



ALS

Aboriginal Legal Service (NSW/ACT) Limited



Response to the New South Wales Law Reform Commissions' Open Justice Draft Proposals

4 August 2021

About the ALS

The Aboriginal Legal Service (NSW/ACT) Limited ('ALS') is a proud Aboriginal community-controlled organisation and the peak legal services provider to Aboriginal and Torres Strait Islander men, women and children in NSW and the ACT. We have 24 offices across NSW and the ACT, and we assist Aboriginal and Torres Strait Islander people through representation in court, advice and information, as well as providing broader support programs and undertaking policy and law reform work.

The ALS currently undertakes legal work in criminal law, children's care and protection law, and family law. We also provide representation to Aboriginal and Torres Strait Islander people within the Coroner's Court jurisdiction, predominantly families whose loved ones have died in custody or in a police operation. The ALS also provides advice and representation to senior next of kin where a child has died in the care of the state and persons of interest. There has been a substantial increase in the demand for services in this area of law in the past three years.

Introduction

The New South Wales Law Reform Commission ('the Commission') was asked to review the operation of suppression and non-publication orders and access to information in NSW courts and tribunals. The ALS welcomes the opportunity to respond to the Commission's Draft Proposal. The ALS strongly supports the principles of open justice; as a core tenet of our justice system in NSW, it is a crucial mechanism that enables accountability. Nonetheless, it is acknowledged that there are a limited number of circumstances in which open justice must be tempered by other considerations in order to allow for the fair operation of the law. We endorse the guiding principles adopted by the Commission.

Uniform Definitions

The ALS supports the introduction of uniform definitions and endorses the definitions proposed in the new Chapter 4. The Draft Proposal seeks to clarify the court's powers to make non-publication, suppression, exclusion, and closed court orders. We believe it is important for any court to have multiple options to allow for the appropriate balance to be struck between open justice and the right to a fair trial. The purpose of creating uniform definitions seems to serve this objective. The ALS believe reviewing the efficacy of these new powers after inception is important to ensure that there are not unintended consequences such as preferring certain orders which do not ensure for the proper administration of justice.

A new Act

Whilst the ALS believes that the current law in relation to open justice works efficiently, we concede that codifying orders that are drawn from inherent or implied powers should allow for greater consistency and transparency.

The ALS is of the view that the guiding principles contained in Proposal 4.2 ought to be mandatory considerations; and the definition of 'any other person who... has sufficient interest' in Proposal 4.8 ought to be construed widely. The new Act must include principles to guide decision making (Proposal 4.2), and consistent procedures for making orders (Proposal 4.7), giving reasons (Proposal 4.8), appeals (Proposal 4.9), costs (Proposal 4.10) and enforcement (Proposals 4.11–4.12). This will serve to achieve greater uniformity in the implementation of orders.

Statutory prohibitions on publications

The ALS strongly supports the statutory prohibitions on publication, particularly in relation to children and young persons. The protection of a child's identity throughout the entirety of their involvement in the criminal justice system is necessary to support their rehabilitation and

reintegration into the community and to protect them from any stigma. The ALS supports proposals 5.1, 5.2, 5.3, 5.4 and 5.5(a).

The ALS strongly opposes the amendment of prohibitions to enable the identity of the child or young person to be disclosed once they are deceased as provided by proposal 5.5(b). We submit that the concerns identified in the discussion regarding proposal 5.6 and the impact of disclosure on families apply to the families of all deceased children. The ALS supports proposal 5.13.

The ALS supports the autonomy of young persons to consent to disclosure as provided in Proposals 5.8, 5.9, 5.10 and 5.14.

Other powers to make non-publication and suppression orders

The ALS supports Proposal 7.2. The protection of a child's identity is necessary to support their rehabilitation and re-integration into community. Children who are alleged to commit traffic offences should not be offered any less protection.

Monitoring and enforcing departures from open justice

The ALS supports the establishment of a register of non-publication, suppression and closed court orders that is searchable. It is the position of the ALS that this register should be publicly accessible. We believe a Court Information Commissioner will assist in ensure compliance with orders.

Technological issues and open justice

The ALS supports virtual access to courtroom if there are sufficient protections in place to ensure all participants are clearly identifiable so parties can raise objections. Also, there must be protections to safeguard the unauthorised recording and dissemination of court proceedings. We believe Proposal 11.1 is important to ensure only those authorised are present virtually in the proceedings. It also guarantees the accountability of participants. Proposal 11.2 serves the competing interests of allowing parties time to consider any application with the reporting of breaking news.

Conclusion

The ALS broadly supports the Draft Proposals and believes they provide for the appropriate balance between the foundational principles of open justice and the necessary carve outs required for the fair administration of justice and the protection of vulnerable persons.