



NSW Police Force submission to the *Open Justice, Court and tribunal information: access, disclosure and publication* paper

Thank you for the opportunity to comment. The NSW Police Force (NSWPF) provides the below responses to specific proposals raised in the paper. Where a proposal has no response, it can be taken to mean no comment from NSWPF.

As a general comment, NSWPF requests that the proposals are sufficiently flexible to cater for individual cases and overall are to the benefit of victims of domestic violence.

Proposal 3.2: Definition of “publish” and “disclose”

We request that consideration be given to specify that social media communications are captured irrespective of whether they were made publicly or privately (for example, in a closed private group).

Proposal 4.11: Consequences of breaching an order

We request that consideration be given to lowering the proposed knowledge threshold from ‘knows’ to ‘reckless’, as currently in s 16 of the *Court Suppression and Non-publication Orders Act 2010*. Proving that a suspect knew of the existence of the Order could be extremely difficult from an evidentiary point of view.

We also request that the proposed maximum penalty be changed to imprisonment for 3 years. This would allow investigators to access ‘stored communications’ under the *Telecommunications (Interception and Access) Act 1979 (Cth)*. Further, As identified in the paper, there are some offences which carry penalties of 5 or 7 years (*Terrorism (Police Powers) Act 2002 (NSW) s 26P(4)*; *Terrorism (High Risk Offenders) Act 2017 (NSW) s 59F(3)*). These higher penalties reflect the seriousness of those breaches.

Proposal 4.12: Proceedings for offences

We request that consideration be given to make the proposed offence an indictable offence. This would allow police to apply for a search warrant.

Further, we do not support the proposed maximum penalty for the Local Court proceedings. The Local Court should not have its power to sentence according to the gravity of the criminality restricted in this manner. We note that the paper does not provide any rationale that justifies this limitation.

Proposal 4.14: Grounds for making a non-publication or suppression order

The proposed section (2)(a) may cause difficulties for police trying to obtain protective orders for witnesses that require protection. For example, sometimes an accused is unaware of the identity of an informant. Seeking an informant’s views at court regarding a non-publication order may be a risk to their safety (unless it is done confidentially).

There are also circumstances where a person does not consider a protective order to be relevant to them however there are larger operational reasons why police would seek an order regardless of that person’s views.



Further, we question what the relevant circumstances would be to seek the views of the person whose benefit an order is to be made (i.e. the proposed section 2(a)). Is this at the discretion of the Court or would it be prescribed in the section?

Proposal 4.19: Grounds for making an exclusion order

The comments at 4.14 are reiterated here.

Proposal 5.1: Prohibition on publishing information likely to lead to the identification of a child in connection with criminal proceedings

Supported in principle.

Proposal 5.3: Prohibition on publishing information likely to lead to the identification of complainants of sexual offences

Supported in principle.

Would there be a mechanism for review or an exemption of the prohibition (for instance, if the complaint was vexatious)?

Proposal 5.5: Duration of certain prohibitions protecting information likely to lead to the identification of children and young people

Supported in principle.

Proposal 5.6: Duration of prohibition on publishing information likely to lead to the identification of complainants of sexual offences

The comments at 5.3 are reiterated here.

Proposal 5.10: Consent exception amended in certain provisions protecting the identity of children and young people

We request consideration be given to allow police to have standing to make an application for such an order. For instance, if police are investigating a complaint of sexual assault, where the complainant consented to publication, it may be more beneficial to the complainant if police applied for such an order to publish information as part of an investigation strategy.

Proposal 5.12: Consent exception in relation to the prohibition on publishing the identity of a living sexual offence complainant

The comments at 5.10 are reiterated here.

Proposal 5.13: Consent exception in relation to the prohibition on publishing the identity of a deceased sexual offence complainant

The comments at 5.10 are reiterated here.

Proposal 6.9: Duration of non-publication or suppression orders

This proposal, especially section 2, may cause difficulties in *Government Information (Public Access) Act 2009* (GIPA) proceedings.



In GIPA proceedings for instance, on some occasions the purpose of the proceedings is to determine if the correct and preferable decision about disclosure of information has been made. In order to undertake that analysis, discussion of the information is necessarily required.

If a tribunal affirms that the correct decision is to refuse access to the information, clearly any disclosure of the information in the proceedings (whether that be transcript, recording, exhibits or published decision) needs to benefit from a non-publication order.

However, section 2 states the order cannot be indefinite. That seems to be a problem as it undermines the ultimate decision of the tribunal to refuse access. This sits as a standalone example to which non-publications orders apply that should be treated differently.

Proposal 9.1: Maximum penalties for offences

We request that the proposed maximum penalty be changed to imprisonment for 3 years. This would allow investigators to access 'stored communications' under the *Telecommunications (Interception and Access) Act 1979* (Cth). Further, As identified in the paper, there are some offences which carry penalties of 5 or 7 years (*Terrorism (Police Powers) Act 2002* (NSW) s 26P(4); *Terrorism (High Risk Offenders) Act 2017* (NSW) s 59F(3)). These higher penalties reflect the seriousness of those breaches.

Proposal 9.3: Standardised offences

The comment regarding the knowledge threshold at 4.11 is reiterated here.

Proposal 9.6: A Court information Commissioner

We note that the proposal is unclear what powers the proposed Court Information Commissioner would have to apply for search warrants or stored communications warrants etc.

Proposal 10.13: Offence of disclosure of personal identification information

We request that consideration be given to increase the maximum penalty for individuals in breach of the proposed offence. There could be instances where disclosure of personal identification information could have the same effect as publication under the publication offences. The same comments at 9.1 are reiterated here.