



Our ref: 21/238

12 August 2021

Mr Alan Cameron AO  
Chairperson  
New South Wales Law Reform Commission

By email: [nsw-lrc@justice.nsw.gov.au](mailto:nsw-lrc@justice.nsw.gov.au)

Dear Mr Cameron

### Open Justice Review | Draft Proposals

1. The New South Wales Bar Association (**the Association**) thanks the New South Wales Law Reform Commission (**the Commission**) for the opportunity to provide comments on its draft proposals for reform of the law governing public access to courts and tribunals and the disclosure and publication of information arising from legal proceedings.

#### Introduction: consolidation and clarity of the law

2. Justice should take place ‘publicly and in open view’.<sup>1</sup> There are, however, circumstances where the need to secure the effective administration of justice or to protect the dignity and privacy of individuals will necessitate the imposition of restrictions on rights of access to the courts and information about legal proceedings for the general public and the media.
3. The vital importance of open justice requires that all rules that limit access to the courts are clear, consistent and easily ascertainable. Exceptions to the principle of open justice are recognised in New South Wales both at common law<sup>2</sup> and in legislative provisions. The statutory restrictions on the principle of open justice in New South Wales are currently scattered across various acts, numbering at least 22 by the Association’s count.<sup>3</sup>

---

<sup>1</sup> *Scott v Scott* [1913] AC 417 at 441.

<sup>2</sup> There is no inherent power of the court to exclude the public: *John Fairfax Publications Pty Ltd v District Court of NSW* (2004) 61 NSWLR 344. However, in *HT v The Queen* [2019] HCA 40 in appropriate cases courts have jurisdiction to modify and adapt general rules of open justice and procedural fairness.

<sup>3</sup> See s 186(2) of the *Adoption Act 2000* (NSW); ss 10 and 15A to 15G of the *Children (Criminal Proceedings) Act 1987* (NSW); ss 29(1)(f) and 105 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW); s 49 and Div 6 of Pt 4 of the *Civil and Administrative Tribunal Act 2013* (NSW); s 71 of the *Civil Procedure Act 2005* (NSW); s 107(2) of the *Conveyancers Licensing Act 2003* (NSW); ss 6, 7, 9A and 9B of the *Court Security Act 2005* (NSW); ss 3, 4, 5, 6, 7, 8, 9, 11, 12, 13 and 14 of the *Court Suppression and Non-publication Orders Act 2010* (NSW); ss 149B, 247S, 280 and 280A of the *Criminal Procedure Act 1986* (NSW); s 578A of the *Crimes Act 1900* (NSW); s 45 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW); ss 41, 126A, 126E(b) and 195 of the *Evidence Act 1995* (NSW); s 15 of the *Evidence (Audio and Audio Visual Links) Act 1998* (NSW); s 121 of the *Family Law Act 1975* (Cth); s 6(3) of the *Lie Detectors Act 1983* (NSW); s 162 of the *Mental Health Act 2007* (NSW); s 43(5) of the *Minors (Property and Contracts) Act 1970* (NSW); s 140(2) of the *Property and Stock Agents Act 2002* (NSW); s 25 of the *Status of Children Act 1996* (NSW); ss 42(5) and (6) of the *Surveillance Devices Act 2007* (NSW); ss 47, 52 and 53 of the *Surrogacy Act 2010* (NSW); s 65(3)(b) of the *Young Offenders Act 1997* (NSW).

4. The Association welcomes the Commission's overarching proposal to simplify and clarify the law by consolidating in a single statute (**the new Act**) the general powers to limit public access to courts and tribunals and to information in proceedings. The Association also welcomes uniform definitions of key terms to ensure a consistent approach to open justice across jurisdictions.
5. Any substantive changes to the exceptions to open justice should, however, take as their starting point the principles and rules that currently govern limitations on access to fora and information in legal proceedings. The Association would oppose any changes to the current law that would result in fewer protections of individuals' rights.
6. Lastly, access to justice also requires a fair hearing and leaving or inserting the judicial discretions outlined below, together with the concomitant ability to argue for or against the particular orders, are an important bulwark against systemic procedural fairness.

*The draft proposals: substantive changes to the law*

7. The Association supports the following draft proposals as replicating, bringing consistency and clarity to, or further advancing current protections: 3.2 to 3.4, 3.7 to 3.9, 4.1 to 4.4, 4.6 to 4.9, 4.10 to 4.11, 4.13 to 4.16, 4.18 to 4.25, 5.1 to 5.4, 5.6 to 5.9, 5.11, 5.13 to 5.14, 6.1 to 6.2, 6.4 to 6.8, 6.10, 7.1 to 7.3, 7.5 to 7.16, 8.1 to 8.9, 9.1 to 9.2, 9.4, 9.6, 10.1 to 10.3, 10.5 to 10.7, 10.9 to 10.13 and 11.2.
8. The Association, however, has concerns about the following 17 draft proposals: 3.5, 3.6, 4.5, 4.9, 4.17, 5.5, 5.10, 5.12, 6.3, 6.9, 7.4, 9.3, 9.5, 10.4, 10.8, 10.14, and 11.1. The bases for those concerns are laid out in detail below.
9. The Association also recommends for the detailed reasons given below that the Commission consider whether the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW), *Mental Health Act 2007* (NSW), *Crimes (High Risk Offender's) Act 2006* (NSW) and the *Terrorism (High Risk Offenders) Act 2017* (NSW) need to be amended to ensure that sensitive personal data and health information in proceedings under those statutes are protected in a manner that conforms with privacy principles generally and New South Wales' obligations under art 22 of the *Convention on the Rights of Persons with Disability*.

*Proposal 3.5: information likely to lead to identification of a person*

10. Section 9(4) of the *Court Suppression and Non-Publication Orders Act 2010* (NSW) (**CSNPO Act**) at present permits the court to make orders with any exceptions or conditions the court thinks fit to include and to make orders relating to the name of a person or information likely to lead to the identification of a person.
11. The new Act proposed by the Commission would provide a list of the types of information likely to lead to the identification of a person.
12. The Association observes that, while a non-exhaustive list of relevant considerations would ensure a consistency in approach to orders made to prevent the identification of individuals in proceedings, judicial discretion should be maintained and expressly enshrined in the new Act.

*Proposal 3.6: definition of 'contact information'*

13. Sections 149B, 247S, 280 and 280A of the *Criminal Procedure Act 1986* (NSW) (CPA) all provide limitations on personal details being disclosed.
14. The proposal expands the definition of ‘contact information’ to include email addresses, and social media profiles.
15. An expanded definition of ‘contact information’ is not opposed. However, there are many circumstances where such information is a central feature of criminal trials. The Association, therefore, recommends that judicial discretion should be retained to order disclosure where it is a relevant part of the evidence or where the court is otherwise minded to make an order permitting disclosure.

*Proposal 4.5: interaction between the new Act and other laws*

16. The proposal suggests that the new Act should not limit or otherwise affect the operation of provisions in any other statute or law relating to the regulation of open access to courts and information in legal proceedings.
17. Proposal 4.5 would, consequently, leave the existing provisions in the CPA and the *Children (Criminal Proceedings) Act 1987* (NSW) (C(CP)A) unchanged.
18. The Association’s members report that the CPA and C(CP)A in their current form are unclear as to whether proceedings should be conducted *in camera* where a person charged as a juvenile has by the time of trial or sentencing in the District Court or Supreme Court attained the age of 18. Members report that, while some judges have closed the court in these circumstances, others have not.
19. The Association observes that the rationale behind court closures and limitations on the publication of information about juvenile defendants and offenders under the age of 18 is clearly laid out in the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules):

*Young persons are particularly susceptible to stigmatization. Criminological research into labelling processes has provided evidence of the detrimental effects (of different kinds) resulting from the permanent identification of young persons as "delinquent" or "criminal". The juvenile [should be protected] from the adverse effects that may result from the publication in the mass media of information about the case (for example the names of young offenders, alleged or convicted).<sup>4</sup>*

20. Rules 8.1 and 8.2 of the Beijing Rules stipulate that:

*8.1 The juvenile's right to privacy shall be respected at all stages in order to avoid harm being caused to her or him by undue publicity or by the process of labelling [emphasis added].*  
*8.2 In principle, no information that may lead to the identification of a juvenile offender shall be published.*

21. The Association recommends that the CPA and C(CP)A be amended to ensure that those whose offences are alleged to have been committed when under 18 have their right to privacy respected

---

<sup>4</sup> Commentary on rules 8.1 and 8.2, the Beijing Rules.

at all stages of proceedings, by allowing for exclusion of the public during trials and hearings and non-publication of the young person's identity, regardless of when proceedings against them are finally resolved.

*Proposal 4.17: duration of non-publication or suppression orders*

22. Section 12(1) of the CSNPO Act currently provides for the duration of an order to be specified and stipulates that orders should operate for the least duration required. The CSNPO Act does not, however, prevent courts from issuing orders that will operate indefinitely.
23. The Commission seeks to ensure that the court will be unable to make non-publication or suppression orders of indefinite duration.
24. The Association is concerned that preventing courts from issuing indefinite prohibitions on the publishing of information relating to legal proceedings may potentially lead to the imposition of orders that operate for arbitrary durations
25. Proposal 4.17, were it enacted, would also not allow for cases where an indefinite order was appropriate. A practical example for an indefinite order being required is where a witness and his or her family are under a witness protection programme. It may be that the details of evidence and contact information should never be released as a matter of safety and public policy. The risk may never be mitigated without an indefinite order. Similarly, a witness may be of a very young age and an order fixed for an arbitrary period of, for example, 20 years would be insufficient.
26. In the absence of clear evidence that indefinite orders have been misused, the Association recommends that judicial discretion to impose, where necessary, non-publication or suppression orders without fixed end dates be maintained.

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

27. The Association is similarly concerned that requiring a duration for all statutory prohibitions on publication or information is insufficiently flexible to take into account varied circumstances. For example, proposal 5.6 suggests a prohibition on publishing the identity of a complainant after they are deceased.
28. The Association would support an amendment that specifies that a statutory prohibition will last until a specified event – for instance, the death of the relevant person – rather than requiring a fixed (and somewhat arbitrary) period of time to have elapsed.

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

29. The Commission recommends in proposal 5.10 that, where a child is under the age of 16, the court should be empowered to grant leave for the publication of his or her identity after taking into account the child's views considered in the light of his or her age and level of understanding. The draft proposal would also grant children over the age of 16 but under 18 the right to consent to publication of their identity in criminal proceedings 'on the advice of an Australian Legal practitioner'.



30. The Association is opposed to allowing the publication of the identity of a child under 16. Juvenile offenders' youth, immaturity and a lack of appreciation of consequences has been recognised by the establishment of a specialised jurisdiction for them in the form of the Children's Court and is recognised in s 6 of the C(CP)A. Publication of the identity of a child can increase community stigma, inhibit rehabilitation and reduce successful reintegration into society, all of which have been noted in the commentary to rr 8.1 and 8.2 of the Beijing Rules (see above) as reasons for why the identities of juvenile offenders should be shielded.
31. It is submitted that proposal 5.10 would, if enacted, undermine the special status of, and protections afforded to, children and would run counter to s 6 of the C(CP)A, which provides as guiding principles for the youth justice system that, while children bear responsibility for their actions, they require guidance and assistance because of their state of dependency and immaturity.
32. The proposal to permit publication by consent of information relating to a child between the ages of 16 and 18 is supported. Children of that age have greater maturity and would, in accordance with the terms of proposal 5.10, have the benefit of legal advice.
33. The Association notes that person would still be able to consent to such an application upon reaching the age of 18. That part of the proposal is also supported.

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

34. This proposal seeks to amend s 578A(4)(b) of the *Crimes Act 1900* (NSW) to permit a court to grant leave to publish the identity of a living complainant of a sexual offence. There are three bases for this. The first is where the complainant is under the age of 16 and the court, after taking into account their views, their age and understanding, grants leave for their identity to be published. The second is where the complainant is over 16 but under 18 and has had legal advice from an Australian legal practitioner about the implications of consent. The third is where the complainant is over the age of 18.
35. As with proposal 5.10, the Association is concerned about a child failing to appreciate the lifelong consequences of such orders, and the inability to recall information once it is published given access to technology, social media and the like.
36. For the same reasons as outlined above in respect of proposal 5.10 the Association does not support the proposal for children under the age of 16.
37. The proposal is otherwise supported when the complainant has reached the age of 16, and has had the benefit of legal advice, or 18 when they can determine whether or not to consent to an order.

*Proposal 6.3: duration of non-publication or suppression orders*

38. Unlike the current provision contained in s 12 of the CSNPO Act, draft proposal 6.3 would, like draft proposal 4.17, prevent the court from making an order that is 'specified to operate indefinitely'.

39. As noted in the response to proposal 4.17 above, the Association is concerned that the inability to make orders of indefinite duration will lead to the imposition of arbitrary timeframes (for instance, 20 years) to ensure the orders can have their intended effect.
40. This element of proposal 6.3 is not supported and, in the Association's view, the legislated ability for interested parties to seek a variation of any order is sufficient to strike the correct balance between competing interests. The remainder of the proposal is, however, supported.

Proposal 6.9: duration of non-publication or suppression orders

41. Proposal 6.9 relates to the power of NSW Civil and Administrative Tribunal and the Mental Health Review Tribunal to make non-publication and suppression orders under s 64 of the *Civil and Administrative Tribunal Act 2013* (NSW) and s 151 of the *Mental Health Act 2007* (NSW), respectively
42. The draft proposal mirrors proposal 6.3. The Association's opposition to prohibiting the making of indefinite orders in relation to proposals 4.17 and 6.3 above apply to 6.9.

Proposal 7.4: requirement to make an exclusion order in prescribed domestic violence proceedings

43. Proposal 7.4 would require that the court must sit *in camera* to hear complainants' evidence in domestic violence matters. If enacted, proposal 7.4 would create an irrebuttable presumption that the court will close for domestic violence complainants' testimony regardless of the circumstances of the case or whether it is in the interests of justice for a witness's evidence to be heard in open court.
44. A requirement that the court will be closed to the public for the duration of a complainant's testimony in domestic violence proceedings appears to be an unnecessary displacement of the principle of open justice. It is not self-evident that the opprobrium, embarrassment and shame that may be attached to the divulging of details of alleged sexual offences in open court are necessarily present or present to the same degree in domestic violence matters
45. Nor is it clear that a presumption that a complainant's evidence will be heard *in camera* would represent a proportionate method of addressing the difficulties some witnesses may have in relaying their allegations to the court.
46. A more proportionate response might be to enact a statutory power for the court to hear complainants testify *in camera* and to structure the exercise of that discretion by listing in the legislation factors the court may (or must) consider before ordering courtroom closures either on the application of the prosecution or of its own motion. That list of relevant factors should be accompanied by a requirement for the presiding judge to give due weight to the public interest in trials proceeding in open court.
47. Such a structured discretionary power would sit more comfortably alongside the court's other statutory powers, its inherent jurisdiction over proceedings and its implied powers to regulate proceedings.

Proposal 9.3: standardised offences

48. The Commission proposes that, where a person has allegedly breached a statutory prohibition on, or order relating to, the publication of information in legal proceedings, the prosecution must prove that the defendant knew of the existence of the prohibition or orders.
49. The proposal represents a significant change to the current law. For instance, the offence provisions in s 16 of the CSNPO Act require only recklessness as to the existence of an order rather than actual knowledge of the order.
50. Regard should be had to s 45 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW), which makes it a strict-liability offence to publish the names of, or identifying information about, children or other persons involved in proceedings under that Act.<sup>5</sup> The Association recommends that the offence under s 45 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) be retained because of the protective purposes of that provision.
51. The Association also notes that conduct falling short of a knowing breach of a prohibition or order may still amount to *sub judice* contempt as the subjective intention of the contemnor is not necessary to make out a contempt, the focus being instead on the effect of the conduct on the due administration of justice and the tendency of the publication to prejudice particular proceedings at the time of the publication.

*Proposal 9.5: a register for orders*

52. The proposal is to create a register of non-publication, suppression and closed-court orders. The register would be searchable by authorised parties, including journalists and legal representatives of news media organisations, researchers and publishers.
53. The Association supports the creation of a register of orders accessible to authorised parties.
54. It is noted, however, that draft proposal 9.5(4) indicates that ‘the register would include sufficient detail to identify the information protected by the order, except where this would frustrate the purpose of the order’.
55. Exceptions to inclusion on the register would, in the Association’s view, be needed to ensure that some matters are completely excluded from the register to avoid any risk that persons at risk of harm are not identified.
56. For example, where the reason for the prohibition order concerns a person’s assistance to authorities, the mere fact that a particular matter is on the register may of itself be sufficient to give rise to the risk that the protected person will be identified and subjected to reprisals. Similar issues may arise in relation to matters involving informers or undercover police officers.

*Proposal 10.4: records available to journalists*

57. The proposal is to provide journalists with an entitlement to access key documents without the need for leave of the court. Key documents would include the statement of facts, indictment, bail conditions, written submissions and transcripts of proceedings in open court. Other documents would be available to journalists only with leave of the court.

---

<sup>5</sup> See s 45(6) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW), which confirms that ‘[t]he offence created by this section is an offence of strict liability’.

58. The proposal for journalists to have access to key documents without leave of the court is opposed because of the potential for the release of such documents to prejudice trial proceedings. The following two examples serve to illustrate why the proposal is not supported.
59. First, statements of facts are prepared at an early stage of proceedings and may include or describe evidence that is ultimately not admitted at trial, for example, alleged admissions by the accused person. It would be inappropriate to publish details in advance of the trial.
60. Second, written submissions often also refer to sensitive evidence or evidence that is likely to be prejudicial to a party, for example, tendency evidence. It would equally be inappropriate to publish the details of documents in advance of a trial.
61. It is neither practicable nor possible for all such potential issues to be identified at an early stage of proceedings and in many matters media interest may not be known to the parties. Accordingly, documents with the potential to prejudice proceedings, should not be provided to journalists without the leave of the court, and prior notification to the parties to allow for the parties to seek a non-publication order in relation to any such document.

*Proposal 10.8: procedure for access*

62. The Commission proposes that, when a researcher requests access to documents in legal proceedings, the court 'may' (not 'must') in appropriate cases contact the parties to allow them to be heard.
63. For the reasons given in the Association's response to draft proposal 10.4, it is suggested that, prior to trial, the parties should be notified of requests and be given a reasonable and specified time period in which to seek a prohibition order, particularly in relation to the disclosure of statements of fact and written submissions.

*Proposal 10.14: offence of unauthorised disclosure of court record by a court officer*

64. Submissions have been sought as to whether there should be a special offence of unauthorised disclosure of records on the court file by court officers and in the event that such a provision is included the proposal is that the offence requires knowledge that the disclosure was not authorised.
65. The Association is of the view that there is no need for the specific offence provision.

*Proposal 11.1: virtual access to proceedings*

66. The proposal is to establish a clear process for virtual access to proceedings including providing courts and tribunals with the ability to control registration for virtual access to proceedings. The Commission also proposes that the *Court Security Act 2005* (NSW) be amended to expressly prohibit the recording of proceedings which are accessed virtually and that a condition of access should be that observers should be required to acknowledge the prohibition on recording.
67. There are a number of issues which may be raised about virtual access, many of a technical nature. The experience of the Association's members is that for observers, such as media, or the general



public, access should be ‘one-way’ access. There have been frequent interruptions in matters where observers have failed to mute their own video/audio. A system should be able to indicate by way of, for instance, a light on the bar table that a recording of proceedings is ‘live’/being transmitted so that legal representatives are aware when conversations at the bar table may be transmitted.

68. The Association invites consideration of an ‘observer’ link for media and the general public to observe proceedings, having acknowledged the prohibition on recording, and in respect of any relevant orders that have been made as to prohibition, exclusion or closing of the court.
69. The Association would welcome a ‘participant’ link for persons who will be required to speak during the course of the proceedings.
70. If methods have not already been employed by Courts and Tribunal Services to prevent observers inadvertently or deliberately taking screenshots or other recordings of proceedings on electronic devices, the Association suggests investigation of the use of encryption and digital rights technologies to prevent the capturing of images in ‘virtual courtrooms’ as is used by on-demand streaming services.

#### Orders relating to mentally disordered offenders and high-risk offenders

71. The law recognises the right to privacy in respect of a person’s health data and various legislative provisions limit the disclosure of such information.<sup>6</sup> Additionally, professional ethical duties may impose obligations on individuals not to disclose others’ personal and medical information.
72. The principle of open justice is not, however, necessarily applied in a manner consistent with the protection of individuals’ sensitive health information. An emerging area of concern arises out of legal proceedings (and the concomitant compulsory production of documents) under each of the following three pieces of legislation:

- (i) *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW) (MHCIFP Act);
- (ii) *Crimes (High Risk Offender’s) Act 2006* (NSW) (CHRO Act); and,
- (iii) *Terrorism (High Risk Offender’s) Act 2017* (NSW) (THRO Act).

These three pieces of legislation allow for extension applications of limiting terms, extended supervision orders and continuing detention orders.

73. An application for an interim extension order under the MHCIFP Act can be made in the Supreme Court where an offender is subject to a limiting term that is about to expire (the limiting term having been imposed after the offender was found unfit and a finding of guilty was made at a special hearing on the limited evidence available). An interim extension order can be made for up to three months while two court-appointed experts prepare reports. The threshold test at the interim hearing is easily satisfied. At the final hearing, an extension order can be made for up to

---

<sup>6</sup> See the *Privacy Act 1988* (Cth), *Health Records and Information Privacy Act 2002* (NSW) and *Privacy and Personal Information Act 1998* (NSW).

five years. There is no limit on the number of applications the Attorney General can make. The test is whether the defendant poses an unacceptable risk of serious harm to others and cannot be adequately managed by less restrictive means.

74. Similar applications can be made for persons whose offending is caught by the THRO Act and the CHRO Act.
75. The High Court of Australia has confirmed that legislation such as the MHCIFP Act, CHRO Act and THRO Act is valid in the Queensland context.<sup>7</sup> For the purposes of the present submission, it is assumed that the compulsory production of material and sharing and exchanging of material can be justified by reference to the proportionality test to protect public safety and national security. However, the subsequent lack of protection from disclosure and/or publication of the material cannot be regarded as necessary; nor can it be regarded as proportional to the encroachment on the defendant's privacy caused by disclosure or publication of the information. In the absence of such protections, the MHCIFP Act, CHRO Act and THRO Act arbitrarily infringe upon defendants' privacy and potentially violate human rights conventions.
76. Importantly, each of these three regimes confers on the relevant minister or Attorney General (as the case may be) wide powers to compel agencies/persons to provide them with documents and information about the defendant, where they would otherwise not be entitled to that information due to limits on privacy. This information can be used in support of applications brought in the Supreme Court under the three regimes.
77. Consistent with the principle of open justice, otherwise confidential and sensitive personal/ health information may be provided to court-appointed experts, tendered in court, made the subject of cross-examination and submissions at the hearings and even referred to in detail in judgments, which are then, in turn, published without restriction through various databases. Such information can include medical diagnoses (including psychiatric diagnoses), details of providers of ongoing care and other sensitive personal information the publication of which may be distressing, stigmatising and humiliating for the defendant and those associated with the defendant (such as family and friends).
78. Subject to one exception discussed below, there is at present no built-in protection in the legislative regimes to prohibit disclosure or publication of this sensitive private information without the defendant's consent. The only mechanism by which a defendant can seek to protect that information from being published or disclosed without consent is to make an application under the CSNPO Act. Such applications shift the burden to the defendant to establish a proper basis for the making of a non-publication or suppression order, including sourcing evidence and providing positive reasons in each case why an order should be made. Not all applications are successful and often the plaintiff does not consent to the application.
79. The one exception imposes an obligation on the Supreme Court to take steps to maintain confidentiality of information to which a terrorism intelligence application relates.<sup>8</sup>
80. Section 162 of the *Mental Health Act 2007* (NSW) (MHA) provides for the non-publication or broadcasting of persons who are the subject of the Tribunal hearings, who appear as a witness or who are mentioned or otherwise involved in any proceeding under the MHA or MHCIFPA.

---

<sup>7</sup> *Fardon v Attorney General (Qld)* (2004) 223 CLR 575.

<sup>8</sup> Section 59C of the THRO Act.

81. However, in the context of a limiting term extension application, Adamson J in *Attorney General of NSW v Huckstadt (No 2)* ruled that s 162 MHA does not apply to the Supreme Court as the court cannot be considered a 'person' for the purpose of that provision.<sup>9</sup> Therefore, in the absence of evidence justifying a non-publication order or suppression order (which can be quite a high hurdle and onerous task for a defendant who is more often than not legally aided), no such order is made.

82. Section 189 of the MHA also provides additional prohibitions on disclosure by persons:

*(1) A person must not disclose any information obtained in connection with the administration or execution of this Act or the Mental Health (Forensic Provisions) Act 1990 or the regulations unless the disclosure is made--*

- (a) with the consent of the person from whom the information was obtained, or*
- (b) in connection with the administration or execution of this Act or the Mental Health (Forensic Provisions) Act 1990, or*
- (c) without limiting paragraph (b), to a designated carer or principal care provider of a person in connection with the provision of care or treatment to the person under this Act or the Mental Health (Forensic Provisions) Act 1990, or*
- (d) for the purposes of any legal proceedings arising out of this Act or the Mental Health (Forensic Provisions) Act 1990 or the regulations or of any report of any such proceedings, or*
- (d1) for a purpose referred to in health privacy principle 10 (1) (f) (research) under the Health Records and Information Privacy Act 2002, or*
- (e) with other lawful excuse.*

83. In *Attorney-General of NSW v Keropa (3)*, Justice Hulme observed:

*True it is that Parliament has determined that privacy considerations should prevail to the extent that non-publication provisions are to be found in the Mental Health Act (ss 162 and 189) and the Guardianship Act (s 101). It is of significance, however, that no such provision has been made in relation to proceedings brought under Sch 1 of the MHFP Act. In *Attorney General of NSW v Huckstadt (No 2)*, Adamson J made the following observation at [51] with which I respectfully agree:*

*'If Parliament had intended to restrict the disclosure of information relating to forensic patients in proceedings in this Court generally, it would have done so expressly. That Parliament has chosen not to do so leads to the conclusion that this Court's discretion under the Act is to be applied having regard to the circumstances of the particular application rather than by general implications said to arise from legislative provisions.'*<sup>10</sup>

84. Similar provisions to those contained in ss 162 and 189 of the MHA appear in ss 6E and 101 of the *Guardianship Act 1987* (NSW).

85. As protections for patient privacy exist under the MHA and the *Guardianship Act 1987* (NSW), the default position ought, in the Association's view, to be that the publication of sensitive personal

---

<sup>9</sup> [2017] NSWSC 595 at [40].

<sup>10</sup> [2017] NSWSC 929 at [22].

and health data should also be prohibited in proceedings governed by the MHCIFP Act, THRO Act and CHRO Act.


86. The *Convention on the Rights of People with a Disability (CPRD)* was ratified by Australia on 16 August 2008; the Optional Protocol was ratified in 2009. Article 22 of the CPRD provides, with respect to privacy that:

*1. No person with disabilities, regardless of place of residence or living arrangements, shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence or other types of communication or to unlawful attacks on his or her honour and reputation. Persons with disabilities have the right to the protection of the law against such interference or attacks.*

*2. States Parties shall protect the privacy of personal, health and rehabilitation information of persons with disabilities on an equal basis with others [emphasis added].*

86. The treatment of health information under the MHCIFP Act, MHA, CHRO Act and THRO Act arguably contravenes art 22 CPRD because each permits an arbitrary interference with a defendant's privacy.
87. New South Wales should endeavour to protect the privacy of personal/health/rehabilitation information of persons with disabilities 'on an equal basis with others', and that should be considered as a part of the Commission's Open Justice Review.
88. The Association, therefore, recommends that the Commission consider whether amendment to the MHCIFP Act, MHA, CHRO and THRO is required to ensure that personal/health information in proceedings governed by those Acts is treated in a manner consistent with privacy principles generally and, in particular, art 22 of the CRPD.

### Conclusion

87. The Association again thanks the Commission for the opportunity to make a submission on the draft proposals. Should you have any questions about this letter, please contact policy lawyer Mr Richard Easton 

Yours sincerely



Michael McHugh SC  
President