioner otherwise considers the prohibition or restriction appropriate".[211] Given NSW is in the majority, ARTK make no submissions about this non-publication order making power.

TRAP

A TRAP the powers prescribed by Part 2, Div 1 of the *Royal Commissions Act 1923* (NSW). The division includes the power to give directions preventing or restricting the publication of evidence or information given, or of matters in documents produced, to or before the Panel at its absolute discretion.[212] There are no equivalent provisions in the ACT, NT, Queensland, SA or Tasmania.[213] Victoria does not expressly prescribe a non-publication order making power but does grant the Racing Tribunal the power to give directions at any time and do whatever is necessary for the expeditious, fair hearing and determination of a proceeding: a power that is arguably sufficiently broad to allow a non-publication order to be made.[214] A member of the WA Racing Penalties Appeals Tribunal can direct that any evidence or reports about any documents, exhibits or other things produced to Tribunal not be published.[215]

Given there are so few restraints in this area of law ARTK submits that *Thoroughbred Racing Act 1996* (NSW) s 43 be repealed and a Courts Suppression and Non-publication Orders Regulation be prescribed that states that for the purposes of CSNPO Act s 3, "court" includes "an Appeal Panel appointed, and conducting an appeal, pursuant to *Thoroughbred Racing Act 1996* (NSW) Part 4".

In summary, ARTK submits that:

- Each of *Civil and Administrative Tribunal Act 2013* (NSW) s 64, *Conveyancers Licensing Act 2003* (NSW) s 107(2), *Coroners Act 2009* (NSW) s 74, *Drug and Alcohol Treatment Act 2007* (NSW) s

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[209] ACT, Commissioner may give directions prohibiting or restricting the publication of evidence given at a hearing (whether in public or private) or of matters contained in documents lodged with, or received in evidence by, the commission (*Royal Commission Act 1991* (ACT) s 28); Queensland, a commission may order that any evidence given before it, or the contents of any book, document, writing or record produced at the inquiry, shall not be published (*Commissions of Inquiry Act 1950* (Qld) s 16); SA, a Commission may forbid publication of specified evidence, or any part thereof, either absolutely or subject to conditions determined by the commission or forbid the publication of the name of a witness, person alluded to during the inquiry and any other material tending to identify any such witness or person (*Royal Commissions Act 1917* (SA) s 16A);Tasmania, a Commission may prohibit or restrict the public reporting of a hearing or any evidence taken or received by it if it is satisfied that the public interest in the reporting is outweighed by any other consideration, including public security, privacy of personal or financial affairs or the right of any person to a fair trial (*Commissions of Inquiry 1995* (Tas) s 14); and, in WA it is an offence to publish a written record or transcript of Commission proceedings or evidence which the Commission has directed not to be published or any documents, books or writings produced to or obtained by the Commission which the Commission has directed not to be published (*Royal Commissions Act 1968* (WA) s 19B).

[210] See *Inquiries Act 1945* (NT)

[211] *Inquiries Act 2014* (Vic) s 26 authorises a Commissioner to prohibit or restricting publication of the identity of witnesses or any information or evidence given to the Commission for the purposes of an inquiry. Such an order may be made if: (a) prejudice or hardship might be caused to any person, including harm to their safety or reputation; (b) the nature and subject matter of the information is sensitive; (c) legal proceedings could be prejudiced; (d) the conduct of the proceeding would be more efficient and effective; or (e) the Commissioner otherwise considers the prohibition or restriction appropriate.

[212] *Thoroughbred Racing Act 1996* (NSW) s 43

[213] *Racing Act 1999* (ACT); *Racing and Betting Act 1983* (NT); *Racing Integrity Act 2016* (Qld); *Racing Act 2002* (Qld); *Racing Act 1976* (SA); and, *Racing Regulation Act 2004* (Tas).

[214] *Racing Act 1958* (Vic) s 50W

[215] *Racing Penalties (Appeals) 1990* (WA) s 17

37*, Property and Stock Agents Act 2002* (NSW) s 140(2) and *Thoroughbred Racing Act 1996* (NSW) s 43 be repealed; and

- A Courts Suppression and Non-publication Orders Regulation be prescribed[216] that states that for the purposes of CSNPO Act s 3, "court" includes:
  (a) Any person appointed pursuant to Chapter 2, and who is conducting a hearing contemplated by Chapter 6, of the *Coroners Act 2009* (NSW);
  (b) The NSWCAT; and
  (c) An Appeal Panel appointed under, and conducting an appeal pursuant to, *Thoroughbred Racing Act 1996* (NSW) Part 4.

Question 4.1(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?

Yes. ARTK takes no issue with the current definitions. What is of concern is the fact that the two types of order are often conflated when, in fact, they have differing effects. It is not uncommon for court staff and even the occasional lawyer to inform a journalist that a "suppression order" has been made when, once the terms of the order are ascertained, it is quite plain that the order is a non-publication order. For an example, see the correspondence in the answer to Question 4.5(1) below.

Question 4.1(2): What changes, if any, should be made to these definitions?

See answer above.

Question 4.1(3): What other statutes should these definitions (with or without amendment) apply to?

None. ARTK recommends the amendments outlined above, none of which require the distinction to be inserted into any Act.

Question 4.1(4): What other changes (if any) should be made to these statutes in relation to the types of action an order may prevent?

None.

Question 4.2(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?

Yes. ARTK's recommendations above are directed at whether a particular order making power should be repealed or not. We do not recommend any alterations to the types of information that may be the subject of any order.

Question 4.2(2): What changes, if any, should be made to these provisions?

See answer above.

Question 4.3: 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?

The ability to circumvent a non-publication order with consent would unquestionably save ARTK members significant sums in legal fees. However, we approach this question with some unease because the examples

[216] Pursuant CSNPO Act s 18

stated in the Paper at paragraph 4.17 of consent given by a victim of a sexual or family violence offence who wishes to speak publicly about their experience are, respectfully, not on point. An order prohibiting the identification of a complainant in a prescribed sexual offence case cannot meet the necessity test because the automatic statutory prohibition in *Crimes Act 1900* (NSW) s 578A already covers the field.[217] That provision also already allows any complainant to give consent to be identified provided he or she is over 14 years of age. It is also unusual in ARTK's experience for an order to be made restraining the identification of a family violence victim. In that context the accused always knows the complainant well and vice versa so such an order cannot be made on the basis that it is required to protect safety of the complainant (although an order restraining publication of the complainant's whereabouts would meet the necessity test).[218]

More generally if the person whose identity is the subject of a non-publication order consents to being identified and that identification would not identify any other person the subject of the order then the order cannot be necessary and should be revoked on that basis. Obtaining the support of the person whose identity is protected by a non-publication order is one of the first steps an ARTK member seeking to have an order reviewed would take (in fact, there is almost no point bringing a review application if the protected person is not on board). While sceptical, ARTK is happy to entertain this suggestion.

Question 4.4(1): Are the existing provisions relating to the scope of suppression and non-publication orders appropriate? Why or why not?

No. The proceedings brought against various media entities by the Victorian Director of Public Prosecutions in relation to publications made in relation to the trial of Cardinal George Pell have clearly shown that non-publication orders made in such high-profile cases don't work. On the day the verdict was announced in his trial at first instance, internet users could locate the outcome with ease on websites accessible in Australia but published overseas. The Australian media could not publish due to the effect of the non-publication order but the rest of the world could. ARTK submits the same issue would have arisen if the trial had been held in NSW. ARTK urges the Commission to consider amending the CSNPO Act such that in such circumstances described the CSNPO Act should provide that orders expire automatically.

Question 4.4(2): What changes, if any, should be made to existing provisions in relation to:

(a) the exceptions and conditions that apply

Non-publication orders cannot prohibit publication of more than is "reasonably necessary to achieve the due administration of justice, based on the material before the court".[219] ARTK supports any amendment of the CSNPO Act that makes this clearer. ARTK also supports an amendment to legislate the effect of R v Qaumi (No 8) [2016] NSWSC 1730 at [31], namely that orders should never apply retrospectively to media outlets that have already published the restricted information. That requires a take-down order which ARTK submits is materially different from a non-publication order.[220]

In conjunction with this latter point, ARTK also notes that unless the CSNPO Act is amended to address single publication rule, the forthcoming amendments to the uniform defamation acts will result in inconsistencies between defamation and non-publication/suppression law. As the Commission is no doubt aware, the *Defamation Amendment Bill 2020* (NSW) will introduce single publication rule by inserting a new s 14C into the *Defamation Act 2005* (NSW) which, because it is limited to defamation proceedings, will not affect non-publication order law. As the Commission is also doubtlessly aware, the current multiple publication rule applicable in Australia to all forms of internet publication (including non-publication orders) comes from Dow

[217] R v AB (No 1) [2018] NSWCCA 113

[218] CSNPO Act s 8(1)(c)

[219] Wilson v Besson at [12] citing HT v R (2019) 374 ALR 216; [2019] HCA 40

[220] Also see AW v R [2016] NSWCCA 227

Jones & Co Inc v Gutnick (2002) 210 CLR 575; [2002] HCA 56 which was a claim brought in defamation. ARTK submits there is significant public interest in the two areas of law remaining consistent and that single publication rule should also be introduced into the CSNPO Act.

(b) the geographic limits of such orders

See answer to Question 4.4(1). Other than that issue, ARTK notes that the geographic limits of an order in today's publishing/broadcasting environment is largely a moot point since all of our members publish on the internet and, hence, in each Australian jurisdiction.

(c) the duration of such orders

Orders lacking an expiry date or event are an endless source of frustration to ARTK members. It is not enough to simply order that a non-publication order apply "until further order" because once matters conclude that further order will never come. That said, ARTK accepts that there is no utility in assigning an arbitrary time in the future when all orders made in proceedings of a particular kind will expire.[221] While not meaning to be unduly cynical, ARTK submits that if an automatic time of expiry is legislated it is highly likely it will simply be relied upon without proper consideration being given to whether the facts of the particular case mean an order ceases to become necessary before the sunset. ARTK submits that:

(i) CSNPO Act s 12 should be amended to provide that any order that does not indicate when it expires – or applies for more than 5 years – is invalid and has no effect; and

(ii) As noted above, CSNPO Act s 12 should also be amended to provide that an order, or part thereof, automatically expires if the material the subject of an order is communicated in a manner downloadable in Australia by overseas news media organisations.

(d) any other aspects of the scope of such orders?

ARTK has nothing further to add.

Question 4.5(1): Are the existing procedures (under the *Court Suppression and Non-publication Orders Act 2010* (NSW), or any other statute) for making suppression and non-publication orders adequate? Why or why not?

No. This question raises one of ARTK's most significant concerns about non-publication orders. It is a common experience upon inquiring about the circumstances in which a non-publication order was made for an ARTK member to find there is no information on a court file evidencing or explaining how the necessity test was met. It is also not uncommon to be told that the parties to the proceedings agreed on an order and it was subsequently rubber-stamped by the bench (the police/DPP generally either do not consent to, nor oppose, non-publication order applications and rarely actively oppose an order being made).[222]

As stated above, some 250 orders are being made in NSW every year. ARTK estimates that in 2020, our members appeared in no more than 40 proceedings to object to orders being made (if that). As objections to orders are almost always left to our members, up to 210 incursions on open justice occurred in the last calendar year without a proper contradictor being present. We submit that it is unlikely that the necessity test was properly raised and measured in many or all of those cases. We also submit that it is not the role of the media to be 'relied upon' to take the role of contradictor in each and every circumstance. To do so is to misunderstand the role of – and resources available to – the media.

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[221] See Paper at [4.32]

[222] We are particularly unsure of orders made in the Local Court where the Magistrate may have little to no prior experience with the requirements of the CSNPO Act.

ARTK submits:

(a) The court should not be permitted to make an order on its own initiative

Where there is national uniformity across statutes other than the CSNPO Act which allow for non-publication orders to be made, ARTK cannot cavil with the court being able to make an order on its own motion. Otherwise, as stated above, necessity must be established by evidence either by way of affidavit or affidavit together with sworn testimony. The parties to the proceedings are the most across the available evidence and are best placed to determine whether a non-publication order should be sought. Further – and with the greatest of respect to NSW justices, judges and magistrate – an order moving from the bench without hearing submissions in opposition cannot test necessity as it should as there is no contradictor present. ARTK submits that the CSNOP Act s 9(1) should be amended to remove the ability of the court to make an order "on its own initiative".

(b) An order should not be entertained unless prior notice is given via the court's EDL to parties who may oppose the order

Unfortunately, very little has changed since 2014 when Ms Mullins (now Ms Alick) wrote her article about the state of non-publication orders in NSW.[223] Our members rarely exercise the right to appear and be heard and we almost never receive notice about an order being sought until after it has been made. While ARTK submits that we should receive advance notice, for the sake of completeness – and because an increase in opposition to order applications is likely to be raised as a concern against such an amendment being made – we add that receiving advance notice may not significantly alter the number of matters in which we appear because:

(i) As a matter of economics ARTK members cannot afford to appear at every application. Our members are not going to intervene where it is plain to them that their resources are better spent elsewhere because evidence that will be tendered in the case clearly meets the necessity test; and

(ii) As noted above, the only comparable legislation to the CSNPO Act is the *Open Courts Act 2013* (Vic). Section 10 of that Act generally requires 3 business days advance notice to be given of an application for a non-publication order. However, it also allows a court/tribunal to hear an application on shorter notice, or no notice at all, if there was a good reason for the notice period being truncated or ignored or it is in the interests of justice to hear the application without notice being given. In addition, as noted in the Paper[224] the court/tribunal is only required to take reasonable steps to notify the media of an application upon receiving notice.[225]

(c) The CSNPO Act should be amended to make it clear that both the court and parties to proceedings in which an order are required to cooperate with anyone having standing to oppose an order and provide on request the terms of the order being sought and all documentary evidence and any submissions that have been, or will be, submitted in support of the order being made

It may seem counterintuitive to the Commission that NSW Registries would decline to give a copy of an order to a journalist who is seeking to comply with it. In practice, one journalist who asked a regional registry for an order told us, "they won't give me it and look at me like I'm stupid when I ask for it. Every day there's a new rule depending on who's working and we just have to roll with it". If the court is required to provide notice of all orders made in NSW as soon as practicable after an order has been made, the problem described here would cease to be a

[223] Paper at [4.43], L Mullins, "Open Justice Versus Suppression Orders: A Battle of Attrition" (2014) 33(3) *Communications Law Bulletin* 7, 8.

[224] At [4.45]

[225] Open Court Act 2013 (Vic) s 11

problem. Consequently, ARTK recommends that *Evidence Act 1929* (SA) ss 69A (8) – (13) or similar provisions be inserted into the CSNPO Act.

The second hurdle, after the terms of an order have been obtained, is identifying the parties' legal representatives. The records kept by the court often do not include this information or where there is a reference to the lawyers/barristers it may not be complete or correct. Determining who "Mr Crown" is can be difficult and time consuming. Once the acting lawyer has been identified, it is not uncommon for ARTK members to either be ignored if we write indicating our intention to appear or for the parties to refuse to provide information about an order or why it was sought. For example, see the chain of email correspondence below, keeping in mind that the lawyer in this case has mistaken a non-publication order for a suppression order:

From: Marlia Saunders
Sent: Tuesday, 27 October 2020 2:30 PM
To: [Name Withheld]
Subject: Application for non-publication order

Dear [Name Withheld]

I act for Nationwide News Pty Limited, publisher of The Daily Telegraph and News Local newspapers.

My clients understand that you are acting for a client charged with child sex offences and has applied for a non-publication order. My clients may wish to be heard on the application, which I understand is listed before Magistrate [Withheld] in [Withheld] Local Court next Tuesday 3 November.

Can you please provide me with your client's application and supporting evidence, so that my clients can consider their position?

Kind regards
MARLIA SAUNDERS
Senior Litigation Counsel

From: [Name Withheld]
Sent: Tuesday, 27 October 2020 2:33 PM
To: Marlia Saunders
Subject: FW: Application for non-publication order
Importance: High

Dear Marlia,

I am involved in one matter in which there is an interim suppression order.

As such, it would be a breach of the court order to provide anyone with a copy of any documents which identified my client or members of his family.

With kind regards
[Name Withheld]

From: Marlia Saunders
Sent: Wednesday, 28 October 2020 11:35 AM
To: [Name Withheld]
Subject: Re: Application for non-publication order

Dear [Name Withheld]

With respect, your interpretation of the law is incorrect.

My clients are parties entitled to appear and be heard in respect of the application for a non-publication order.

In a separate matter I am currently involved in where a defendant charged with aggravated sexual assault has sought a non-publication order, the court papers were served on the media parties despite the fact an interim order has been made.

Of course, my clients could not publish anything in the court papers, but it enables them to consider whether or not they wish to be heard on the application.

I request that you reconsider your position and provide me with your client's application and supporting evidence, failing which I reserve the right to provide this correspondence to the court next Tuesday in support of an application for an adjournment.

Kind regards

MARLIA SAUNDERS
Senior Litigation Counsel

From: [Name Withheld]
Date: Thu, 29 Oct 2020 at 11:19
Subject: RE: Application for non-publication order
To: Marlia Saunders

Dear Ms Saunders,

Have you asked the police or the court for a copy of the documents?
If you have, then would you please advise me of their response.
If you have not, would you please advise why you have not sought the documents from them?

You advised that in another matter, documents were served on you despite a non-publication order.
That may amount to a contempt issue.

Would you please advise who will be appearing at court next week.
Then I can communicate with them directly.

With kind regards
[Name Withheld]
Liability limited by a scheme approved under Professional Standards Legislation

Once engaged in a matter, ARTK members are just as bound by the Harman undertaking as any other party. It would be a powerful reminder to all parties of their duties if legal practitioners and officers are reminded in the CSNPO Act of their paramount duty to the administration of the court and the interests of justice enshrined in the *Legal Professional Uniform Law Australian Solicitors Conduct Rules 2015* r 3 and best served in cases such as these by prompt and frank conferral.

(d) ARTK neither supports nor opposes open standing

We remain neutral as to this point because ARTK suspects that even if CSNPO Act s 9(2) were amended to allow for open standing it is likely that our members would remain the most common objectors to orders being made. The legal representatives employed by our members both internally and externally have significant experience in this area of law and while the resources of our members are not unlimited, it is likely that we still have the most time, resources and expertise to dedicate to opposing orders being made. If this amendment is made, we would be happy to find that we were wrong.

Question 4.5(2): What changes, if any, should be made to existing procedures in relation to:

(a) who may make an 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?

See answer to Question 4.5(1).

Question 4.6: What provision, if any, should be made for costs orders in relation to applications for suppression or non-publication orders?

As stated in our Preliminary Submission, ARTK submits that the CSNPO Act should be amended to allow for costs orders to be made. We hope that by introducing that power the level of uncooperativeness we often experience from the other side of the bar table might dissipate. We also hope that it might lead to an end to "frivolous and unmeritorious" applications such as the orders sought in R v Mustapha Kayirici.

Question 4.7(1): Does the *Court Suppression and Non-publication Orders Act 2010* (NSW) deal with the consideration of the public interest in open justice appropriately? Why or why not?

While we generally agree with the submissions made by Banki Haddock Fiora, we depart from them with respect to their submission that the CSNPO Act should be amended to introduce a "balancing exercise between the public interest in open justice" and "competing interests sought to be protected by the order". The line of authorities dealing with non-publication orders has actively resisted the introduction of a balancing exercise because it suggests that open justice can be weighed against other interests.[226] It cannot. It is an "exceptionally high test" and nothing less.

Our Preliminary Submission recommended that the Commission consider whether reference to the principle of free communication of information, a presumption in favour of disclosure of information and a recognition of the consequential right of the news media to publish information relating to court proceedings should be added to CSNPO Act s 6. The former two elements are drawn from *Open Courts Act 2013* (Vic) s 4 and the latter is a natural corollary to them. ARTK submits that CSNPO Act s 6 should be amended to incorporate these three elements to emphasise the importance both of open court reporting

[226] For example see R v Qaumi & Ors (No 15) (Non-publication order) [2016] NSWSC 318

and the role our members play in it.

Question 4.7(2): What changes, if any, should be made to the existing provision?

See answer to Question 4.7(1).

Question 4.7(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?

Ideally, ARTK would submit that all non-publication/suppression order making powers should take the public interest in open justice into account. However, as stated in the Preliminary Comments, that is not the case in NSW or elsewhere where specific statutory powers to make orders are prescribed, particularly where such statutes prescribe a threshold that is not as robust as necessity. If there is general support for amending other statutes then ARTK is happily on board.

Question 4.7(4): What other considerations should be taken into account before an order is made?

None.

Question 4.8(1): What changes, if any, should be made to the "necessary" test?

None. The common law on point is clear and well-developed.

Question 4.8(2): Should a definition of "necessary" be included in the *Court Suppression and Non-publication Orders Act 2010* (NSW) or any other statute? If so, what should it be?

No.

Question 4.9(1): Are the grounds for making suppression and non-publication orders under the *Court Suppression and Non-publication Orders Act 2010* (NSW) and other NSW statutes appropriate? Why or why not?

In relation to the CSNPO Act, yes; in relation to other NSW statutes, see ARTK's Preliminary Comments above.

Question 4.9(2): What changes, if any, should be made to them?

In relation to the CSNPO Act, none and ARTK vigorously opposes any suggestion that the current grounds should be expanded upon. In relation to other NSW statutes, see ARTK's Preliminary Comments above.

Question 4.10(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?

ARTK agrees that the court should be required to give reasons on each occasion a final order is made. Reasons perform two functions. Firstly, they inform anyone with standing to oppose an order why it was deemed necessary and, consequently, whether there is a basis to seek to have it reviewed. Secondly, and perhaps more importantly, they require the justice, judge or magistrate considering the application to articulate why an order is required and, in engaging in that task, ARTK submits that as often as not it becomes apparent to the adjudicator of fact that the necessity test has not been met and that an order is not required. Given the necessity test does not apply to interim orders ARTK cannot press for reasons to

be given in relation to them.

Question 4.10(2): If there was to be a requirement, how should it be expressed?

The proposed CSNPO Act s 15A recommended at the answer to Question 4.5(1) incorporates this requirement. Alternatively, the Commission could recommend adopt a version of *Open Courts Act 2013* (Vic) s 14A which provides:

(1) Subject to subsection (2), a court or tribunal which makes a suppression order must give a statement of reasons that sets out—
  (a) the reasons for the terms of the order; and
  (b) the reasons for the duration, grounds and scope of the information covered by the order.

(2) A court or tribunal is not required to give a statement of reasons—
  (a) for an interim order; or
  (b) for an order varying a suppression order, if the order specifies the purpose of the variation;
  (c) for an order revoking a suppression order; or
  (d) if giving a statement of reasons would render the suppression order ineffective.

(3) A failure to comply with this section does not affect the validity of a suppression order.

Question 4.11(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?

No. As stated above, the problem with interim orders is it is too easy to apply for and obtain an interim order with no evidence to hand. While the CSNPO Act s 10(2) requires the court to deal with interim orders urgently, in practice "urgently" can mean 5 to 7 days later, if not more. In one case in which the NCAELO was involved in 2019, either a barrister or internal solicitor was required to travel to Newcastle five times to deal with an interim order as the matter was adjourned for a variety of reasons.

Question 4.11(2): What changes, if any, should be made to the existing provision?

Open Courts Act 2013 (Vic) s 20 does provide any assistance on this point as it too merely provides that interim orders once made must be dealt with urgently. ARTK suggests amending CSNPO Act s 10 to require interim orders to be relisted within 72 hours irrespective of whether or not that means the same adjudicator hears the matters again consistent with the requirements in *Evidence Act 1929* (SA) s 69A(3).

Question 4.11(3): What provision, if any, should be made for interim orders in other statutes that grant powers to make suppression or non-publication orders?

None. ARTK does not support any extension of the non-publication order making powers contained in legislation other than the CSNPO Act.

Question 4.12(1): Are the existing provisions relating to the review and appeal of suppression and non-publication orders appropriate? Why or why not?

No. These provisions appear to work relatively well, particularly the ability of the court that originally made the order to reconsider it.

Question 4.12(2): What changes, if any, should be made to these provisions?

None.

Question 4.12(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)?

All orders no matter what legislation they are made under should be reviewable and ARTK supports any amendment to any legislation necessary to achieve that outcome. That said, as discussed above in the Preliminary Comments, most of the Acts that include a non-publication order making power other than the CSNPO Act set a threshold that affords the court significantly greater discretion in making an order. As a matter of practice, the ability to review such orders is unlikely to often result in a different outcome being reached.

Question 4.13: How could the *Court Suppression and Non-publication Orders Act 2010* (NSW) provisions be amended to assist courts in framing more effective orders?

ARTK does not support any amendment to the CSNPO Act introducing a rigid framework into which non-publication/suppression orders must be made to fit. In fact, ARTK submits that rather than amending the Act to achieve this end, better outcomes could be secured by providing more education and resources for adjudicators to aid their understanding of the workings of the CSNPO Act as it currently stands.

Question 4.14(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?

This question is largely moot. As stated above, a CSNPO Act order cannot meet the necessity test where an automatic statutory prohibition already applies so as the law currently stands, the CSNPO Act does not apply to situations that are the subject of automatic statutory prohibitions. That said, that doesn't mean that judges and magistrates do not make orders overlapping with automatic statutory restraints. In the example above where the reporter described the refusal of the Registry to give him a copy of an order, the only information they would convey was "An order was made on 1 July 2020 by Judge [Name Withheld]: 'Non Publication Order re: Complainants/s Name & Accused's Name'". The relevant matter was the sentencing of an elderly paedophile who pleaded guilty to at least 10 counts of intentionally sexually touching a child under 10 and two counts of sexual intercourse with a child under 10 in relation to three young girls, including his own granddaughter. As the complainants were not only minors at the time of the relevant offences but also complainants in a prescribed sexual offence case, both *Children (Criminal Proceedings) Act 1986* (NSW) s 15A and *Crimes Act 1900* (NSW) s 578A apply and prohibit the girls from being identified. The order as far as it pertains to the complainants was wholly unnecessary and should never have been made.

As for the provisions outside the CSNPO Act that allow suppression/non-publication orders to be made, as noted in the Preliminary Comments these already apply a necessity test or set the bar lower. Where a lesser test is prescribed, an applicant seeking an order would be foolish to rely on the CSNPO Act which in practice means thee CSNPO Act should only ever be relied upon where there is no other provision allowing an order to be made.

Question 4.14(2): Which provisions for suppression and non-publication, if any, should be consolidated or standardised?

See Preliminary Comments above.

AUSTRALIA'S RIGHT TO KNOW SUBMISSION TO NEW SOUTH WALES LAW REFORM COMMISSION'S OPEN JUSTICE REVIEW

COURT AND TRIBUNAL INFORMATION: ACCESS, DISCLOSURE AND PUBLICATION CONSULTATION PAPER No. 22

Response to Chapters 5 – 10

15 MARCH 2021

Australia's Right to Know (ARTK) coalition of media companies welcomes the opportunity to make a submission to the New South Wales Law Reform Commission's (the Commission) *Open Justice: Court and tribunal information: access, disclosure and publication* Consultation Paper (the Paper).

This is ARTK's second submission in response to the Consultation Paper and addresses Chapters 5 – 10 inclusive.

CHAPTER 5: MONITORING AND ENFORCING PROHIBITIONS ON PUBLICATION AND DISCLOSURE

Question 5.1(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?
No. As stated in Chapter 2[227], ARTK does not support contempt as a penalty for the infringement of any of the legislation referred to in the Report because our journalists are uniquely put at risk by such provisions. We also take that position because ARTK members have a good working relationship with the DJC. Any concerns the DJC or the DPP may have about the potential infringement of an automatic statutory prohibition or a non-publication order can be raised with us directly and without formality (noting, of course, that such communications do not occur frequently) and responded to promptly, should the need arise.

Question 5.1(2): What changes, if any, should be made to the existing arrangements? To what extent should there be greater consistency in the statutory offences?
All contempt penalty provisions should be repealed and replaced with offence provisions providing for fines.[228]

Question 5.1(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**
- **(c) exceptions to any of the statutory offences, or**
- **(d) the current maximum penalties for any statutory offences?**

As noted in Chapter 2, ARTK submits that the mental element for any offence should be that the infringing act was intentional. ARTK makes no submissions about the terms used for publication or disclosure because no matter how they are defined our members will always be engaging in both. Any exceptions to statutory offences that we support have been commented on elsewhere in this Response. Naturally we support any reduction in the current maximum penalties the Commission may recommend. In particular, any amendments which remove or reduce the risk of journalists being jailed for doing their jobs has our support.

Question 5.1(4): What changes, if any, should be made to the current arrangements for enforcing contempt of court in relation to breaches of prohibitions on publication or disclosure?
As stated above, contempt should not be an applicable penalty.

Question 5.2(1): How should prohibitions on publication and disclosure of information be monitored?
ARTK submits the current arrangements for monitoring the Australian media suffice. That said, ARTK accepts that is largely because our members all actively seek to comply with the legislation referred to the Report and to monitor and comply with non-publication and suppression orders. We are happy to respond further to any particular concerns any other submission to the Commission may raise.

Question 5.2(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?
ARTK supports more information being made available.

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[227] See answer to question 2.2(5)
[228] In particular, CSNPO Act ss 16(2) – (4); *Crimes (Appeal and Review) Act 2001* (NSW) ss 108(6), s 111(7); and *Supreme Court Act 1970 (NSW) s 101A*(9).

Question 5.3(1): Are the existing arrangements for managing breaches of prohibitions on publication and disclosure of information effective? Why or why not?
As stated above, ARTK regards the current arrangements as sufficient. The only matter raised in the Report that ARTK wishes to comment on specifically is paragraph 5.58 which states, "The ODPP reports that their requests "meet with varying success" and that "in many cases the request is refused, and we are told to get a court order".[229] Generally speaking, ARTK members would only respond in such a way in relation to a take-down request if we do not believe the CSNPO Act necessity test can be met.

In particular, the ODPP often comes to our members before trial asking for material to be removed from the internet which may initially have been published months or even years prior, in many cases dating back to when the accused person was first charged. Material that old is referred to as being archival: it remains live on a website but is buried so far in the past that a reader is highly unlikely to be able to find it simply by scrolling through the pages of the website and would have to use a search engine to locate it. Naturally, any potential juror won't know who the accused is until after he or she is empanelled and, consequently, could only be searching for archival material in the accused's name before being empanelled by coincidence. By the time jurors are empanelled, they are warned about *Jury Act 1977* (NSW) s 68C which makes it is an offence for a juror to make their own inquiries about a case. Only a juror who flagrantly disregards the instructions of the court would search for archival material after receiving that instruction.

The other issue with archival material is that it has almost always dissipated to other websites and, in high profile cases, may be widely available from multiple other sources on the internet. It is well established that a take-down order will be futile if what is reported in the article the subject of the order would still be accessible online even if the article were to be killed, particularly if the relevant information is available from websites published overseas and out of reach of the jurisdiction of the NSW courts. Futile orders can never meet the necessity test which is also why our members will often put the ODPP to proof if requested to take articles down.[230]

Question 5.3(2): If not, what changes could be made?
None.

Question 5.4(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?
ARTK members are easily located.

Questions 5.4(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?
ARTK members already publish in every Australian jurisdiction because we publish online. As a mutual recognition scheme would have no impact on our current operations, we make no comment.

Question 5.4(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?
This issue is discussed in our answer to Question 4.4(1).

Questions 5.4(4): Should the time limits for enforcing the statutory offences considered in this Chapter be extended? Why or why not?
No. Publications/broadcasts by ARTK members have wide readership and circulation and our members are easily located. If any ARTK member is to be prosecuted it should not take more than 6 months to do so.

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[229] NSW, Office of the Director of Public Prosecutions, *Preliminary Submission PCI12,* 10.
[230] Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim [2012] NSWCCA 125; 293 ALR 384 at [76]; R v Perish; R v Lawton; R v Perish [2011] NSWSC 1102 at [44].

CHAPTER 6: ACCESS TO INFORMATION

Preliminary Comments

Accessing court information – or more accurately, the inability to access court information – is the bane of every journalist's existence: "it's inconsistent"; "they make it almost impossible"; "I could bang on for hours about how difficult it can be at times to even get access to inspect court documents". Other than the Supreme Court, it is almost impossible to get a copy a document: "they won't do it full stop; nor will they give us electronic copies". No one disputes the benefit of accurate and timely court reporting or the role it plays in safeguarding open justice; nor can anyone seriously suggest that the courts lack the capacity to provide journalists with information on request. Apart from the fact that they already deal with journalists' access requires on a daily basis, NSW courts collectively managed to migrate from physical attendance to largely online proceedings in a matter of mere weeks when the first Covid 19 lockdown hit Australia in 2020. There is simply no reason why accessing information in such a modern justice should be so difficult.

As noted throughout Chapter 6, there is complex mass of acts, rules, regulations and practice directions which dictate who can access court information and what information they can have. For journalists, this involves:

Supreme Court

1. *Criminal Procedure Act 1986* (NSW) s 314
2. Practice Note SG Gen 2 – Access to Court Files (civil but is also applied in criminal proceedings where the decision is civil in nature[231]) / *Uniform Civil Procedure Rules 2005* (NSW) r 36.12
3. Practice Note SC CL 8 – Media Access to Sexual Assault Proceedings Heard In Camera
4. Recording and Broadcasting of Judgment Remarks Policy
5. If all else fails, the inherent power of the Supreme Court

District Court

1. *Criminal Procedure Act 1986* (NSW) s 314
2. *District Court Rules 1973* (NSW) r 53.4
3. Practice Note DC (Civil) No 11 – Access to Court Files (Civil and Criminal)
4. District Court Criminal Practice Note No 4 – Media Access to Sexual Assault Proceedings Heard In Camera

Local Court

1. *Criminal Procedure Act 1986* (NSW) s 314
2. *Local Court Rules 2009* (NSW) rr 8.10, 8.10A
3. Local Court Practice Note 1 of 2013 – Recording Court Proceedings

Coroners Court

Coroners Act 2009 (NSW) s 65

NSWCAT

Noting that no access is permitted before proceedings are finally determined

1. *Civil and Administrative Tribunal Rules 2014* (NSW) r 42
2. NCAT Policy 4 – Access to, and Publication of, Information Derived from Proceedings in the Tribunal

[231] For example, State of New South Wales v Bowdidge (No 2) (Application by Nationwide News Pty Ltd) [2020] NSWSC 159

ARTK does not agree with the suggestion at paragraph 6.7 of the Paper that "due to the differences in the way different courts and registries operate, a consolidated regime is unworkable" and "it may be best to leave the current regimes in place and improve their features". We respectfully submit that this approach would offer very little improvement. Rather, the way forward must be to scrap all of the current access regimes and start again. The only real question, to our way of thinking, is how.

The *Courts Information Act 2010 (NSW)* (**CI Act**) would – on the face of it – simplify the current access regimes and increase access to court information. Since any change at all would be an improvement, ARTK would not object to the CI Act commencing subject to certain amendments. However, our preferred position is the adoption of the same open access provisions that have been passed in Queensland for the reasons discussed below.

Question 6.1(1): Should the regimes governing access to court information be consolidated? Why or why not?

Yes. ARTK agrees with the Preliminary Submissions L McNamara and J Quilter, the UTS Faculty of Law, Banki Haddock Fiora, Legal Aid NSW and J Johnston, P Keyzer, A Wallace and M Pearson who collectively describe the current system as complex, confusing, inconsistent, inapt and "designed (at worst) to limit access to any court file to the immediate parties to any proceedings and (at best) to privilege other applicants who can afford legal representation, and have the time and resources to devote to pursuing an application".[232]

Question 6.1(2): If so, how should the regimes be consolidated?

There are three tiers of access to court information found amongst Australian jurisdictions:

1. Queensland has the most open access system in Australia as all comers – media or otherwise – can access civil and criminal files provided they are prepared to pay the applicable search and/or copying fees[233];
2. The Federal Court has the second most open access system[234] which, while not as open as Queensland, allows for significantly more access to court documents and information than elsewhere around Australia; and
3. The other Australian jurisdictions provide for limited access in much the same way that NSW currently does.[235]

ARTK notes that should the CI Act be proclaimed, NSW would join the Federal Court in providing tier 2 access. However, ARTK submits adopting the Queensland approach – preferably coupled with the Federal Court approach to access to exhibits – would be simpler.

Question 6.1(3): What principles and rules should underpin a consolidated regime?

ARTK submits the only principle required is that open justice today necessitates journalists having access to the documents underlying the court proceedings they are reporting.

Question 6.2(1): In what circumstances, if any, should courts have discretion to permit or deny access to court information?

In the civil context, ARTK submits the only circumstances which should restrain access to court information is confidentiality, in which case the parties should apply for a suppression order at the time of filing to ensure the confidential information cannot be published/broadcast. In relation to criminal proceedings, ARTK again accepts that where a suppression order has been made, access to documents

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[232] Report at [6.16], noting that the "applicants" referred to in the quote are usually ARTK members and even we don't find the current system affords much of a privilege.

[233] *Uniform Civil Procedure Rules* 1999 (Qld) rr 980, 981; *Criminal Practice Rules 1999* (Qld) rr 56, 56A, 57

[234] *Federal Court Rules 2011* (Cth) r 2.32; Access to Documents and Transcripts Practice Note

[235] Noting the examples included in Chapter 6, Footnote 22 of the Report. We have not attempted to distil the legislation and directions applicable in other Australian jurisdictions here. If the Commission would like that information, please let us know.

including the suppressed material should be restrained. However, where the proceedings are the subject of a non-publication order or an automatic statutory prohibition, that should not constitute sufficient grounds to refuse a journalist access to court information. At present, *Criminal Procedure Act 1986* (NSW) s 314(4) is the most common cause of journalists being denied access to information because either a non-publication order or automatic statutory prohibition[236] applies to the case. We discuss this further, including providing Case Studies, in Chapter 10 of this Response. However, we note here that it is of particular concern to ARTK that s 314(4) is repeated in CI Act s 13. ARTK vigorously objects to the CI Act commencing before s 13 is repealed: otherwise, journalists will find themselves in no better position than they currently stand. We also object to CI Act s 14(4) on the same grounds.

Question 6.2(2): In what circumstances, if any, should information be available as of right?
Any journalist applying for information for the purpose of preparing a report of the proceedings should have an entitlement to access to court information subject only to a suppression order restraining access or the file not being available because it is being used by the court. ARTK adds that reform of that kind likely will result in savings to courts' resources because Registry staff will no longer have to spend time trying to determine whether they can release a document or not.

Question 6.3(1): What, if any, standard considerations or principles should all (or most) courts apply when determining an access request?
See answer to Question 6.1(3) and for the avoidance of doubt, ARTK vigorously opposes the introduction of any access system that has discretionary elements.[237]

Question 6.3(2): Are there any circumstance that would warrant different considerations to the standard considerations being applied? If so:
- **(a) What circumstances, and**
- **(b) What should the considerations be?**

No.

Question 6.4(1): What types of court information should be available for access?
For journalists, all information should be available for access unless it is the subject of a suppression order.

Question 6.4(2): Should different access rules apply to different types of information?
No.

Question 6.5: Should access to court information be prohibited in certain circumstances? If so, when?
Yes. When the parties have applied for and been granted a suppression order. Otherwise, no.

Question 6.6: Who should be able to access what types of court information and on what conditions?
ARTK is concerned about journalists being able to access court information.

Question 6.7: How should the privacy of personal identification information contained in court information be protected?
Paragraph 6.105 of the Paper raises the concern that allowing access to personal identification information contained in a court file could lead to "criminal or other improper purposes, such as identity theft, or to humiliate, degrade, stalk or harass a person". Journalists already have access to such information and do not, and have not, used it for any such purposes.

Question 6.8(1): What procedures, if any, should apply when a person seeks access to court information?

[236] Most commonly *Children (Criminal Proceedings) Act 1987* (NSW) s 15A or *Crimes Act 1900* (NSW) s 578A
[237] Per paragraphs [6.38] to [6.56] of the Report

Journalists currently file a pro forma paper application for access to documents in the Supreme, District and Local Courts. We are happy to continue with that procedure or any reasonable alternative the Commission may recommend including any methods of electronic filing.

Question 6.8(2): What guidance, if any, should be given in relation to these procedures?
We refer above to the necessity to treat an application by a journalist differently from a non-journalist. Any guidance given to Registries dealing with access applications should reflect that difference and the importance of journalists who are preparing reports of court proceedings for publication/broadcast being supplied with accurate information in a timely fashion.

Question 6.9(1): By what methods should court provide a person with access to court information?
ARTK will answer this question at the answer to Question 10.1(3). It makes no submissions in relation to access granted to those other than the media.

Questions 6.9(2): Should the available methods be different depending on the applicant and the situation? If so, how?
Yes. Journalists who use court information to report the proceedings ensure that a significantly largely portion of the community is able to obtain access to that information by reading, watching or listening to their resulting articles. ARTK strongly submits that any method of providing access which facilities such court reporting should be implemented.

Question 6.10(1): In what circumstance should a person be charged a fee to access court information?
Question 6.10(2): In what circumstances should any fees for accessing information be waived or reduced?
ARTK supports the Victorian Supreme Court approach: news media organisations and journalists should not be required to pay a fee to access information if it is for the purposes of reporting the news.[238]

Question 6.11: Should there be a national regime government access to documents? Why or why not?
Yes, of course there should be a national access regime and it should all be based on the regime suggested above.

Question 6.12: How could NSW courts and tribunals improve access to judgments and decisions?
ARTK supports the publication of all judgments and decisions of NSW courts and tribunals.

[238] *Supreme Court (Fees) Regulations 2018* (Vic) r 14A

CHAPTER 7: PROTECTIONS FOR CHILDREN AND YOUNG PEOPLE

Question 7.1(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?

ARTK accepts that since 2 March 2020, all Australian jurisdictions prohibit the identification of people charged with an offence committed while they were under 18 years of age.[239] ARTK also accepts that the majority of Australian jurisdictions restrain the identification of juvenile witnesses (and either expressly, or by inference, juvenile victims of crime) in proceedings in child or youth courts[240]. However, that same majority do not prohibit minors from being identified as the victim of, or a witness in, proceedings for charges laid against adults except in particular types of cases (eg, sexual offence cases).

Queensland and NSW form the minority in this area, each having legislation which prohibits the identification of juveniles in a broader range of circumstances. In Queensland, the following children cannot be identified:

(a) A child living in Queensland who has been harmed or allegedly harmed by, or is at risk of harm from, a parent, step-parent or other family member;[241]
(b) Any person is or was a child when an offence was, or was alleged to have been, committed against them;[242]
(c) A child who is reasonably likely to be witnesses in a case involving an offence of a sexual or violence nature,[243] and
(d) A child who is reasonably likely to be witness in a case not involving an offence of a sexual or violence nature can have his or her identities suppressed.[244]

However, (a) and (c) above cease to apply once the child becomes an adult and child victims who have since become adults are able to consent to be identified[245].

Issue 1: Scope of 15A Generally

Setting Queensland aside, *Children (Criminal Proceedings) Act 1987* (NSW) s 15A (NSW) is otherwise an outlier amongst Australian jurisdictions because it is the only Australian law prohibiting the identification of children involved in criminal proceedings with such a broad scope. Unlike any other Australia law, s 15A makes it an offence to identify a person who is:

(a) A child witness in proceedings against a person charged as an adult in all circumstances;
(b) Mentioned in proceedings in relation to something that occurred when the person was a child, whether those proceedings are against an adult or a juvenile;
(c) Otherwise involved in the proceedings and was a child when so involved, whether those proceedings are against an adult or a juvenile; and/or
(d) A sibling "of a victim of the offence to which the proceedings relate, and that person and the victim were both children when the offence was committed".

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[239] *Criminal Code 2002* (ACT) s 712A; *Youth Justice Act 2005* (NT) s 50(1)(b); *Youth Justice Act 1992* (Qld) s 301; *Young Offenders Act 1993* (SA) s 63C; *Youth Justice Act 1997* (Tas) s 31, s 108; *Children, Youth and Families Act 2005* (Vic) s 534, s 534A, 534B; *Children's Court of Western Australia Act 1988* (WA) s 35, 36A

[240] *Youth Justice Act 2005* (NT) s 50; *Youth Offender Act 1993* (SA) s 63C; *Youth Justice Act 1997* (Tas) s 31, 108; *Children, Youth and Families Act 2005* (Vic) s 524; *Children's Court of Western Australia Act 1988* (WA) s 35, 36C. The ACT is outlier in this area having no such restraints.

[241] *Child Protection Act 1999* (Qld) s 189

[242] *Child Protection Act 1999* (Qld) s 194

[243] *Child Protection Act 1999* (Qld) s 193

[244] Ibid

[245] *Child Protection Act 1999* (Qld) s 194

Parental consent[246] is irrelevant to all of the above restraints unless the child is dead. If the relevant child is under 16 years of age, the only way to identify him or her is with a court order; if the child is over 16 years of age the child – and only the child – can consent to be identified provided that consent "is given in the presence of an Australian legal practitioner", whose services the child's family will have to pay for. ARTK agrees with the Banki Haddock Fiora submission cited at paragraph 7.2 of the Paper that s 15A "unreasonably covers people 'who may have been mentioned only very peripherally in criminal proceedings', and that this 'serve[s] no discernible public interest purpose'". In fact, at times the practical effect of s 15A is completely contrary to the public interest: see Case Studies 1 and 2 in the ARTK Confidential Annexure.

CASE STUDY 1: R v John Doe[247]

In December 2020, Doe was charged with one count of common assault, two counts of common assault (domestic violence related), driving with a mid-range PCA and two counts of stalk or intimidate intending to cause fear of physical or mental harm after an altercation with his partner outside a club. He subsequently pleaded guilty. Doe and his partner – who is currently protected by an AVO – got into an argument after she asked to leave the club. Part of the argument involved pushing and shoving over the stroller of their young child before Doe punched his partner with his clenched fist, causing her to stumble backwards and fall to the ground. The child has nothing to do with charges and is too young to speak, let alone be a witness. However, the allegations would take on a very different complexion if the fact the child was present could be published.

CASE STUDY 2: Family A[248]

The scope of s 15A is also often rendered redundant because the identities of children – living or dead – which are restrained in reports about criminal proceedings may still be readily ascertainable from other reports. For example, none of these reports about the Oatlands crash tragedy in 2019 breach s 15A despite naming or identifying the siblings of the deceased children, or the children who were injured in the incident, because they are reports about matters occurring in the lives of the families, not the court:

https://www.9news.com.au/national/oatlands-crash-bridget-sakr-braced-for-christmas-without-veronique/43ed118c-381e-46ce-9223-90daaec01f55

https://www.catholicweekly.com.au/thousands-gather-to-pray-after-children-killed-in-oatlands/
https://catholicleader.com.au/news/prayers-flow-for-four-maronite-catholic-children-killed-in-sydney-mother-forgives-in-her-heart

https://www.sbs.com.au/language/english/happy-birthday-in-heaven-heartbroken-parents-reflect-on-daughter-s-death-one-year-after-oatlands-crash

Similarly, the media are free to report that Shane and Sheldon Shorey – who died in Dubbo in January 2021 after being struck by an allegedly unlicensed driver – have a brother Mark, who is also a minor, in any report

[246] Noting, of course, that the term used by the *Children (Criminal Proceeding) Act 1987* (NSW) is senior available next of kin.
[247] This Case Study has been anonymised in this open submission because it would identify a person the subject of *Children (Criminal Proceedings) Act 1987* (NSW) s 15A.
[248] This Case Study has been redacted from this open submission because it would identify children the subject of Children (Criminal Proceedings) Act 1987 s 15A.

of His Honour Justice Sacchar's decision in Frail v Shorey [2021] NSWSC 122 because that matter was in the equity division.

Issue 2: Inability for Parents to Consent to Identification of Living Children

ARTK further submits that the inability of parents to consent to their living children being identified is unduly parochial and can, at times, be detrimental to the rights of child. Where a family experiences the trauma of losing some of their children but not others they often want the news reports about what occurred to refer to all of the children, particularly where some or all of the living children were also at the scene of the crime.

CASE STUDY 3: Family B[249]

It is also rare in ARTK's experience for anyone, media or otherwise, to apply to the court pursuant to *Children (Criminal Proceedings) Act 1987* (NSW) s 15D(1)(a) for the court's consent to identify a living child under 16 years of age. Since 2013, the NCAELO has only done it once:

CASE STUDY 4: ROBERT WEBBER

In September 2014, when Bobby the Brave was only seven months old, he was nearly beaten to death while his parents were interstate on their honeymoon and he was in the care of his non-biological uncle, Andrew Nolan. As a result of this vicious attack, Bobby was left with mixed dystonic spastic quadriplegic cerebral palsy and a range of other medical conditions and in desperate need of medical assistance that his family was struggling to afford. By 2016, the family had started a GoFundMe page to raise funds for Bobby's ongoing treatment that *The Sunday Telegraph* wanted to publicise. However, it was impossible to do justice to Bobby's story, and explain why the public should donate to his cause, without including the fact that Nolan's criminal case was still proceeding through the court.[250] *The Sunday Telegraph* filed a s 15D(1)(a) application on the family's behalf and after a hearing on 21 April 2016, attended by then in-house Counsel Larina Alick, orders were made permitting Bobby and his sister Olivia to be identified. Bobby's family were in financial distress. It was beyond their means to pay for the legal work required to draft the s 15D(1) application and supporting affidavits and have a lawyer or barrister attend the hearing yet, clearly, it was in Bobby's best interests for the family to be able to identify him. ARTK submits it is highly unlikely that Bobby's is the only NSW case where s 15A has impeded the interests of the child in this way.

Issue 3: s 15A Applies to Dead Children

As noted above, NSW is also an outlier because s 15A applies even if the affected child is now dead. NSW is one of only two Australian jurisdictions to extend the operation of any automatic statutory prohibition to deceased persons and the only one to do so in relation to children.[251] The Act did not apply to dead children until 23 March 2004 when the *Crimes Legislation Amendment Bill 2004* (NSW) was assented to. The only justification for this extraordinary departure from open justice is to be found the Second Reading Speech in the Legislative Assembly where the Parliamentary Secretary, speaking for then Attorney General Bod Debus, told the house:

[249] This Case Study has been redacted from this open submission because it would identify children the subject of Children (Criminal Proceedings) Act 1987 s 15A.

[250] After repeatedly denying liability Nolan ultimately pleaded guilty to causing grievous bodily harm with intent. He was sentenced in December 2016 to 12 years, 6 months jail but following a successful appeal, that sentence was increased to 15 years, 3 months: https://www.dailytelegraph.com.au/news/nsw/family-seeks-help-for-bobby-the-brave-after-sickening-attack-at-hands-of-uncle/news-story/5dbdebf6dffc542c9307a6896530e46d; https://www.smh.com.au/national/nsw/andrew-nolan-jailed-for-three-more-years-for-bashing-baby-nephew-bobby-webber-20170510-gw1c3k.html; R v Nolan [2017] NSWCCA 91 (10 May 2017)

[251] The other being Tasmania which, in April 2020, extended its restraint on the identification of the complainant in sexual assault cases to deceased victims at the eleventh hour and giving ARTK the opportunity to make submissions against that particular the change before it was enacted: *Evidence Act 2001* (Tas) s 194K(5)(b).

This amendment closes a gap to cover situations where the victim of the offence is a deceased child and extends that protection to include the siblings of child victims, including deceased child victims, in order to minimise the trauma to the family of the deceased.[252]

Respectfully, there was no gap to close. Instead, the passage of the Bill made NSW the only Australian jurisdiction to write deceased children affected by crime, and their siblings, out of history. If Azaria Chamberlain or Mason Jet Lee had died in New South Wales it is possible that no one would know who they were. If William Tyrell is declared dead or his body is found he may well vanish from his own narrative despite having been identified by the media since his disappearance in September 2014. ARTK submits that is plainly not in the public interest.

Issue 4: Extension of s 15A to Apply Before Commencement of Criminal Proceedings

Lastly, paragraphs 7.35 to 7.37 of the Paper discusses extending s 15A to apply before criminal proceedings commence, noting that in 2008 the NSW government did not support such a change "because there was no equivalent provision elsewhere in Australia". Since that remains the case today, ARTK opposes any such amendment which, in any event, could well prove to be difficult to draft and be unworkable in practice. For example, it may not always be possible for a journalist to ascertain that an investigation has formally began and/or whether a particular child is, in fact, being investigated. ARTK submits it is not in the public interest by impede the reporting of criminal investigations by infecting such reporting with uncertainty.

Questions 7.1(2): What changes, if any, should be made to the existing prohibition and the exceptions to it?

ARTK recommends that subsection 15A(1)(c), (d) and (e) and section 15E be repealed; that subsection 15A(1)(b) be clarified to limit the relevant automatic statutory restraint to proceedings in the Children's Court; that subsection 15D(1)(a) be amended to allow senior available next of kin to identify a child under 16 years of age and insert that definition into the section; and, that clauses 17 and 18 of the Schedule 2 be updated to remove the references to section 11 and replace them with references to section 15A. ARTK also recommends that clauses 17 and 18 of Schedule 2 be amended to reflect the fact that what was formerly section 11 is now *Children (Criminal Proceedings) Act 1987* (NSW) ss 15A through 15F.

Question 7.2(1): Should criminal proceedings involving children continue to be held in closed court as a rule? Why or why not?

Being persons "*engaged in preparing a report on the proceedings for dissemination through a public news medium*" journalists are not generally excluded from Children's Court proceedings.[253] As this balance – general public excluded, journalists able to report – is the majority approach to access to child or youth courts, ARTK has no comment except that media access to allow for the reporting of Children's Court matters should be retained.[254]

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[252] https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/HANSARD-1323879322-31827; Explanatory Memorandum

[253] *Children (Criminal Proceedings) Act 1987* s 10

[254] In the ACT, NT and South Australia, hearings are closed to the general public but may be attended by "a person who attends the proceeding to prepare a news report of the proceeding and is authorised to attend for that purpose by the person's employer" (ACT) or "a genuine representative of the news media" (NT and SA) unless the court orders otherwise: *Court Procedures Act 2004* (ACT) s 72; *Youth Justice Act 2005* (NT) s 49; *Youth Court Act 1993* (SA) s 24; In Tasmania, the media are not permitted to attend the Magistrates Court (Youth Justice Division): *Youth Justice Act 1997* (Tas) s 30; In Queensland, unless/until the Children's Court is convened by a Judge exercising jurisdiction to hear and determine a charge on indictment, a representative of mass media is not permitted to attend the proceedings unless a successful application is made to the court which can only grant the application "if, in the court's opinion, the person's presence would not be prejudicial to the interests of the child": *Children's Court Act 1992* (Qld) s 20; In Victoria, the Children's Court is open unless the court orders otherwise: Children, Youths and Families Act 2005 s 534; and, In WA, the Children's Court may sit in chambers and has the power to exclude particular persons from a hearing but otherwise sits in public: Children's Court of Western Australia Act 1988 (WA) s 14, 31.

Question 7.2(2): Are the current exceptions to the rule appropriate? If not, what changes should be made?
See answer to question 7.2(1).

Question 7.3(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?
All of the Australian jurisdictions which have legislated youth justice alternatives also prohibit the identification of the juvenile involved in such programs.[255] That being the case, ARTK does not object to the *Young Offenders 1997* (NSW) s 65 except to say that the consent subsection should be amended to allow a person who is no longer a child to consent to the publication of information that would otherwise infringe subsection 65(1).

Question 7.3(2): What changes, if any, should be made to the existing prohibition?
Young Offenders Act 1997 (NSW) s 65(3)(b) should be amended to allow publication or broadcasting with the consent of the child "or person".

Question 7.4(1): Is the prohibition on publishing the identities of children involved in apprehended domestic violence order proceedings appropriate? Why or why not?
While there is no consistency in this area of law amongst Australian jurisdictions, the legislation of each state or territory (except WA) is drafted broadly enough to prohibit the identification of any child who, at the very least, is a party to or witness in the proceedings or affected by an order obtained following the proceedings.[256] In addition, while most courts start as open proceedings, they generally have the power to close and/or to make non-publication orders in relation to the proceedings. As noted at paragraph 7.50 of the Paper, "only NSW and the Northern Territory have dedicated rules for domestic violence order proceedings involving children" and these rules differ.

Because there is no clear majority approach to this area of law it is difficult to comment about constructively. However, ARTK submits:

1. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) ss 41, 41AA and 58 are inconsistent with *Children (Criminal Proceedings) Act 1987* (NSW) s 10 and *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 104C. While both of those acts close the court to the general public they make specific provision for a person "*engaged in preparing a report on the proceedings for dissemination through a public news medium*" to remain in the courtroom – unless ordered otherwise – for the purpose of reporting the proceedings. The *Crimes (Domestic and Personal Violence) Act 2007* (NSW) should be consistent with the other NSW legislation.
2. *Crimes (Domestic and Personal Violence) Act 2008* (NSW) s 45 prohibits the identification of any child for whom an order is sought or any reference "*likely to lead to the identification of the person*". Sometimes orders expressly seek to protect a child in which case it is plain that he or she cannot be identified. However, *Crimes (Domestic and Personal Violence) Act 2008* (NSW) s 38(2) requires that any order for the protection of person who is 18 years or older must also protect any child with whom the protected person has a domestic relationship (unless the court orders otherwise). For example, in most cases, that means an order protecting a wife against her former partner must extend to the couple's children who will be living with the wife. Arguably, any report which names the couple is "likely to lead to the

[255] *Youth Justice Act 2005* (NT) s 43; *Youth Justice Act 1992* (Qld) s 301; *Young Offenders Act 1993* (SA) s 13; *Youth Justice Act 1997* (Tas) s 22; *Young Offenders Act 1994* (WA) s 40

[256] *Family Violence Act 2016* (ACT) ss 60, 149; *Domestic and Family Violence Act 2007* (NT), ss 26, 123, 124, 124A; *Domestic and Family Violence Protection 2012* (Qld), ss. 158, 159, 160 and *Domestic and Family Violence Protection Regulation 2012* (Qld) r 3; *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 33; *Family Violence Act 2004* (Tas) ss 31, 32; *Family Violence Protection Act 2008* (Vic) s 68, 166, 167, 168 and *Personal Safety Intervention Orders Act 2010* (Vic) ss 51, 123, 124, 125; and, *Restraining Orders Act 1997* (WA) ss 27, 70.

identification" of the children – even if it does not refer directly to them – to whom s 45 will now apply due to s 38. Unlike Queensland where reports of domestic violence order proceedings cannot be published except in the rarest of circumstances, it was clearly not the intention of the NSW Parliament in enacting the *Crimes (Domestic and Personal Violence) Act 2008* (NSW) to prohibit any and all reports of proceedings under that Act. ARTK submits to make good that intention, the Act should be amended to make it clear that identifying the adult parties to the proceedings – without more – does not identify any children affected by the proceedings in any capacity.

Questions 7.4(2): What changes, if any, should be made to the existing protections?
ARTK recommends that the *Crimes (Domestic and Personal Violence) Act 2008* (NSW) ss 41, 41AA and 58 be amended to allow any person who is engaged in preparing a report of the proceedings for dissemination through a public news medium to access the proceedings unless ordered otherwise and that s 45 be amended to clarify that the identification of a parent, guardian or person living in a domestic relationship with a child – or a reference to the fact that person is a parent, guardian or person living in a domestic relationship with a child – does not without more identify the relevant child.

Question 7.5(1): Is the prohibition on publishing or broadcasting the identities of children involved in care and protection proceedings appropriate? Why or why not?
ARTK accepts that all Australian jurisdictions have legislated automatic statutory prohibitions restraining the identification of children who fall under this area of law.[257] However, NSW goes further than any other jurisdiction in the nature of its restraint. ARTK, respectfully, does not agree with the Paper at paragraph 7.55 which states:

> *The prohibition only applies to publications that connect the child with the (court or non- court) proceedings. It does not prohibit the publication or broadcast of the names of children who are in the care and protection system generally, if the specific proceedings are not referred to.*

After *Secretary, Department of Family and Community Services v Smith* [2017] NSWCA 206 was handed down on 23 January 2017, the *Children and Young Persons (Care and Protection) Act 2018* was passed inserting subsection 105(1AA) into the Act which provides:

> (1AA) The name of a child or young person who is or has been under the parental responsibility of the Minister or in out-of-home care must not be published or broadcast in any form that may be accessible by a person in New South Wales, in any way that identifies the child or young person as being or having been under the parental responsibility of the Minister or in out-of-home care (however expressed).
>
> ***Note :*** *Identifying the child or young person as being or having been a foster child or a ward of the State, or as being or having been in foster care or under the parental responsibility of the Minister, or in the care of an authorised carer, are all examples of identifying the child or young person as being or having been in out-of-home care.*

A "name", for the purposes the subsection, includes any material that identifies, or is likely to lead to the identification of, the child or young person.[258]

This eradicated the effect of His Honour Justice Brereton's judgment and had an immediate chilling effect on reporting about foster care. Identifying any current foster carer must be likely to lead to the identification of any foster child currently in their care or who has recently been in their care, making any reports about this

[257] *Criminal Code 2002* (ACT) s 712A; *Care and Protection of Children Act 2007* (NT) s 301; *Child Protection Act 1999* (Qld) s 189; *Children and Young People (Safety) Act 2017* (SA) s 162; *Magistrates Court (Children's Division) Act 1998* (Tas) s 12; *Children, Youth and Families Act 2005* (Vic) s 534; *Children's Court of Western Australia Act 1988* (WA) ss 35–36A and *Children and Community Services Act 2004* (WA) s 237
[258] *Children and Young Persons (Care and Protection) Act 1989 (NSW) s105(4)*

subject fraught with risk. Moreover, it is not only news reporting where this has become an issue. It is not uncommon for foster carers to be nominated for community and other awards. Every time a community group or charity publishes a biography of a current foster carer they run the same risk of infringing s 105(1AA).

Question 7.5(2): What changes, if any, should be made to the existing prohibition and exceptions?
Children and Young Persons (Care and Protection) Act 1998 (NSW) s 105(1AA) should be repealed.

Question 7.6(1): Are the existing provisions relating to the exclusion of people (including the child or young person themselves) from court and non-court proceedings under the *Children and Young Persons (Care and Protection) Act 1998* (NSW) appropriate? Why, or why not?
Since journalists are "*engaged in preparing a report on the proceedings for dissemination through a public news medium*" they are not generally excluded from Children's Court proceedings under the *Children and Young Person (Care and Protection) Act 1998* (NSW)[259]. ARTK has no comment to make except to say that the media's ability to access Children's Court proceedings for reporting purposes should be retained[260].

Question 7.6(2): What changes, if any, should be made to these provisions?
None.

Question 7.7(1): Should there continue to be prohibitions on the publication or disclosure of material that identifies people involved in adoption proceedings? Why, or why not?
Each Australian state and territory has an automatic statutory prohibition in relation to the identification of a child available for adoption (and often a person over 18 who is available for adoption), the parent, guardian or applicant applying to adopt and the parents or guardians allowing the child to be adopted (if applicable)[261]. The only real differences between the jurisdictions are:

(a) Whether the restraint can be overcome with consent (Queensland, NSW, SA, Victoria and WA) or not (ACT, NT and Tasmania); and
(b) Among those jurisdictions that do allow for consent, whether consent is required those the proposed report directly identifies (SA, Victoria and WA) or whether all people the subject of the identification restraint, but not only being indirectly identified, are also required to consent (Queensland and NSW).

Pursuant to *Adoption Act 2010* (NSW) s 180, the fact one person affected by the adoption application consents to be identified in a publication/broadcast is not enough to safely publish because the proposed report must "not identify (and is not reasonably likely to identify) any person affected by the adoption application who does not consent to being identified". In most cases, identifying an adopted child with

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[259] *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 104

[260] In the ACT, NT and South Australia, hearings are closed to the general public but may be attended by "a person who attends the proceeding to prepare a news report of the proceeding and is authorised to attend for that purpose by the person's employer" (ACT) or "a genuine representative of the news media" (NT and SA) unless the court orders otherwise: *Court Procedures Act 2004* (ACT) s 72; *Youth Justice Act 2005* (NT) s 49; *Youth Court Act 1993* (SA) s 24; In Tasmania, the media are not permitted to attend the Magistrates Court (Youth Justice Division): *Youth Justice Act 1997* (Tas) s 30; In Queensland, unless/until the Children's Court is convened by a Judge exercising jurisdiction to hear and determine a charge on indictment, a representative of mass media is not permitted to attend the proceedings unless a successful application is made to the court which can only grant the application "if, in the court's opinion, the person's presence would not be prejudicial to the interests of the child": *Children's Court Act 1992* s 20; In Victoria, the Children's Court is open unless the court orders otherwise: Children, Youths and Families Act 2005 s 534; and, In WA, the Children's Court may sit in chambers and has the power to exclude particular persons from a hearing but otherwise sits in public: Children's Court of Western Australia Act 1988 (WA) s 14, 31.

[261] *Adoption Act 1993* (ACT) s 97; *Adoption Act 2010* (NSW) s 180 and Uniform Civil Procedure Rules 2005 (NSW) r 56.4; *Adoption of Children Act 1994* (NT) s 71; *Adoption Act 2009* (Qld) s 315; *Adoption Act 1988* (SA) s 31; *Adoption Act 1988* (Tas) s 109; *Adoption Act 1984* (Vic) s 121; and, *Adoption Act 1994* (WA) s 124.

consent is unlikely to identify "the mother and father of the child in relation to whom an adoption application is made, and any other person who has parental responsibility for the child when the adoption application is made" except to officers of the Court. However, assuming the best of outcomes, identifying an adopted child will always identify the person(s) who adopted him or her, namely "a person who makes an adoption application" and vice versa. A media entity wanting to publish a news report identifying either and adopted child or an adopter will almost always require consent from both before proceeding and that consent which might not be possible to obtain. ARTK agrees with the Banki Haddock Fiora submission quoted at paragraph 7.73 of the Paper which submitted that "*a person affected by an adoption application should be entitled to consent to the publication of their identity, provided they have the capacity to provide informed consent*" and nothing more.

Question 7.7(2): What change, if any should be made to existing prohibitions and exceptions?
Adoption Act 2010 (NSW) s 180 should be amended to remove the requirement that when publishing identifying material, the publication/broadcast cannot identify any other person affected by the adoption application.

Question 7.7(3): Should adoption proceedings continue to be held in closed court? Why, or why not?
On principle, no. However ARTK does not object to the continuation of such proceedings in closed court as that is what occurs in all Australian state and territories[262].

Question 7.7(4): What changes, if any should be made to the existing closed court provisions?
ARTK would welcome the implementation of an alternative access regime in similar terms to *Criminal Procedure Act 1986* (NSW) s 291C but accepts it is not available in any other Australian jurisdiction.

Question 7.8(1): Should there continue to be prohibitions on the publication or disclosure of material relating to parentage and surrogacy proceeding? Why or why not?
Parentage
Proceedings under the *Status of Children Act 1996* (NSW) are subject to two legislated restraints which make them virtually impossible to report about. All declaration of parentage applications (or annulments thereof) are conducted in closed court[263] and it is an offence to identify any person by, or in relation to whom, a declaration of parentage application is made or an annulment thereof is sought.[264] There are no exceptions to this automatic statutory prohibition.

Elsewhere, WA does not appear to have equivalent legislation while each of the ACT, Queensland and Tasmania do not prescribe closed courts or automatic statutory prohibitions in their equivalent legislation.[265] SA's legislation does not prescribe closed courts but does prohibit reports identifying a range of people that might be referred to or associated with family relationships proceedings[266] while the NT and Victoria are aligned with the NSW approach.[267] Given the lack of uniformity ARTK recommends that the media should be

[262] *Adoption Act 1993* (ACT) s 112; *Adoption Act 2000* (NSW) s119; *Adoption of Children Act 1994* (NT) s 79; *Adoption Act 2009* (Qld) s223; *Adoption Act 1988* (SA) s 24; *Adoption Act 1988* (Tas) s 93; *Adoption Act 1984* (Vic) s 107; and, *Adoption act 1994* (WA) s 133.
[263] *Status of Children Act 1996* (NSW) s 24
[264] *Status of Children Act 1996* (NSW) s 25
[265] *Parentage Act 2004* (ACT) and parentage declarations are not children's proceedings for the purposes of *Criminal Code 2002* (ACT) s 712A; *Status of Children Act 1978* (Qld); and, *Status of Children Act 1974* (Tas).
[266] It is an offence to identify an applicant, a person related to or associated with an applicant, a person in any other any connected in the matter to which the application takes place and a witness in the hearing of any applications under that Act: *Family Relationships Act 1975* (SA) s 13.
[267] *Status of Children Act 1978* (NT) s 17(1)) and it is an offence to publish the identify of any person by, or in relation to whom, proceedings are taken under that Act unless the court orders otherwise (*Status of Children Act 1978* (NT) s 17(2)); and, *Status of Children Act 1974* (Vic) s 32) and it is an offence to identify a party to a surrogacy arrangement or

permitted to report parentage proceedings, subject to compliance with the automatic statutory prohibition, but that that restraint should be amended to allow those affected by it to consent to being identified, should they wish to.

Surrogacy

NSW surrogacy law applies a substantially similar approach: all proceedings in respect of parentage orders are heard in closed court unless the order directs otherwise[268] and it is an offence to identify a person as being affected by a surrogacy arrangement.[269] However, unlike the *Status of Children Act 1996* (NSW), the *Surrogacy Act 2010* (NSW) provides that the automatic statutory prohibition falls away if the person identified, or reasonably likely to be identified, as a person affected by a surrogacy arrangement consents to being identified; the material does not identify, and is not reasonably likely to identify, any person affected by the surrogacy arrangement who does not consent to being identified; and, where the consent person is under 18 years of age the publisher or broadcaster has the consent of the person who has parental responsibility for the child.[270]

ARTK notes there is no consistent approach to surrogacy legislation elsewhere. Neither the ACT nor the NT has legislation on point. While Victoria and WA both have automatic statutory prohibitions they are limited to restraining identification in any report about a proceedings or an order (VIC), or an account of proceedings (WA), under their respective legislation.[271] In SA, any disclosure identifying an applicant, relative or associate of an applicant, witness in the hearing of the application or person in any other way connected in the matter to which the application relation is an offence[272] while Tasmania prohibits publishing the name or identify of any intend parent, child, birth mother, birth mother's spouse or birth parent of guardian of the child[273]. Neither jurisdiction has any exceptions upon which ARTK members could rely. The *Surrogacy Act 2010* (Qld) is the most similar to NSW and while the terminology that act deploys differs from the *Surrogacy Act 2010* (NSW) it too prohibits the identification of the same range of people connected with the surrogacy arrangements unless written consent is given by each identifiable person.[274]

The issue ARTK takes with *Surrogacy Act 2010* (NSW) s 52 is that the consent it allows for will be more or less effective depending on the factual circumstances of the particular surrogacy arrangement which may, or may not, be readily discernible. For example, if the birth mother and the intended parents were not previously well-known to each other, and none of them made wide-spread disclosures about the surrogacy arrangement, then it is likely that if birth mother consented to be identified in a news report it would not identify any other person prohibited from being identified by that section without consent and the ARTK member could safety publish/broadcast. Conversely, if the child grew up with the intended parents then any identification of the child would necessarily identify the intended parents and vice versa. A media entity wanting to publish an identifying news report would most likely require consent from each of the child and the intended parents, which consent which might not be possible to obtain. ARTK recommends amendments which afford those affected by surrogacy arrangements greater freedom should they wish to consent to their stories being told.

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a child who is the subject of a surrogacy arrangement in any report of proceedings (*Status of Children Act 1974* (Vic) s 33).

[268] *Surrogacy Act 2010* (NSW) s 47

[269] *Surrogacy Act 2010* (NSW) s 52, where persons affected by a surrogacy arrangement are the relevant child, the birth mother, a birth mother's partner (if any), another birth parent (if any), the intended parents, a party to any proceedings under the Act other than the Attorney General or a person whose consent to a surrogacy arrangement, or the making of a parentage order, is required under the Act.

[270] Ibid

[271] *Assisted Reproductive Treatment Act 2018* (Vic); *Status of Children Act 1974* (Vic) s 33; *Surrogacy Act 2008* (WA); *Family Court Act 1997* (WA) s 243

[272] *Family Relationships Act 1975* (SA) s 13

[273] *Surrogacy Act 2012* (Tas) s 42

[274] *Surrogacy Act 2010* (Qld) s 53

Uniform Civil Procedures Rules 2005 (NSW) (**UCPR**)
UCPR r 56A.4 additionally provides that unless the Supreme Court orders otherwise, an application for a parentage order under the *Surrogacy Act 2010* (NSW) is to be dealt with in the absence of the public. The rule redundant given *Surrogacy Act 2010* (NSW) s 47 and should be repealed on that basis.

Question 7.8(2): What changes should be made to the existing prohibitions?
UCPR r 56A.4 should be repealed, both *Status of Children Act 1996* (NSW) s 24 and *Surrogacy Act 2010* (NSW) s 47 should be amended to allow the media to enter and remain in courtroom for the purpose of reporting the proceedings and both *Status of Children Act 1996* (NSW) s 24 and *Surrogacy Act 2010* (NSW) s 52 should be amended to allow for effective consent.

Question 7.8(3): Should parentage and surrogacy proceedings continue to be held in closed court? Why or why not?
On principle, no. However ARTK does not object to the continuation of such proceedings in closed court as that is what occurs in the majority of Australian jurisdictions.[275]

Question 7.8(4): What changes, if any, should be made to the existing closed court provisions?
ARTK would welcome the implementation of an alternative access regime in similar terms to *Criminal Procedure Act 1986* (NSW) s 291C but accepts it is not available in any other Australian jurisdiction.

Question 7.9: What further protections, if any, should there be from the publication and disclosure of, or public access to, types of legal proceedings involving children other than those to which protections already apply?
ARTK does not support any amendments of this kind which would make reporting legal proceeding involving children any more difficult than it already is.

[275] *Status of Children Act 1978* (NT) s 17; *Surrogacy Act 2010* (Qld) s 51; *Surrogacy Act 2012* (Tas) s 44; *Status of Children Act 1974* (Vic) s 32; *Surrogacy Act 2008* (WA) s 43. *ACT has no relevant legislation and proceedings under the Family Relationships Act 1975* (SA) s 13 are held in open proceedings but no identification of those involved is permitted.

CHAPTER 8: VICTIMS AND WITNESSES, PRIVACY AND ACCESS TO INFORMATION

Question 8.1(1): Are the general privacy protections for victims and witnesses in NSW appropriate? Why or why not?

The legislation pertaining to victim impact statements is discussed in Chapter 2 and the Victims Register provided for by the *Mental Health (Forensic Provisions) Regulation 2017* (NSW) is discussed in Chapter 3, including the changes ARTK recommends be made to each. The CSNPO is extensively canvassed in Chapter 4 and as stated there ARTK opposes any amendments to expand the grounds upon which a non-publication or suppression order can be made.

ARTK notes that *Criminal Procedure Act 1986* (NSW) s 280 – which limits the requirement of a witness to provide his or address or telephone number – is not a publication/broadcasting restraint and, consequently, ARTK has no objection to it. We note that absent those details being a materially relevant part of the evidence (in which case they have to be included) ARTK members would generally not require such information except to the extent that publishing a person's suburb of residence is often a means deployed to avoid misidentification should any potentially defamatory imputations arise from a report: for example, John Smith of Newtown vs John Smith of Mona Vale.

Question 8.1(2): What changes, if any, should be made?

Like *Criminal Procedure Act 1986* (NSW) s 280, the power prescribed by *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30N is not a publication/broadcast restraint. It simply allows the court to receive information without disclosing it at large. If the victim changed his or her mind and gave the media the same information on the steps of the courthouse there would be no bar to publishing/broadcasting it other than any possible defamation ramifications. That being the case, ARTK leaves others to comment on this section.

ARTK otherwise opposes any amendments which would introduce further closure powers into any NSW legislation. That said, ARTK also accepts that in addition to the Federal legislation cited at paragraph 8.23 of the Report, there are a number of other jurisdictions that have legislation allowing a court to close to receive the evidence of a vulnerable or special witness.[276] If the Commission were minded to recommend that such a provision be enacted in NSW ARTK submits that *Criminal Procedure Act 1986* (NSW) s 291C should be further amended to allow the media to access those proceedings for the purpose of reporting them.

Question 8.2(1): Are the privacy protections for specific types of victims and witnesses in NSW appropriate? Why or why not?

See answers previously provided in Chapters 2 (closing court proceedings) and 7 (generally and in relation to automatic statutory prohibitions). In addition, paragraphs 8.51 to 8.60 of the Report refer to the November 2020 amendments to the *Criminal Procedure Act 1986* (NSW) that inserted Part 4B into the Act which deals with evidence given by domestic violence complainants. *Criminal Procedure Act 1986* (NSW) s 289T and 289U require that evidence given in domestic violence offence proceedings, and where an AVO is applied for if the person the order is directed at has been charged with an offence in relation to which the protect person is the victim, must be given in closed court. Any other part of proceedings for a domestic violence offence can be closed if the court so orders.[277] These powers are in addition to the automatic statutory prohibition and suppression order making powers in the *Crimes (Domestic and Personal Violence) Act* (NSW) 2007 ss 45 and 58.

In relation to the court closing while the complainant in a domestic violence offence gives evidence, Victorian courts have the discretion to close "to avoid causing undue distress or embarrassment to a

[276] See references in Chapter 9.

[277] *Criminal Procedure Act 1986* (NSW) s 289UA

complainant or witness in any criminal proceeding involving a...family violence offence".[278] Elsewhere, similar powers exist where such complainants constitute vulnerable or special witnesses. That is always the case in the NT and Queensland; is highly likely to apply in the ACT; and, may be the case in SA, Tasmania and WA depending on the nature of the charge and/or the factual circumstances of the case.[279] In the ACT that designation triggers a discretion to close the court which cannot be exercised against "a person who attends the proceeding to prepare a news report of the proceeding and is authorised to attend for that purpose by the person's employer".[280] In the NT, the complainant's evidence must be heard in closed court unless the court orders otherwise.[281] In Queensland, where a special witness's evidence is to be given by way of a recording or statement, the court has a discretion to close.[282] In Tasmania there is a discretion to close to hear evidence from a special witness.[283] In SA and WA, assuming the relevant complainant is a vulnerable witness, there is no power to close the court during his or her evidence.[284] In summary, only NT and NSW automatically close the court with the other jurisdictions - at most - prescribing a discretion to close.

As for closure when an apprehended, domestic or family violence order is being made:

- Queensland proceedings are in closed court[285] as are NT proceedings if the only protected person is a child or a vulnerable witness is giving evidence where a vulnerable witness means an adult who will be protected by the order or a vulnerable witness as defined by *Evidence Act 1939* (NT) s 21AB;[286]
- In the ACT, the court is not required to sit in public for the making of an interim and/or ex parte family violence order but otherwise sits in public with the court having the discretion to close;[287]
- Victoria prescribes a discretion to close the court;[288]
- SA and Tasmania have open proceedings, relying on their respective automatic statutory prohibition to provide appropriate protection to complainants;[289] and
- In WA, the applicant for a restraining order can request that the first hearing of the matter occur in closed court.[290]

None of the other jurisdictions have a discretionary power to close domestic violence offence proceedings other than when the complainant is giving evidence.

Question 8.2(2): What changes, if any, should be made?

In light of our answer to Question 8.2(1), ARTK submits that the stronger communities amendments went too far. *Criminal Procedure Act 1986* (NSW) s 289UA is an outlier and should be repealed and *Criminal Procedure Act 1986* (NSW) s 289U should be amended replacing automatic court closure with a discretion to

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[278] *Open Courts Act 2013* (Vic) s 30(2)(d)

[279] *Evidence (Miscellaneous Provisions) At 1991* (ACT) s 102 gives as an example of a vulnerable witness a person who "is intimidated or distressed because of the person's relationship to the accused person"; *Evidence Act 1939* (NT) s 21AB definition of a vulnerable witness expressly includes "a complainant in a domestic violence offence proceeding"; *Evidence Act 1977* (Qld) s 21A, special witnesses include the complainant in a domestic violence offence "who is to give evidence about the commission of an offence by the other person"; *Evidence Act 1929* (SA) s 4; *Evidence (Children and Special Witnesses) Act 2001* (Tas) s 8, complainants in family violence cases are not automatically special witnesses but subsection (2) requires the court in such cases to consider making an order designating them as such; and, *Evidence Act 1906* (WA) s 106R.

[280] *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 102

[281] *Evidence Act 1939* (NT) s 21A(2)(AD)(b)

[282] *Evidence Act 1977* (Qld) 21AAA

[283] *Evidence (Children and Special Witnesses) Act 2001* (Tas) s 8(2)(b)(iii)

[284] *Evidence Act 1929* (SA) 13A; and, *Evidence Act 1906* (WA) s 106R.

[285] *Domestic and Family Violence Act 2012* (Qld) s 158

[286] *Domestic and Family Violence Act 2007* (NT) s 13, s 104, s 106

[287] *Family Violence Act 2016* (ACT) s 59, s 60

[288] *Family Violence Protection Act 2008* (Vic) s 68

[289] *Intervention Orders (Prevention of Abuse) Act* (SA) 2009 s 33; and, *Family Violence Act 2004* (Tas) s 31, s 32.

[290] *Restraining Orders Act 1997* (WA) s 26, s 27

close in cases where a domestic violence offence complainant is giving evidence. ARTK accepts NSW is in the slim majority in prescribing an automatically closed court for the evidence of the complainant when an AVO is being made. While there is no comparative basis to press it, ARTK submits that to the extent that closed courts, or closure powers, are to be retained, that the media should be given the same rights of access to the proceedings as prescribed in *Criminal Procedure Act* (NSW) s 291C.

Question 8.3: What privacy protections, if any, are needed for other types of victims and witnesses?
ARTK opposes any further restraints on publication/broadcast being made.

Question 8.4(1): Are the current arrangements governing access to court information by victims appropriate? Why or why not?
The question is better answered by other respondents.

Question 8.4(2): What changes, if any, should be made?
The question is better answered by other respondents.

CHAPTER 9: PROTECTIONS FOR SEXUAL OFFENCE COMPLAINANTS

Question 9.1(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?
Yes. As noted in Chapter 3 of this Response this is one of the areas of law in relation to which all Australian jurisdictions concur. Complainants in sexual offences cases cannot be identified anywhere in Australia without their consent.[291] Not all survivors do consent: in fact, those that do are very much in the minority. However, as current Australian of Year Grace Tame demonstrates, for those who do want to consent owning their own narrative and recounting their experiences in their own name can be significantly empowering. ARTK has long held NSW as the standard by which other Australian consent laws of this kind should be measured. *Crimes Act 1900* (NSW) s 578A requires no changes.

Before turning to the next question, ARTK raises one additional point. At paragraph 9.7, the Report asserts that one argument in support of the automatic statutory prohibition – which ARTK does not dispute – is that "the media may be more likely to report sexual offences "ruthlessly and salaciously," compared with other offences" citing a Tasmania Law Reform Institute report which, in turn, cites the text "Rape and the Legal Process" by Jennifer Temkin.[292] Professor Temkin is a British academic at the University of Sussex and her book was first published in 1987.[293] ARTK members are well versed in answering criticism and we are happy to address any concerns that the Commission may wish to raise. However, if the Commission does intend to critique media conduct we would ask that it be based on current Australian publishing or broadcasting activities. ARTK absolutely rejects any suggestion that this outdated citation has even the slightest relevance to the work our members do.

Question 9.1(2): What changes, if any, should be made?
No changes are required.

Question 9.2(1): Are the situations in which courts may be closed during sexual offence proceedings appropriate? Why or why not?
As noted at paragraph 9.23 to 9.36 of the Report, there are four occasions upon a NSW court may close in relation to a prescribed sexual offence case:

(a) When complainant gives evidence (in which case the court closes automatically and there is no discretion);[294]
(b) When the complainant gives a witness impact statement;[295]
(c) During other parts of the proceedings for a prescribed sexual offence;[296] and
(d) All incest proceedings occur in closed court.[297]

(b) is discussed in Chapter 2 of this Response and ARTK makes no comment about (d).

As for (a) and (c), there is no unified Australian approach. Victoria has no equivalent of (a) above but has legislation that is the most closely aligned with (c). *Open Courts Act 2013* (Vic) s 30(2)(d) allows the court to close to avoid causing undue distress or embarrassment to a complainant or witness in any criminal

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[291] *Evidence (Miscellaneous Provisions) Act 1991 (ACT)* s 74; *Criminal Proceedings Act 1900* (NSW) s 578A; *Sexual Offences (Evidence and Procedure) Act* (NT) s 6; *Criminal Law (Sexual Offences) Act 1978* (Qld) s 6; *Evidence Act 1929* (SA) s 71A; *Evidence Act 2001* (Tas) s 194K; *Judicial Proceedings Reports Act 1958* (Vic) s 4; *Evidence Act 1906* (WA) ss 36A – 36C.
[292] Tasmania Law Reform Institute, *Protecting the Anonymity of Victims of Sexual Crimes*, Final Report 19 (2013) at [2.3.2] citing Jennifer Temkin, Rape and the Legal Process (Oxford University Press, 2nd ed, 2005) at 305
[293] See https://journals.sagepub.com/doi/abs/10.1177/136571270300700306?journalCode=epja
[294] *Criminal Procedure Act 1986* (NSW) s 291
[295] *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30I
[296] *Criminal Procedure Act 1986* (NSW) s 291A
[297] *Criminal Procedure Act 1986* (NSW) s 291B

proceeding involving a sexual offence and that closure power is not limited to when the complainant or a witness is giving evidence. Queensland and NT prescribe a closed court but only during a sexual offence complainant's evidence.[298] In the ACT and Tasmania the complainant in a sexual offence case is a vulnerable witness and each jurisdiction prescribes a discretion to close the court while such a witness is giving evidence but, again, not at any other time.[299] SA and WA prescribe various powers to allow the court to assist a vulnerable witness in giving evidence but neither includes a closed court or closure power.[300] In summary, it's 3:3:2 in relation to the court automatically closing, prescribing a discretion to close or neither when hearing the complainant's evidence and 6:2 against prescribing a power that allows for the court to close at any other time.

Question 9.2(2): What changes, if any, should be made?

Give the answer to question 9.2(1) – and consistent with the position taken in previous Chapters of this Response – that *Criminal Procedure Act 1986* (NSW) s 291A should be repealed, noting that CSNPO Act s 8(1)(d) would still apply to the proceedings should additional publication restraints be required.[301]

[298] *Criminal Law (Sexual Offences) Act 1978* (Qld) s 5; and, *Evidence Act 1939* (NT) s 21F.

[299] *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 102; and, *Evidence (Children and Special Witnesses) Act 2001* (Tas) s 8(2)(b)(iii).

[300] *Evidence Act 1929* (SA) s 13A; and, *Evidence Act 1906* (WA) ss 106N, 106R.

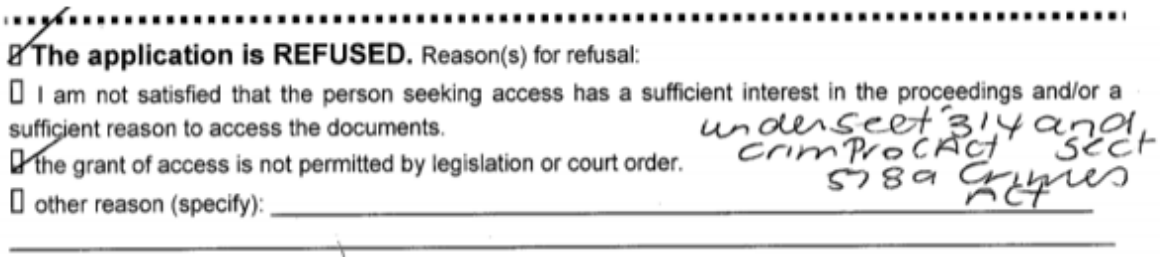
[301] That subsection allows an order to be made the order is necessary to avoid causing undue distress or embarrassment to a party to or witness in criminal proceedings involving an offence of a sexual nature (including sexual touching or a sexual act within the meaning of Division 10 of Part 3 of the *Crimes Act 1900*).

CHAPTER 10: MEDIA ACCESS TO INFORMATION

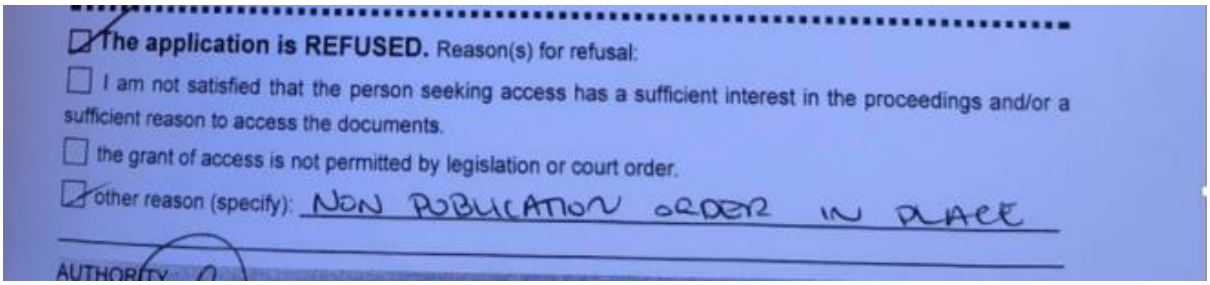
Question 10.1(1): Are the current arrangements for the media to access court information in relation to both civil and criminal proceedings appropriate? Why or why not?

No. This question has been addressed in previous chapters of this Response (in particular, see Chapters 4 and 6) but to summarise:

1. There is no entitlement to information in civil proceedings as the relevant legislation and Practice Directions are entirely discretionary. The remains the case despite the fact that the court has recognised that readers can understand from reading reports based on pleadings that the matter remains in dispute;
2. As noted in Chapter 6, even if a journalist convinces a court to exercise that civil access discretion, neither the Local nor District Court will provide hard or email copies of documents. That can at times make preparing a report of the proceedings difficult particularly where the file is sizable or the legal concepts raised in the documents are not familiar to the journalist and he or she needs the assistance of the ARTK's members legal advisers to understand the documents;
3. The right to inspect documents in criminal proceedings referred to at paragraphs 10.7 of the Report is often read down to a discretion (for example, see Case Study 7 below);
4. Moreover, in the last two to three years, the Local and District Court Registrar's have developed a practice that in criminal cases, if either a non-publication order or an automatic statutory prohibition applies (most commonly *Children (Criminal Proceedings) Act 1987* (NSW) s 15A or *Crimes Act 1900* (NSW) s 578A) they will always deny access to information on the basis of *Criminal Procedure Act 1986* (NSW) s 314(4). For example:



Or:



Paragraphs 10.12 and 10.13 of the Report note that all applications for access to documents pursuant to s 314 must be made to court registrar. However, as at the date of this Response and irrespective of the entitlement provided in s 314, there is almost no point in a journalist making an application if an automatic statutory prohibition or non-publication applies to the case. For example:

CASE STUDY 5: R v SHANE MATTHEWS

On 18 September 2019, Matthews pleaded guilty in Local Court to two counts of indecently assaulting a person under 16 years of age and the matter was listed in the District Court for sentencing. A journalist filed an application with the Local Court Registry for access to the indictment, court attendance notice or other document commencing the proceedings and the statement of facts but was informed later the same day that his application had been refused because "*s. 314 (4) (b) Criminal Procedure Act*". No information was provided about how s 314(4)(b) had been enlivened which, in this case, could have been due to s 15A, s 578A and/or in relation to the statement of facts, *Criminal Procedure Act 1986* (NSW) s 80. Because the file had already been transferred to the District Court the journalist could not ask a Magistrate to review the denial of access decision.

However, judicial consideration of how s 314 interacts with automatic statutory prohibitions by the lowers courts is divided. The District Court Judicial Registrar has expressed the view on an ex tempore basis in at least two decisions of which ARTK is aware that the Registrars are correct and that if either s 15A or s 578A apply to proceedings, a Registrar cannot release any information about the case. For example:

CASE STUDY 6: R v DOV TENENBOIM

From: judicialregistrar [Email Address Redacted]
Date: Wed, 2 Sep 2020 at 14:47
Subject: RE: Application for Review of Registrar's Decision - R v Tenenboim (2018/00178450)
To: [Defendant's Lawyer], Tim Matchett <[redacted]>,
[redacted] <[redacted]>
Cc: [CDPP Lawyer]

Apologies for the delay in providing a determination in this case, I acknowledge it has been a longer delay than normal and I appreciate the patience of the parties.
I confirm further to the listing on 22 May 2020 I have reviewed the file in this case and provide a determination on the application made by [Journalist].
I confirm that the circumstances of the application are that 23 March 2020 [Journalist] made an application to access the file, in particular seeking access to:

i) The indictment/CAN or other document commencing the proceedings.
ii) The Police Fact Sheet.
iii) Any record of conviction or order.

The purpose for the application was for the preparation of a fair and accurate report of the proceedings.

[Journalist] made a number of acknowledgements in the application including that he shall ensure that he complies with the terms of any Court Suppression Order and/or Non Publication Order made in relation to the proceedings under the relevant legislation.
I also confirm that the following Suppression/Non Publication orders were made:

i) Non Publication of the name of [Name Redacted - Not the Accused] on 11 September 2019 by Magistrate [Name Redacted].
ii) Non publication of any information in whatever form which identifies or tends to identify the name, background and/or whereabouts of Registered Source "RS#######" on 8 August 2020 by Magistrate [Name Redacted].

The application to access the documents in the file was refused on or about 30 March 2020 under section 314(4)(b) of the Criminal Procedure Act or as a result of the suppression order(s) being in place.

I recall advising the parties at the listing on 22 May 2020 that I considered the Registrar's decision correct, but that did not in the circumstances prevent [Journalist] from making a further application to myself of a Judge for access to the file under the District Court Rules. Notwithstanding the decision of the Registrar and/or its correctness it remained possible for the Court to consider granting access to the file/documents to Mr Parkes-Hupton and I confirm I resolved to review the file and consider if such a course was possible.

On review of the file I can advise that I do not see a difficulty with access being granted to the Court Attendance Notices.

The Fact Sheet agreed between the parties present a different circumstance. It was agreed after the Case Conference and is included in a set of documents marked "Confidential". Further, there is a further draft of the Fact Sheet on file marked "Proposed Fact Sheet". It appears to me that the parties may have a variation of the agreed Fact Sheet under consideration for the sentencing on 21 September 2020. The status of the Fact Sheet by its possible variation is not the major concern that arises, rather it compounds the major concern in my view, that is that the Fact Sheet contains a matrix of facts surrounding the offences committed by the defendant that contains sufficient details that if published could lead a reader on a pathway to deducing or ascertaining information that may identify the persons the subject of the Non Publication Orders.
There are multiple addresses, references to computer application accounts and messages or communications on multiple dates that may, albeit in the range of a low possibility, lead a person with partial knowledge of the offences and facts to draw conclusions as to the identity of persons

involved. It appears prudent to reserve the question of access to the Fact Sheet to the Trial Judge so that first, the parties can confirm its final form, secondly, a further request for access can be made where the prosecution and defence are present to assist the sentencing judge to make appropriate orders for access, and or confirm any redaction or further restriction. In my view, the normal process of considering the redaction of this information in order to avoid any risk of accidental identification of persons is not possible in the circumstances and presents a risk if the Fact Sheet is made available. Finally, I note [Journalist]'s undertakings and that confirms that otherwise abide any Non Publication Order, however, that intention may not be suitable to be relied on by itself in the circumstances I have described to preserve the integrity of the orders. The balance of documents sought being records of orders/convictions are not present and will be available as at the sentencing.

The following orders will be made:

1. [Journalist] and/or any other applicant for access to the file is permitted access to the file to inspect the Court Attendance Notices only.
2. The question of access to the Police Fact Sheet is reserved to the Sentencing Judge.

Copies of the Fact Sheets will be made available through the Media Officer, I will arrange for her to contact you once they are ready to be inspected.

Regards
Judicial Registrar
District Court of NSW

At least two Magistrates have reached the opposite conclusion:

CASE STUDY 7: R v RONALD TARLINGTON

Tarlington is a NSW police officer who was charged with sexually touching a colleague without consent during a Christmas Party in 2018. He was convicted of that offence in 2019 and sentenced to an 18 month good behaviour bond in February 2020. His appeal against his conviction was dismissed in August 2020. A Downing Centre Registrar's refusal to grant access due to s 578A being applicable to the case was overturned by Local Court Magistrate Atkinson in June 2019. In making that decision the Magistrate noted:

> *In the submissions it was also noted and, indeed, it is reflected in the application that journalists are aware of the legislative sanctions that can apply and it is for this reason I refer to contempt as well. They are well aware of sanctions that may be applied against them or their employees if there is a breach of legislative provisions or there is conduct which might be in the nature of contempt. This is by way of introduction but turning to the matter before me today, what I am dealing with is the interface between two legislative provisions.*
>
> *... I am not of a view that the prohibition contained in s 578A(2) is a matter that falls within the prohibition contained in 314(4)(b). I note, in coming to that view, I have had regard to the decisions, including that of R v AB (No 1) [2018] NSWCCA 113 where Meagher J discussed the public interest in open justice. This case is not directly on point because in that case they were dealing with the intersection of other pieces of legislation but, nevertheless, the Court was promoting the public interest in open justice. These concepts are reinforced in decisions such as Rinehart v Welker, John Fairfax Publications v District Court. They are well known cases where the Court emphasises the need for open justice.*
>
> *In the submissions, I was taken to specific sections of those and, in relation to the decision of R v AB, at para 38 of that decision the Court stated:*
>
> > *"The short answer to this submission is that the making of an order in either form is not necessary to prevent prejudice to the proper administration of justice. The appropriate remedy for any contravention of the prohibition in s 15A(1) is for proceedings to be brought under s 15A(7) against a person who has published contrary to that prohibition."*
>
> *As I understand it, and it was put in submissions, is that it is not for the registry to pre-empt a potential breach. Each case is dealt with on its merits and if there is a breach it would be a matter for the DPP to consider whether or not charges should be laid in relation to a contravention. Taking everything into account today, I am satisfied that the prohibition contained in s 578A(2) does not operate to cause the prohibition contained in 314(4)(b) to operate.*
>
> *On that basis I find that the Registrar is not bound by the prohibition and the media is entitled to inspect the documents that access has been sought.*

CASE STUDY 8: R v DAVID FROST

Frost was charged with one count of aggravated indecent assault of a cognitively impaired victim. He was found not guilty of that charge in February 2019. A Downing Centre Local Court Registrar refused access to documents on the file due to a non-publication order which prohibited publication of the names of the complainant and her daughter. No media application was made to overturn the order because s 578A also prohibited the publication of either name and having the order lifted would not impact what could be published/broadcast. The Registrar's refusal to allow access was overturned by Local Court Deputy Chief Magistrate Allen in November 2018 who noted:

> *... I take your point in respect of s 314, and it would appear on the face of it that a blanket refusal on the part of the registrar appears perhaps to have been seated in misunderstanding of the non-publication order or the ambit of the non-publication order ...*
> *…*
> *[I]t appears to me that the registrar in exercising the determination of the 29 October 2018, to refuse the application, by Lucy Cormack, on that day for access to material held by the Court in the proceedings, DPP v David Patrick Frost, was or had its genesis in perhaps too restrictive a reading of s 314 of the Criminal Procedure Act 1986.*
> *…*
> *The non-publication order in the other proceedings does not preclude the publishing of documents per se, but rather, the publishing of material that would identify the nominated persons. That is agreed between all parties. I reiterate, it would appear that the registrar's decision was most likely erroneously seated in a too restrictive a reading of, in particular, s 314(4) of the legislation.*

For the sake of completeness, ARTK notes that s 15A and s 578A are substantially similar insofar as the activities they restrain are publishing/broadcasting to the public as opposed to disclosure and, consequently, this decision should also apply in relation to the former provision. ARTK also notes, particularly in the case of automatic statutory prohibitions, that despite a refusal of access the journalist will almost always know who the person whose identity is being protected is since it is their job to know. It is also their job to know that they cannot publish or broadcast that information. In some cases this results in a journalist being deprived of access to the most basic facts underlying criminal proceedings of all, namely the charges**:**

CASE STUDY 9: R v BEN FENNER

Fenner is a former teacher who was charged with allegedly having a sexual relationship with one of his students. He was convicted in October 2020 of 7 counts of sexual intercourse with a person under his care and sentenced to three years and nine months jail. At his first mention a journalist applied for the indictment, court attendance notice or other document commencing the proceedings and any order or record of conviction made in the matter. The application was refused by the Registrar on the basis that the matter concerned a "*sexual related offence s578a*". Other media were able to ascertain that Fenner had been charged with multiple counts of sexual intercourse with a person under care between 17 and 18 years of age which enabled the journalist to file his report.

5. It is not uncommon for journalists to unwittingly be given the wrong information by well-meaning media officers and registry staff either because the right information is not available to them or due to a lack of understanding about the differences in the publications/broadcasting restraints that may apply to a case. As noted in Chapter 4 of this Response there is an important distinction between a suppression order and a non-publication order. Similarly, there is an important distinction between an order - which would have to be lifted or varied if reporting were to be permitted - and an automatic statutory prohibition, which may have an exception a journalist can explore. If a journalist is misinformed about the applicable restraint then lawyers acting for ARTK members cannot give accurate advice.

   For example, a journalist contacted the DCJ media officer earlier this year to ask whether all of the prescribed sexual offence charges in a matter had been sent up to the District Court. The response the journalist received is set out below:

Yes, all but the following which are Suppressed and we have no access to

2020/00078007	036	Suppressed	Local Court - Crime - Central	03Dec2020 / Central	Criminal	LC Determined (case open)	02Dec2020
2020/00088870	001	Suppressed	Local Court - Crime - Sydney	15Dec2021 / Sydney Downing Centre	Apprehended Violence Order	LC Active (case open)	20Mar2020
2020/00089019	001	Suppressed	Local Court - Crime - Sydney	15Dec2021 / Sydney Downing Centre	Apprehended Violence Order	LC Active (case open)	20Mar2020
2020/00089195	001	Suppressed	Local Court - Crime - Sydney	15Dec2021 / Sydney Downing Centre	Apprehended Violence Order	LC Active (case open)	20Mar2020
2020/00089286	001	Suppressed	Local Court - Crime - Sydney	15Dec2021 / Sydney Downing Centre	Apprehended Violence Order	LC Active (case open)	20Mar2020

On making further inquiries about what "Suppressed" means, the media office informed the journalist, "The registrar at Central LC informs me that these suppression and non-publication orders were made by Magistrate on 6/8/20 at Downing Centre Local Court". Later, when the journalist asked "can you send me the wording of the suppression/no pub, so I can ensure we are not breaching it", the media officer responded: "Order applies to: "The identity of any witness including the defendant". It would appear from these inquiries that it was more than simply s 578A applicable to the case but whether the order was a suppression order or, in fact, a non-publication order remained unclear (as did the basis for the order being made and its duration).

In other examples:

CASE STUDY 10: R v PETER HIGGINS

On 13 September 2019 Higgins was sentenced for two counts of an indecent act with a male and one count of buggery in historic child sex offences said to have been committed while he was a Christian Brother working a high school (he was subsequently acquitted of all counts following a successful appeal in August 2020). On September 17, a journalist applied to the Campbelltown District Court registry for access to the file but his application because the file was "*subject to 314(4)*". When the journalist contacted the District Court media office to ascertain why s 314 was said to apply he was informed "*there is a non-publication order on identifying the victim*". Lawyers for the journalist made further inquiries and were ultimately informed that in fact there was no order but rather, the "*order noted for this case refers to a statutory prohibition that applies under s 578A Crimes Act 1900*".

CASE STUDY 11: R v JAMES DOE[302]

James Doe was sentenced in the District Court March 2021 after pleading guilty to intentionally choking a person with recklessness with two other charges - neither a prescribed sexual offence - being taken into account. As is often the case with strangulation charges, Doe and the complainant had been in a relationship and living together at the time of the offending. An additional charge of aggravated sexual assault inflicting actual bodily harm (which is a prescribed sexual offence) had been withdrawn prior to Doe entering his guilty plea. However, since s 578A continues to apply "even though the prescribed sexual offence proceedings have been finally disposed of" the complainant could not be identified if the sexual assault charge was to be reported.

Two journalists writing about the matter made inquiries with the District Court media officer. The first was initially informed that the only publishing restraint applicable to the matter was s 578A. On further inquiries being made by both journalists, the media officer was informed by court staff that, in fact, a non-publication order had been made on 28 June 2019 when Doe was arraigned which prohibited the complainant from being named or identified. That order meant that the journalists could not report the fact that the remaining charges were domestic violence charges, that Doe and the complainant were in a relationship at the time of the offending and that the offending occurred at their joint place of residence because all of these matters would identify the complainant as being Doe's former partner. ARTK was given no information about why the order was deemed necessary but its effect was to limit reporting of the matter beyond what compliance with s 578A would require. The NCAELO had received no prior notice of an order being made in the matter.

[302] This Case Study has been anonymised in this open submission because it would identify a person the subject of *Crimes Act 1900* (NSW) s 578A.

5. There is no sound reason why a statement of facts should only be made available to the media in the case of a guilty plea. Even denied access to that information, the journalist is still going to cover the proceedings in court and as long as the magistrate, judge or justice reads the statement of facts before making directions or orders, that document is part of the proceedings and defensible should a defamation complaint be made pursuant to *Defamation Act 2005* (NSW) s 29 as part of a proceeding of public concern. The fact that a journalist is denied access to the statement of facts if no plea, or a not guilty plea, is entered merely increases the chance that the report of the proceedings may include an error of fact and means "we can't accurately and fairly report what happens in court when they discuss details". On at one occasion it has resulted in a refusal of access decision when s 314 was applied in its most literal sense:

> **CASE STUDY 12: R v JIM BYRNES**
> Byrnes pleaded not guilty to driving while suspended but in September 2019, was convicted in absentia after he did not attend Local Court. He subsequently succeeded in having that penalty reduced to a three-month good behaviour bond with no conviction recorded. The Registrar refused a journalist access to the facts sheet in the matter, telling the journalist that the reason for the refusal was because Mr Byrnes did not plead guilty (keeping in mind that s 314 provides an entitlement to access to the "police fact sheet (in the case of a guilty plea)").

6. The time taken in relation to re-listing interim non-publication orders is discussed in Chapter 4. If a journalist gives instructions to review an access refusal decision then the delay is longer:

> **CASE STUDY 13: R v JOSEPH CREWS**
> In January 2019, Crews pleaded guilty to three counts of disseminating child abuse material and one count of possession of child abuse material. The Downing Centre Local Court registry granted a journalist access to the court attendance notice but denied access to the agreed statement of facts because it "*mentions details about the victims*". An appeal against the decision was filed on February 12 at which time the registry would not give a return date earlier than four weeks hence. The matter returned to court on March 8 but due to the size of the list was adjourned to March 12 at which time the Magistrate overturned the Registrar's decision and granted access to the facts. Were it not for the journalist's determination to see the story through the matter would not have been reported at all.

Question 10.1(2): Should the media have special privileges to access court information in relation to civil and/or criminal proceedings? Why or why not?

Yes. Firstly, while in the past it was the case that a person sitting in the back of a courtroom could understand the basis of the proceedings from what was said by counsel and the bench (for example, in times where facts sheets and affidavit were read aloud), modern litigation favours brevity: it has to since there is so much more of it. Consequently, unless the observer has legal training it is difficult - if not impossible - to make sense of what is happening unless a journalist is able to access the documents underlying the proceedings and explain them by way of reporting.

Secondly, ARTK adopts the quote set out at paragraph 10.4 of the Paper that "[a]s few members of the public have the time, or even the inclination, to attend courts in person, in a practical sense [the principle of open justice] demands that the media be free to report what goes on in them". Adding to that point, and by way of example, on 8 March 2021:

- Deputy Chief Magistrate Michael Allen had 47 criminal matters in his 9:30am list at Downing Centre;
- Between 9:30am and 11:00am that same day, there were 96 criminal matters before the District Court judges at Downing Centre/John Maddison Tower; and
- In that same timeframe, there were an additional 16 criminal matters in the Sydney Supreme Courts.

There is no way for any one person to attend all of these matters even if minded to do so. If you are living in regional NSW, the list is the same length or longer once taking into account the fact that there may be multiple courthouses accessible from your location but with significant travel time between them. ARTK accepts that our members cover only a small portion of the total number of cases in NSW every day but even that small amount provides access to many more observers of the proceedings than would be possible if attempted in person.

Question 10.1(3): What changes, if any, should be made to the current arrangements, including in relation to:

(a) the nature of the access provided;

Journalists covering courts spend a significant amount of time at court and are happy to continue to attend registries in person to inspect files as the primary source of access. They are well versed on the necessity to preserve the file and the fact that documents cannot be altered, removed or damaged. Journalists also understand their obligations in relation to automatic statutory prohibitions and non-publications orders and, if in doubt, have access to legal advice. From time to time it would also be useful to be able to contact a Registry and request that brief documents such as court attendance notices be provided by email or apply for larger documents to be copied and then collected by the journalist. At present, our journalists tell us that metropolitan Sydney registries flatly refuse to provide documents by email while some regional registries have been known to be cooperative on that front.

(b) the types documents that may be accessed;

As stated in Chapter 6 of this Response, we submit our journalists should be allowed to access all documents subject only to suppression orders but suspect that the proclamation of the CI Act, which prescribes the types of documents the public and the media can access, is more likely to prove palatable. We do not agree with the objection raised by Legal Aid that access to uncontested material should not be permitted. As the Court of Appeal noted in Cummings v Fairfax, readers are able to understand that matters raised in proceedings are contested and that allegations made by one party against another are exactly that and nothing more. ARTK makes the same submission in relation to inadmissible information which could also be the subject of a suppression order on the basis that one is necessary to prevent prejudice to the proper administration of justice.

(c) time limits of access, and

ARTK notes that paragraph 10.54 of the Paper accepts that the current two-day rule prescribed by s 314 is an outlier. Consistent with our approach elsewhere in this response, we submit it should be repealed on that basis. However, ARTK also agrees with the *Sydney Morning Herald* submission referred to at paragraph 10.17 of the Paper and submits that the two-day rule should be repealed because it is an impediment to reporting proceedings. Paragraph 10.18 of the Paper gives the example of proceedings involving co-defendant's where one matter concludes before another. ARTK also notes that *Defamation Act 2005* (NSW) s 29 does not

require the report to be contemporaneous in order for the defence of a fair report of proceedings of public concern to arise. If contentious material is referred to in open court, the most legally sound defamation position is to ensure that that information is reported as part of a report of court proceedings which may require a journalist to access a court file well after the proceedings have concluded.

ARTK does not agree with the suggestion at paragraph 10.21 of the Report that access should be provided unless "providing access would require an unreasonable diversion of the court's resources" as prescribed by CI Act s 14(4)(a). As stated in Chapter 6 of this Response, ARTK cannot support an access system which includes discretionary elements of any kind. We are not being unduly pessimistic. We simply know from the experiences of our journalists - many of which are set out above - that if registry staff are given any discretion at all they will exercise it against the media.

(d) application procedure

As previously stated in our answer to Question 6.8(1), journalists currently file pro forma paper applications and are happy to continue with that procedure or any reasonable alternative.

Question 10.2(1): Is the current regime governing media access to proceedings appropriate and workable? Why or why not?

No. Changes to parts of NSW current access regimes have been recommended in previous Chapters of this Response.

Question 10.2(2): What changes, if any, should be made to the current regime, including in relation to:

(a) prescribed sexual offence proceedings

ARTK addresses access to these proceedings in Chapters 3 (victim impacts statements) and 9 (prescribed sexual offences generally) of this Response. We add here that given the advances in video access to courtrooms brought about by the Covid-19 pandemic there is no reason why a journalist should ever be denied the ability to view closed court evidence in the future.

(b) proceedings involving children

ARTK answers this question in Chapters 3 and 7 of this Response.

(c) accessing "virtual courtrooms"; and

We agree with the submissions cited at paragraph 10.86 of the Report that virtual access to courtrooms has been inconsistent and that, generally speaking, the Federal Court has achieved the best outcomes in this area. That said, there has been improvement since the Preliminary Submissions were written and we hope for ongoing improvement in the future. ARTK welcomes any recommendations which make it easier for journalists - and their lawyers - to access virtual courtrooms and information about them.

(d) orders excluding people under the Court Security Act 2005 (NSW)?

ARTK's answer to Question 2.2(1) addressed this issue.

Question 10.3(1): Are the rules that apply to media recording and broadcasting of court proceedings appropriate? Why or why not?

No. NSW and WA are the only two jurisdictions that do not allow journalists to record proceedings for the purpose of ensuring they are accurately reported. ARTK recommends that the *Court Security Act 2005* (NSW) s 9 be amended to adopt the Victorian recording provision but would settle for any amendment that allows recording to occur. As for broadcasting, there is no consistent position amongst Australian courts, although ARTK notes that the Supreme Courts could each permit broadcasting of proceedings within their

inherent jurisdiction. None of the ACT, SA or Tasmania have any references to broadcasting in their legislation or media guidelines. The NT Supreme Court Media Policies and Practices allow for broadcasting and, in fact, that court is currently grappling with whether or not to broadcast the criminal trial in R v Zachary Rolfe via YouTube. The Victorian Supreme Court provides its own online collection of recorded proceedings at https://www.supremecourt.vic.gov.au/about-the-court/on-demand and both the County and Supreme Courts of Victoria allow for broadcasting and did so in the sentencing of George Pell. WA's Media Guidelines do not allow for broadcasting but the court is engaging in its own program of live streaming. ARTK submits that open justice is significantly enhanced by allowing broadcasting of proceedings and invites NSW to take the lead and allow for greater broadcasting in the future.

Question 10.3(2): What changes, if any, should be made?
See answers to Questions 10.3(1) and (2) above.

Question 10.4(1): Are the laws that prohibit media from publishing or broadcasting information relating to court proceedings appropriate? Why or why not?
See preceding Chapters of this Response.

Question 10.4(2): What changes, if any, should be made?
See preceding of Chapters of this Response.

Question 10.4(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?
No. See Chapter 4 of this Response.

(b) is the list of people with standing to be heard in application for suppression or non-publication orders appropriate?
ARTK members are news media organisations and, as such, have standing. The only comment ARTK makes in relation to this point is that to the extent that there is any doubt that a freelance journalist has standing, ARTK supports any amendment that would ensure they do.

(c) are the current arrangements for communicating the existence of suppression and non-publication orders adequate?
No. See Chapter 4 of this Response.

Question 10.4(4): What changes, if any, should be made to the laws and procedures relating to the media and suppression and non-publication orders?
See Chapter 4 of this Response.

Question 10.5(1): Are the current definitions and use of the terms "media" and "news media organisation" appropriate? Why or why not?
Generally speaking, ARTK has no concerns about these definitions as its members are media and/or news media organisations. That said, paragraph 10.142 of the Report raises the question of who is a journalist in today's contemporary media and suggests that freelance journalists may not fall within the definition. ARTK does not accept that freelancers are not journalists and notes that if there is to be any amendment in this area of the law then it should at least align with the definitions of "journalist" and "news medium" prescribed by *Evidence Act 1995* (NSW) s 126J. A person having the benefit of that Shield Law should also be entitled to access court information and have standing to challenge non-publication and suppression orders.

Question 10.5(2): What changes, if any, should be made to these terms and their definitions?
None.

Question 10.5(3): How else could members of the media identified for the purposes of laws dealing with media access to court information and proceedings?

See answer to Question 10.5(1).

AUSTRALIA'S RIGHT TO KNOW SUBMISSION TO NEW SOUTH WALES LAW REFORM COMMISSION'S OPEN JUSTICE REVIEW

COURT AND TRIBUNAL INFORMATION: ACCESS, DISCLOSURE AND PUBLICATION CONSULTATION PAPER No. 22

Response to Chapters 11-13

17 MARCH 2021

Australia's Right to Know (ARTK) coalition of media companies welcomes the opportunity to make a submission to the New South Wales Law Reform Commission's (the Commission) *Open Justice: Court and tribunal information: access, disclosure and publication* Consultation Paper (the Paper).

This is ARTK's third submission in response to the Consultation Paper and addresses Chapters 11 – 13 inclusive.

CHAPTER 11 – RESEARCH ACCESS TO INFORMATION

Question 11.1(1): What changes, if any, should be made to the existing arrangements for providing researchers with access to court information?

Question 11.1(2): In particular, what changes, if any, should be made in relation to:

- **(a) a centralised scheme for giving researchers access to court information, including a research committee;**
- **(b) the kinds of researchers who should be able to access court information**
- **(c) the kinds of research that court information should be available for**
- **(d) the other considerations that may be relevant to granting a researcher access to court information**
- **(e) the type of court information researchers should be able to access**
- **(f) the types of conditions that should be placed on researchers who are given access to court information**
- **(g) applicable fees and arrangements for fee waiver**
- **(h) access to archived court records, and**
- **(i) requests to collate data and/or statistics?**

As ARTK members are engaged in news reporting we have not answered these questions.

CHAPTER 12: DIGITAL TECHNOLOGY AND OPEN JUSTICE

Question 12.1: If virtual courtrooms are to be available what provision, if any, should be made to ensure:

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

A virtual courtroom is no different from a physical one. In the same way that there is no difference in the application of defamation law principles whether in print/broadcast or online there is no reason to differentiate between open justice principles merely because the proceedings occur electronically. Journalists should be granted access to virtual proceedings as a matter of course. ARTK would be greatly concerned by any suggestion that the way forward should be anything less as it would not be open justice.

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

ARTK is aware that there have been some teething difficulties as journalists and the general public acclimatise to online proceedings. The answer is education. As noted in previous Chapters of this Response, ARTK members devote considerable resources to legal advice and training. This is an ongoing process and we are confident that it can resolve any risks involved in journalists reporting virtual courtrooms.

Before turning to the next question, paragraph 12.17 of the Paper refers to a Preliminary Submission that raised privacy concerns about a *Sydney Morning Herald* article "Defamation case draws a crowd of virtual observers" which appeared in the CBD column on 9 December 2020. The article in the CBD column is about the people who logged in to observe defamation proceedings brought by business woman Elaine Stead against the *Australian Financial Review's* columnist Joe Aston. Had the same business and legal figures who logged in to the proceedings attended them in person, the CBD column would have reported that too. ARTK submits that rather than raising a privacy concern, the article demonstrates that there really is no difference in reporting physical or virtual proceedings and nor should there be.

Question 12.2(1): What arrangements, if any, should be made for electronic access to court information?

ARTK has discussed journalist access to information at length in Chapters 6 and 10 of this Response. We agree with the submission referred to at paragraph 12.30 of the Paper that where court documents are "created, filed and managed electronically, it is difficult to justify limiting the method of accessing court documents to a physical inspection" and that "[t]echnological solutions exist to provide electronic access ... without compromising the security of the court file". We also agree with paragraphs 12.41 and 12.42 of the Paper which note that electronic access "could also improve the accuracy of media reports" and "could also make searching easier, cheaper and more convenient". We would welcome any electronic access on any basis that the Commission may care to recommend.

Paragraph 12.32 of the Paper notes that concerns have been raised in Preliminary Submissions about control of digital information being lost if files can be downloaded, data limits and cyber security. We cannot address the data limits concern as that is a matter for the courts. However, as we have previously submitted the information in court files is information that journalists should have access to whether that be by way of a right to inspect a physical file or by electronic access. That being the case, this objection is a moot point insofar as ARTK is concerned. As for the cyber security issue, as noted at paragraph 12.30 of the Paper, the courts are already encouraging electronic filing. Respectfully, if they have already got cyber security under control then allowing journalists to access the information electronically isn't going to make matters worse. We do not believe the concerns raised regarding "increased risk to privacy and security interest and the possibility that personal information will be used improperly or criminally" should be directed at journalists and, in any event, we have addressed these issues in previous Chapters of this Response.

Question 12.2(2): In particular, what should the arrangements be in relation to:

(a) The type of information that can be accessed
As submitted in Chapter 6 and 10, access should be unlimited subject only to a suppression order.

(b) Who can access the information
ARTK submits its journalists are obvious candidates but we also support the Queensland-style open access.

(c) Any necessary protections against unauthorised disclosure or publication of such information?
See response to (a) above.

Question 12.3(1): What, if anything, can be done to deal with situations where suppression and non-publications order under NSW law are breached outside Australia?
We have discussed this issue in Chapter 4 of this Response and submitted that once material is published outside Australia that is the subject of a suppression or non-publication order that the order should lapse for publishers/broadcasters inside Australia. Further to this submission we note that paragraph 12.50 of the Paper refers to the fact that information contrary to the George Pell orders was published by The Washington Post and The Daily Beast, amongst others. These are independent media bodies with little to no presence in Australia, operating under First Amendment US law. ARTK has no doubt that the next time an internationally prominent person faces criminal charges in Australia, US-based publishers will again disregard any non-publication or suppression orders that might be made. Indeed, as the Paper notes at 12.51, this issue has not been limited to the Pell proceedings.

While we cannot pretend to speak for overseas media, ARTK would be very surprised to find that they would agree to geoblock content from IP addresses in Australia or comply with a takedown notice, particularly in any jurisdiction operating under First Amendment law. In any event, as noted at paragraphs 12.58 and 12.60 of the Paper, geoblocking can be worked around and take-down notices are largely dependent on the "cooperation and goodwill of internet content hosts located outside Australia". Lastly, we also adopt the point made at paragraph 12.54 of the Paper that suppressing publications/broadcasts by ARTK members is not the solution because "articles from 'less responsible outlets' could be given more prominence".

Question 12.3(2): In particular what, if anything, can be done to minimise the risk of offending content affecting the fairness of a trial?
ARTK notes that the fade factor is not something that "can be done" to minimise risk as it merely suggests that given the passage of time it becomes less likely that jurors will recall earlier reports about the proceedings. That aside, ARTK does not believe any of the measures in this section of the Paper will assist in minimising risk, mostly because they are beyond the court's control. What the court can control are jurors and that is where ARTK submits that risk minimisation measures should directed, as discussed in Chapter 13 of this Response.

Question 12.4(1): Are current provisions regulating use of social media by the media and public in court adequate? Why or why not?
The social media position of NSW, Queensland, SA and Victoria are all referred to in paragraphs 12.68 to 12.78 of the Paper. In addition, both the ACT and NT allow journalists to use phones in courtrooms but the Media Guides for the territories do not expressly refer to tweeting; Tasmania's Media Guide does not refer to Twitter but does note that blogging from court is prohibited; and, WA has allowed tweeting by journalists since 2014. We are not aware of any particular concerns about journalists tweeting in NSW and, consequently, say that the current provisions are adequate. We are happy to address any specific concerns that might arise from other responses to the Report.

Question 12.4(2): What changes, if any, should be made to the existing provisions?
None.

CHAPTER 13: OTHER PROPOSALS FOR CHANGE

Question 13.1(1): Should there be a publicly accessible register of suppression and non-publication orders made by NSW courts? Why or why not?
While we have answered this question in Chapters 4, 6 and 10 of this Response we'll repeat ourselves here: yes!

Questions 13.1(2): If so:

(a) who should be able to access the register
Our responses to previous Chapters explain the importance of accessing a register to ARTK's members.

(b) what details should be included in the register
In Chapter 4 of this Response ARTK recommends the adoption of the register requirements set out in *Evidence Act 1929* (SA) ss 69A (8) – (13).

(c) who should build and maintain the register
Either the Supreme Court or the DCJ.

Question 13.2(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?
Yes. As discussed in Chapter 4, ARTK members are only able to appear in a small number of CSNPO Act applications each year. We would like to do more but our resources are not infinite and need to be deployed where we think we are most likely to achieve an outcome that will lead to publication/broadcast. Too often these orders are made with little to no thought with the parties' consent or at least without objection. That is administration: it is not open justice. Open justice requires that wherever possible a contradictor should be present.

Question 13.2(2): If so, what responsibilities should the advocate have?
ARTK submits:

1. An application should be not able to proceed until both the advocate and the media are notified that it has been made as recommended in Chapter 4;
2. The advocate should, upon received notice of an application, email an agreed EDL of media contacts to ascertain whether any ARTK member intends to object to the application and, if so, should be excused from appearing at future hearings of the application unless requested to be present by the adjudicator of fact;
3. If no media entity indicates an intention to appear in relation to the application, the advocate should be supplied with the application and all supporting documents in unredacted form;
4. If there are no supporting documents, the advocate should notify the moving party that affidavit or other evidence is required before an order can be granted but should not assist in the drafting or preparation of such evidence;
5. If, upon receiving the papers, the advocate forms the view that the order is likely to meet the necessity test then:
   (a) The advocate should consider the appropriate form of orders including ensuring that no more than is absolutely necessary is restrained from publication/broadcast and that the order terminates either within an appropriate period of time or on the occasion of a suitable event;
   (b) Inform the parties and the adjudicator of fact of that view, including a brief statement of why the adjudicator formed that view, and the draft form of orders; and
   (c) Should thereafter not be required to appear at any further hearings of the application unless requested to attend by the adjudicator of fact.

The draft form of orders should not - of course - be binding on the court but should be given significant weight; and

6. If the advocate forms the view that the application cannot or is not likely to meet the necessity test then the advocate should appear and contest the application. If the moving party fails to provide any affidavit or other evidence then the advocate must appear to contest the application.

Question 13.3(1): What education initiatives could be implemented to improve people's understanding of open justice and associate prohibitions on publishing or disclosing information?
ARTK is more concerned with better education for registry staff, judicial officers and the media officers.

Question 13.3(2): Who should be responsible for delivering those initiatives?
That question may be best answered once an education program is decided upon.

Question 13.4(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?
Paragraphs 13.39 to 13.41 of the Paper note that the current oath requires jurors to swear or affirm to "give a true verdict according to the evidence" and that that "implicitly requires that jurors not seek out or rely on extraneous information about the case". ARTK prefers the explicit and would, consequently, support amending the oath "so that jurors explicitly agree to base their verdict solely on the evidence presented in court and not to seek, or rely on, other information".

Question 13.4(2): Is the current Jury Act 1977 (NSW) offence of making inequities effective? If not, how could it be improved?
ARTK is not aware of any reason why this offence should be regarded as ineffective.

Question 13.4(3): Are the current jury directions about avoiding media publicity and making inquiries about the case appropriate? If not, what reforms are required?
No. Paragraph 13.48 indicates that a judge "can" advise the jury that they should ignore media publications and refrain from making independent inquiries outside the court. ARTK submits this is vitally important and should be a "must". The directions given should make it clear all forms of media - old and new - should be avoided. Aside from this amendment, ARTK notes with interest that none of the authorities cited at footnote 54 (being cases in which a juror was discharged for making internet searches) post-dates 2014.

Question 13.4(4): Could improving the way that juror questions are managed better ensure jurors do not conduct their own inquiries? If so, what improvements could be made?
Yes. ARTK supports any amendments that encourage juries to ask the judge or justice anything they wish to know.

Question 13.4(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?
As previously stated, we are supportive of being as explicit as possible. The exact form of guidance we leave to the Commission to determine.

Question 13.4(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?
Possibly. If so we would support the same questionnaire already applied in the UK referred to at paragraph 13.64 of the Paper.

Question 13.4(7): Should NSW adopt the Queensland approach allowing judge alone trials where there has been significant pre-trial publicity that may affect jury deliberations? Why or why not?
Queensland does not always go down the route of a judge alone trial in such circumstances. For example, although it concerned a stay and not an application for a judge-alone trial, the Court of Appeal decision in the last trial of paedophile Dennis Ferguson is apposite. In upholding the appeal - and sending Ferguson to a trial which resulted in his acquittal - the court noted Chief Justice Mason and Justice Toohey in R v Glennon who wrote, "The possibility that a juror might acquire irrelevant and prejudicial information is inherent in a criminal trial. The law acknowledges the existence of that possibility but proceeds on the footing that the jury, acting in conformity with the instructions given to them by the trial judge, will render a true verdict in accordance with the evidence." More recently, Gerard Baden Clay was successfully tried by jury despite more pre-trial publicity than almost any other modern Queensland case. The High Court confirmed the jury got it right when they reinstated Baden Clay's guilty verdict in 2016. ARTK is supportive of judge alone trials are an option but they should not be the sole means by which this issue is addressed.

Question 13.4(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?
No.

23 March 2021

Dear NSW LRC,

I refer to the response documents recently submitted to you by Australia's Right to Know coalition of media organisations in response to the NSWLRC Open Justice Review consultation paper.

In reviewing that material, we have become aware that we promised to a recommend a solution to the problem created by the publication/broadcasting restraint prescribed by *Criminal Procedure Act 1986* (NSW) s 80 but neglected to do so (see response to Chapter 3). ARTK recommends that s 80 be amended to provide that the section does not apply to publication/broadcast of:

(a) The offence or offences for which the prosecution will seek committal for trial or sentence, or

(b) If an offer made to or by the accused person to plead guilty to an offence has been accepted-- details of the agreed facts on the basis of which the accused person is pleading guilty and details of the facts (if any) in dispute, or

(c) Any matter comprising part of the case conference material that is disclosed in court.

Please do not hesitate to contact me if you have any questions or required any further information.

Kind regards

Georgia-Kate Schubert
On behalf of Australia's Right to Know coalition of media organisations