



**SUBMISSION TO NSWLRC DRAFT PROPOSALS TO THE *OPEN JUSTICE, COURT AND TRIBUNAL INFORMATION: ACCESS, DISCLOSURE AND PUBLICATION* REVIEW**

**17 AUGUST 2021**

Australia’s Right to Know (ARTK) coalition of media organisations appreciates the opportunity to respond to the NSW Law Reform Commission *Draft Proposals to the Open Justice Court and tribunal information: access, disclosure and publication* Review (the Draft Proposals).

We are deeply concerned by many of the Draft Proposals individually and in aggregate. Many proposals will lead to greater complexity and confusion and much less clarity, which will have the likely effect of closing the door on open justice in NSW.

If many of the Draft Proposals are implemented – including a new Act – the effect will most likely be an increase in non-publication and suppression orders and diminished access to court information.

Given the detailed nature of the issues canvassed in the Consultation Paper, it is disappointing that the key proposal is a new Act rather than fixing the long standing and well-understood issues with existing laws.

The proposed new Act includes new definitions; it is also proposed that existing statutes be amended to adopt the new definitions, and existing provisions will continue to operate alongside the new Act. Neither the Consultation Paper nor the Draft Proposals sufficiently explain why a new Act is required, or how the new and the existing provisions will work in concert. We do not support the proposal for a new Act.

There is also a lack of explanation and evidence regarding other proposals, for example the proposed prohibition on the identification of deceased victims of sexual offences.

ARTK remains committed to open justice in theory and – importantly – in practice.

We provide the following detailed feedback on specific Draft Proposals:

## CHAPTER 1 – INTRODUCTION

### Paragraph 1.3 – Draft proposals and other matters incomplete

ARTK is concerned by [1.3] which states: *‘This paper does not outline all the proposals and other matters that we are considering. Our final report will not necessarily be limited to the proposal included in this paper’.*

It is difficult to comment on proposals when they are incomplete – as indicated at [1.3]. It is an obvious statement but we feel it needs to be made here, that it is impossible to comment on individual proposals and other matters that are not included in the Draft Proposals.

As we outlined in our overarching comments above, it is difficult to comment on the Draft Proposals given the shortfall of detail and the interaction between the Draft Proposals and existing laws. This comment applies theoretically, and most importantly in practice – the way in which laws actually operate.

Therefore, it is impossible to ascertain and comment on the operational effect of the interactions between the unknown proposals and matters and the known Draft Proposals.

### Paragraph 1.15 – The important role of judicial directions in a fair trial

ARTK also draws attention to [1.15] which states: *‘The “administration of justice” is a broad concept. In our consultation paper, we refer to two features of justice that are particularly relevant to departures for open justice: that criminal trials are fair... Included within the concept of a fair trial is that the jury must decide the case solely on the evidence presented and tested in court. Publicity about court cases may give potential jurors inappropriate extraneous knowledge.’*

Regarding the matter of juries and fair trials we note the recent decision by the NSW Court of Criminal Appeal (Bathurst CJ, Adamson J, Bellew J) in *Dawson v R*<sup>1</sup> whereby *‘a key issue in the appeal related to extensive pre-trial publicity’*. The Court agreed with the primary judge *‘that the prejudice to Mr Dawson caused by the pre-trial publicity and delay in this case is very serious.’* Importantly, the Court went on to say *‘However, it also held that such prejudice to Mr Dawson is able to be remedied or sufficiently ameliorated by careful directions which the judge at the trial will give to a jury, as was found by the primary judge.’* [our emphasis]

Further, Bathurst CJ noted *‘that a fair trial is not necessarily a perfect trial.’* He also noted *‘while fairness to the accused is one consideration, so too is the public interest of the community in bringing those charged with serious criminal offences to trial.’*

It should also be noted that to ensure the defendant is able to receive a fair trial the Court’s full judgment is temporarily restricted and a non-publication order applies to evidence and submission on the appeal.

### Paragraph 1.21(1) – Pseudonyms – a request for use of more nuanced pseudonyms

ARTK also draws attention to [1.21(1)] which states the proposed new Act would include a power to make a non-publication order, which could include a requirement to use a pseudonym to protect a person’s identity.

We note that the existing laws already include the ability to use pseudonyms which is readily used, so the ability to use pseudonyms in and of itself is not new. We do not object to the use of pseudonyms where it is appropriate. However, from a practical perspective we would like to see less use of AB, AC and the like and a more nuanced application of pseudonyms.

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<sup>1</sup> [\[2021\] NSWCCA 117](#)

For example, an Austlii search of NSW Supreme Court cases for “AB” produces 956 results; “CD” 396 results; and, “EF” 208 results. With that many cases returning as search results for each pseudonym it becomes difficult to distinguish one AB matter from another. More importantly, ARTK submits that it becomes difficult for the New South Wales public to locate and follow media reports about such cases, inhibiting open justice.

**Paragraph 1.21(4) – Closed court does not currently, and should not, have the effect of suppression by virtue of a definition change or other means**

See Chapter 3 below re: Draft Proposal 3.1

## **CHAPTER 2 – APPLICATION OF PROPOSALS TO COURTS AND TRIBUNALS**

ARTK does not make comment on the specifics of Chapter 2, but makes two observations and suggested changes to access to documents and the application of non-publication orders in the NCAT. Currently:

- There is no access to documents in NCAT until the conclusion of the matter. This should be rectified to be consistent with other courts; and
- The threshold for applying a non-publication order in the NCAT is low. As submitted in ARTK’s submission responding to Chapters 1 – 4 of the Consultation Paper (pp 43 to 45), this should be rectified to be consistent with other courts.

## **CHAPTER 3 – UNIFORM DEFINITIONS**

### **Orders**

#### **Proposal 3.1: Definitions of “non-publication order”, “suppression order”, “exclusion order” and “closed court order”**

The new Act proposed in chapter 4 and the access framework proposed in chapter 10 should provide that:

- (1) “Non-publication order” means an order that prohibits or restricts publication of information (but that does not otherwise restrict the disclosure of information).
- (2) “Suppression order” means an order that prohibits or restricts disclosure of information (by publication or otherwise).
- (3) “Exclusion order”:
  - (a) means an order to exclude a specified person or class of people from the whole or any part of proceedings, and
  - (b) does not, of itself, restrict or prohibit the disclosure (by publication or otherwise) of information in that part of proceedings.
- (4) “Closed court order” means an order that:
  - (a) excludes all people from the whole or any part of proceedings, except those whose presence is required for the purposes of proceedings, and
  - (b) has the effect of prohibiting information in that part of proceedings from being disclosed (by publication or otherwise).

ARTK does not support the ‘Closed court order’ proposal at (4) above. ARTK expresses in the strongest terms that this must not proceed.

‘Closed court’, ‘in camera’, ‘in private’ and/or ‘in the absence of the public’ do not currently, and should not, have the effect of automatic suppression.

Firstly, it is overly simplistic to suggest that the terms ‘closed court’, ‘in camera’, ‘in private’ and/or ‘in absence of the public’ all operate in the same manner.

Secondly, concerningly, it is incorrect to state that ‘closed court’, ‘in camera’, ‘in private’ and/or ‘in absence of the public’ has the effect of suppression (as stated at [1.21(4)]). Each of these is – and should be – about the practical operation of the court. Each of these does not – and should not – default to the effect of suppression.

Information and material that is to be subject to non-publication or suppression order must require a separate decision by the court to apply such an order.

To uphold the principles of open justice the two must not be automatically conflated. To do so will do the citizens of NSW a disservice.

It is untenable that ‘closed court’, ‘in camera’, ‘in private’ and/or ‘in absence of the public’ be defined as a single term that would also legislate that information be suppressed.

Thirdly, (4)(a) provides that this could be applied for the whole proceedings. This cannot be contemplated if open justice is to be upheld in NSW.

Again, ARTK cannot abide by closed court orders effecting automatic suppression. ARTK expresses in the strongest terms that this must not proceed.

## **Publish and disclose**

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

Provisions in existing subject-specific legislation that relate to non-publication, suppression, exclusion or closed court orders, statutory prohibitions on publication or disclosure of information, and the new Act proposed in chapter 4, should:

- (a) use the term “publish” instead of “publish or broadcast”
- (b) define “publish” as disseminate or provide access to the public or a section of the public by any means, including by:
  - (i) publication in a book, newspaper, magazine or other written publication
  - (ii) broadcast by radio or television
  - (iii) public exhibition, or
  - (iv) broadcast or publication by means of the internet, including through social media, and
- (c) define “disclose” as including:
  - (i) making information available to a person, or
  - (ii) releasing or providing access to information to a person,by publication or otherwise.

According to [3.9], Draft Proposal 3.2 is meant to ‘*improve consistency and clarity*’ and ‘*lead to greater compliance.*’ It goes on to state that the definitions ‘*should make it easier to people to understand what actions are prohibited.*’

It is difficult to comment on this as there is no evidence provided regarding the what the problem is, the magnitude of the problem, and/or how a change to a statutory definition will help ‘people’ have a better understanding of which is prohibited.

Further, and regarding the proposed drafting, there is a material issue with (c) in that you cannot disclose something to someone who already knows the information<sup>2</sup>.

## Party

### Proposal 3.3: Definition of “party”

Provisions in existing subject-specific legislation relating to non-publication, suppression, exclusion or closed court orders, and the new Act proposed in chapter 4, should provide that a “party” to proceedings includes:

- (a) a complainant or victim in criminal proceedings or protected person
- (b) any person named in evidence given in proceedings, and
- (c) in relation to proceedings that have concluded, a person who was a party to the proceedings before the proceedings concluded.

*‘Any person named in evidence in proceedings’* has the potential to be broad.

## Complainant, victim and protected person

### Proposal 3.4: Definitions of “complainant”, “protected person”, “prescribed sexual offence”, “domestic violence offence” and “victim”

Provisions in existing subject-specific legislation that relate to non-publication, suppression, exclusion or closed court orders, the new Act proposed in chapter 4, and the access framework proposed in chapter 10 should provide that:

- (1) “Complainant”:
  - (a) in relation to proceedings for a prescribed sexual offence, has the same meaning as in s 290A(1) of the *Criminal Procedure Act 1986* (NSW), and
  - (b) in relation to proceedings for a domestic violence offence, has the same meaning as the term “domestic violence complainant” in s 3 of the *Criminal Procedure Act 1986* (NSW).
- (2) “Victim” includes a person against whom an offence is alleged to have been committed.
- (3) “Protected person” has the same meaning as in s 3 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW).
- (4) “Prescribed sexual offence” has the same meaning as in s 3 of the *Criminal Procedure Act 1986* (NSW).
- (5) “Domestic violence offence” has the same meaning as in s 11 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW).

### *Regarding the definition of ‘victim’ at (2)*

According to [3.18] it is proposed that “victim” be defined to include *‘a person against whom an offence is alleged to have been committed’* which is meant to capture *‘a person against whom an offence is alleged to have been committed but the offence has not been formally proved (for example, because the proceedings are ongoing).’*

ARTK is concerned about the open-ended and non-definitive nature of this proposed definition, particularly as it relates to its real-world application. For example: when does a case end (including possibility of

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<sup>2</sup> *Nakhl Nasr v State of New South Wales; George Nasr v State of New South Wales* [2007] NSWCA 101 at [127]

appeal/s)? What if a case does not actually end? What about when a case has ended – is the ‘victim’ still the victim?

#### *Regarding the relationship between definitions*

We also raise the issue of the relationship between definitions, particularly of ‘complainant’ at (1) and ‘victim’ at (2).

#### **Information likely to lead to the identification of a person**

##### **Proposal 3.5: Information likely to lead to the identification of a person**

All statutory prohibitions on publication or disclosure that apply to a person’s “name”, and provisions in existing subject-specific legislation that contain powers to make non-publication or suppression orders in respect of a person’s “name”, should employ the term “information likely to lead to the identification of the person” instead of “name”.

Insofar as Draft Proposal 3.5 is an attempt to address the drafting issue ARTK identified in its submission responding to Chapters 1 through 4 of the Consultation Paper (at p18), then we welcome this development.

However, ARTK also notes that whether an automatic statutory restraint or non-publication/suppression order making power should apply just to the subject person name or also to that persons identify is something that should be considered on a case-by-case basis as each and every case will be different.

We do not support the inclusion in legislation of a list of factors that will always identify a person, including a non-exhaustive list, as it is likely to be used as a check-list as opposed to providing guidance and is, therefore, likely to result in suppression of information that does not identify a person in every case. Illustratively, [3.23] states that *‘such a list could make it easier for people to understand exactly what kinds of identifying information must not be published or disclosed’*. This is exactly what the list should not do.

Our experience in various areas of law is that lists, including non-exhaustive lists, are used as default check-lists. This would do the opposite of serving open justice.

#### **Contact information**

##### **Proposal 3.6: Definition of “contact information”**

- (1) Section 149B, s 247S, s 280 and s 280A of the *Criminal Procedure Act 1986* (NSW) should employ the term “contact information” instead of “personal details”, “address or telephone number” or “personal information”.
- (2) Section 149B, s 247S, s 280 and s 280A of the *Criminal Procedure Act 1986* (NSW), and the legislative framework for accessing court records proposed in chapter 10, should provide that “contact information” includes:
  - (a) a private, business or official telephone number
  - (b) a private, business or official address, and
  - (c) a private, business or official email address or social media profile.

We do not take issue with the concept that witnesses should not be contacted improperly. However, we see the proposed changes as unnecessary.

In particular, the privacy settings – or lack thereof – of a social media profile are uniquely within the control of the person who maintains the particular account. Content may be accessible by anyone because the profile owner has made the choice to set the profile and/or contact information to a ‘public’ setting. Such

profiles and content do not need to be revealed in court to be available and accessible to the public and should not be the subject of any form of statutory restraint

We recommend the NSWLRC reconsider the application of the proposed change in a range of contexts.

### Journalist and news media organisation

#### Proposal 3.7: Definition of “journalist” and “news media organisation”

Provisions in existing subject-specific legislation that relate to non-publication, suppression, exclusion or closed court orders, statutory prohibitions on publication or disclosure of information, the new Act proposed in chapter 4, and the legislative framework for accessing court records proposed in chapter 10, should:

- (a) employ the term “journalist” instead of “media representative”
- (b) define a “journalist” as a person engaged in the profession or occupation of journalism in connection with the publication of information in a news medium, and
  - ~~(c) provide that the factors that indicate a person is a “journalist” include, but are not limited to, the following:~~
    - ~~(i) the person is employed by a news media organisation~~
    - ~~(ii) a significant proportion of the person’s professional activity involves:~~
      - ~~(A) collecting and preparing information having the character of news, or~~
      - ~~(B) commenting or providing observations on news for dissemination in a news medium~~
    - ~~(iii) the information collected or prepared by the person is regularly published in a news medium~~
    - ~~(iv) the person’s comments or observations on news are regularly published in a news medium, and~~
    - ~~(v) in respect of the publication of:~~
      - ~~(A) any information collected or prepared by the person, or~~
      - ~~(B) any comment or observation~~
    - ~~the person or the publisher of the information or observation is required to comply (including through a complaints process) with recognised journalistic or media professional standards or codes of practice, and~~
  - (d) define “news media organisation” as an enterprise or service that engages in the business of broadcasting or publishing news to the public or a section of the public.

ARTK strongly holds agrees that the definition of journalist should be flexible so as to cover a range of journalistic practices. In doing so we strongly oppose the inclusion in legislation of a list of factors, non-exhaustive or otherwise, that purports to indicate a person is a journalist. Our experience in various areas of law is that lists, including non-exhaustive lists, are used as default check-lists and are likely to exclude genuine journalists by virtue of that operation.

ARTK submits that there is a beneficial continuity to applying the definition applicable to the shield law to all laws relevant to open justice. Consequently, we strongly assert that the definition of journalist at s 126J of the *Evidence Act 1995* remains appropriate and should be applied if a definition of journalist is required. Further we believe that, should it be required, a court should be able to make these decisions on a case-by-case basis.

Therefore, we recommend deleting the text as per the text box above.

### Accreditation of journalists



### Proposal 3.8: Accreditation of journalists

- (1) The Department of Communities and Justice should maintain a list of accredited journalists that can be used by each court for the purpose of enabling journalists to exercise certain entitlements.
- (2) The Department should issue identification that can be carried by journalists on court premises so they can be easily identified and use this identification to exercise certain entitlements.

ARTK strongly opposes this proposal. It is unnecessarily heavy-handed and tantamount to licensing journalists which we do not condone.

### Official report of proceedings

#### Proposal 3.9: Definition of “official report of proceedings”

~~All statutory prohibitions on publication or disclosure that contain an exception for an official report of proceedings should define “official report of proceedings” as including:~~

- ~~(a) a report of proceedings intended primarily for use in a law report, or~~
- ~~(b) a report of proceedings approved by the court or tribunal.~~

We think this is unnecessary and do not support this recommendation.

We are also concerned, and have experience in the application of s121 of the *Family Law Act 1975* (Cth), that the perverse outcome is that the court interprets such that it is required to ‘approve’ any or all material for any purpose – including news reports – as the court interprets this material as an ‘official report of proceedings.’ In the case of news reports, this real example occurs notwithstanding that the reporter/s are well versed in statutory restrictions.

The perverse outcome of such a proposal is that any report of the matters by anyone would require the approval by a court – including a news report or any other report for any purpose. This is untenable and should not be pursued.

## CHAPTER 4 – A NEW ACT

ARTK does not support a new Act for a number of reasons:

Firstly, it is not clear what the problem is that is being addressed by a proposed new Act or why a new Act is the appropriate and proportionate response.

Secondly, rather than repealing existing provisions which would overlap with the territory proposed to be covered by the new Act, the NSWLRC instead proposes that the existing provisions should continue to operate side-by-side with the new legislation. Thus, the proposed new Act would not make the law more stream-lined and easier to understand and apply but, instead, add an additional layer of regulation over and above the laws already in place. Amending all existing provisions and definitions to be consistent with the new Act as proposed does nothing to ameliorate this concern.

We are perplexed and perturbed as to the purpose of the new Act and its operation and function. We are deeply concerned by the unnecessary duplication and shuffling of deck chairs of this Draft Proposal at large.

We are also deeply troubled by the diminution of open justice arising from much of the details of the proposal, and the fact that neither the proposed new Act nor the amendments to existing provisions



appropriately address the myriad issues with the operation of the current laws as explained in significant detail in ARTK submissions to the Consultation Paper.

We make the following comments on the proposed Act as a second order to our position above.

### Provisions applicable to all types of orders - definitions

#### Proposal 4.1: Definitions

The new Act should provide that:

- (1) "Court" means:
  - (a) the Supreme Court, Land and Environment Court, District Court, Local Court and Children's Court and, for the avoidance of doubt, does not include the Coroners Court, and
  - (b) any other judicial body that is prescribed in regulations.
- (2) "Proceeding" includes a civil or criminal proceeding.
- (3) "Information" includes any document.
- (4) "Child" means a person who is under the age of 18 years.
- (5) "Mental health impairment" has the same meaning as in s 4 of the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW).
- (6) "Cognitive impairment" has the same meaning as in s 5 of the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW).

ARTK submits that the circumstances in which a civil proceeding should need to be closed should be very few and far between as non-publication order are more adaptable and appropriate means of addressing concerns that may arise in the civil context.

### Principles

#### Proposal 4.2: Principles

The new Act should provide that when deciding whether to make an order under this Act, the following principles should be taken into account:

- (a) open justice is a fundamental aspect of the administration of justice and plays a critical role in:
  - (i) maintaining public confidence in the administration of justice
  - (ii) maintaining the integrity and impartiality of courts, and
  - (iii) enabling the fair and accurate reporting of court proceedings.
- ~~(b) orders should only be made if, and to the extent necessary, on one or more of the grounds specified in Proposal 4.14, Proposal 4.19 or Proposal 4.22, and~~
- (c) orders should be made in a way that is clear, consistent and of limited scope and duration.

We are of the view the above is reasonable, but we are wary that notwithstanding principles incorporated into legislation, the real test is the operation of the law.

Regarding the specifics of Proposal 4.2, we note that (b) relates to other proposals, being:

- 4.14 – grounds for making a non-publication and suppression order;
- 4.19 – grounds for making an exclusion order; and
- 4.22 – grounds for making a closed court order.

We are of the view that (b) is unnecessary. Further, while 4.14 is relevant, the Draft Proposals inextricably link the status of the court with suppression (or otherwise) of information. The status of a court – particularly the Draft Proposal for closed court (as explained previously in this chapter) must not automatically suppress information.

For these reasons (b) must be deleted.

### **Other preliminary provisions**

#### **Proposal 4.3: Inherent jurisdiction and powers of courts not affected**

The new Act should not limit or otherwise affect any inherent jurisdiction or any powers that a court has to regulate its proceedings or deal with a contempt of the court.

Agree. However, again, this is the well-established common law status and we do not see why a new Act is required.

#### **Proposal 4.4: Other laws not affected**

The new Act should not limit or otherwise affect the operation of provisions in or made by or under any other statute or law that:

- (a) prohibit or restrict the publication or disclosure of information
- (b) require the court to make an exclusion or closed court order, or
- (d) contain powers to make non-publication, suppression, exclusion or closed court orders.

We repeat our comments above about this proposal adding complexity to the law and operating to close justice.

#### **Proposal 4.5: Interaction between the new Act and other laws**

The new Act should:

- (a) provide that, in deciding whether to make an order, the court should consider whether:
  - (i) a provision in any other Act already prohibits or restricts the publication or disclosure of the relevant information
  - (ii) a provision in any other Act already requires the court to make an exclusion or closed court order, or
  - (iii) the relevant order could be made under any other Act instead, and
- (b) include a note providing examples of provisions in or made by or under other Acts that:
  - (i) prohibits or restricts the publication or disclosure of information
  - (ii) require the court to make an exclusion or closed court order, or
  - (iii) contain powers to make non-publication, suppression, exclusion or closed court orders.

This seems unnecessary and illustrative of the lack of necessity for a new Act.

### **Powers**

#### Proposal 4.6: Power to make orders

The new Act should provide that:

- (1) A court may, by making a non-publication or suppression order on grounds permitted by this Act, prohibit or restrict the publication and/or disclosure of:
  - (a) information likely to lead to the identification of any party to or witness in proceedings before the court or any person who is related to or otherwise associated with any party to or witness in proceedings before the court (including by requiring the use of a pseudonym)
  - (b) information, whether or not received into evidence, given in proceedings before the court, or
  - (c) information that comprises evidence that may be adduced or given in proceedings before the court.
- (2) A court may, by making an exclusion order on grounds permitted by this Act, exclude a specified person or class of people from the whole or any part of proceedings.
- (3) A court may, by making a closed court order on grounds permitted in this Act:
  - (a) exclude all people from the whole or any part of proceedings, except those whose presence is required for the purpose of the proceedings, and
  - (b) prohibit the disclosure (by publication or otherwise) of information in that part of the proceedings.

Regarding 4.6 (1)(a) – the CSNPO Act s7(a) already allows for this, in practice either by orders that prohibit identification altogether or orders requiring the use of pseudonyms. Again, as this is the current accepted and working position, we do not see why a new Act is required.

4.6(1)(b) duplicates CSNPO Act s7(b). 4.6 (1)(c) seems to overreach and it is not clear what the problems are that (c) is intended to fix.

Regarding 4.6(3) – we do not support closed court orders as per the Draft Proposals and closed court must not, by default, mean suppression.

#### Requirement to give reasons on requests

#### Proposal 4.8: Requirement to give reasons on request

The new Act should provide that a court must provide reasons for making an order. ~~when requested by:~~

- ~~(a) the applicant for the order~~
- ~~(b) a party to proceedings in which the order was made~~
- ~~(c) the government (or an agency of the government) of the Commonwealth or of a state or territory~~
- ~~(d) a journalist or legal representative of a news media organisation, or~~
- ~~(e) any other person who, in the court's opinion, has a sufficient interest in whether an order should have been made or should continue to operate.~~

ARTK strongly recommends, as we have expressed previously, that a court must provide, and make available, sufficiently detailed reasons for making all non-publication and suppression orders. To support open justice, this must not be limited to giving reasons for these types of orders only when requested to do so.

We are concerned by [4.34] which states that reasons for making orders would not be required in every case on the basis that *'giving reasons may not be necessary and may be time-consuming.'*

We believe that the times where open justice is restricted should be so few as to require the court to be required to provide, and make available, sufficiently detailed reasons. Therefore, the making of non-publication orders and suppression orders must require this.

Such a requirement also assists in fulfilling the requirement that orders must only be made when necessary. In the course of writing reasons, the adjudicator of fact is required to engage with the necessity test and if the proof offered by the applicant falls short, the process of producing written reasons will highlight this. Anything other than a requirement to produce reasons is a significant shortfall.

This also dovetails with our opposition to the new Draft Proposal for the definition and operation of closed court being automatic suppression. This must not proceed. If information is to be suppressed in any circumstances it must be a separate consideration of the court over and above considerations pertinent to the operation of the courtroom.

Given this, the above proposed drafting should be amended as indicated above.

If a new Act is not implemented, we recommend a requirement that reasons be given for making non-publication and suppression orders, is adopted into the CSNPO Act.

## Appeals

### Proposal 4.9: Appeals of orders

The new Act should provide that:

- (1) With leave of the appellate court, an appeal can be made against:
  - (a) a decision of the original court to make, or not make, an order
  - (b) a decision by the original court made on the review of an order, or
  - (c) a decision by the original court not to review an order.
- (2) Appeals are to be heard in the following courts:
  - (a) if the original decision was made by the Supreme Court, the Land and Environment Court or the District Court – the Court of Appeal, and
  - (b) if the original decision was made by the Local Court or Children’s Court – the District Court.
- (3) The following people can apply for leave to appeal, and can appear and be heard on an appeal:
  - (a) the applicant for the order
  - (b) a party to the proceedings in which the order or decision subject to appeal was made
  - (c) the government (or an agency of the government) of the Commonwealth or of a state or territory
  - (d) a journalist or legal representative of a news media organisation, and
  - (e) any other person who, in the appellate court’s opinion, has a sufficient interest in the decision that is the subject of appeal.
- (4) On appeal, a court may confirm, vary or revoke the order and may in addition make any other order that the court can make under the new Act.
- (5) An appeal is to be by way of rehearing, and fresh evidence may be given by leave.
- (6) The relevant court may make procedural rules for the application and hearing of applications for leave and appeals (including the filing and service of documents and time limits for doing so).

ARTK queries whether this proposal refers to appeals or review or both; the requirement for fresh evidence only being able to be given with leave of the court at ss (5); and the breadth of the persons who can appeal, particularly at ss (3)(b), (c) and (e).

In any event, and as above, court must be required to make reasons for issuing orders.

## Breaches of order

### Proposal 4.11: Consequences of breaching an order

The new Act should provide that:

- (1) A person commits an offence if the person:
  - (a) engages in conduct that contravenes an order, and
  - (b) knows of the existence of the order.
- (2) The maximum penalty is 100 penalty units or imprisonment for two years, or both, for an individual, or 500 penalty units for a body corporate.
- (3) Conduct constituting this offence may be punished as a contempt of court even though it could be punished as an offence.
- (4) Conduct constituting this offence may be punished as an offence even though it could be punished as a contempt of court.
- (5) If conduct constitutes both an offence and a contempt of court, the offender is not liable to be punished twice.

ARTK does not support an option for the application of imprisonment in these circumstances. We also do not support the application of both penalties and imprisonment. If imprisonment remains a penalty it should be for no more than 12 months.

## Grounds for making non-publication orders

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

The new Act should provide that:

- (1) A court may make a non-publication or suppression order on one or more of the following grounds:
  - (a) the order is necessary to prevent prejudice to the proper administration of justice
  - (b) the order is necessary to prevent prejudice to the interests of the Commonwealth or a state or territory in relation to national or international security
  - (c) the order is necessary to protect the safety of any person
  - (d) the order is necessary to avoid causing undue distress or embarrassment to a complainant or a witness (not including a defendant) in any legal proceeding that involves, or relates to, a prescribed sexual offence
  - ~~(e) the order is necessary to avoid causing undue distress or embarrassment to a complainant, a protected person or a witness (not including a defendant) in any legal proceeding that involves, or relates to, a domestic violence offence~~
  - ~~(f) the order is necessary to avoid causing undue distress or embarrassment to a child who is a party or witness in any civil proceeding, or~~
  - (g) the order is otherwise necessary in the public interest and that public interest significantly outweighs the public interest in open justice.
- (2) Where relevant, in determining whether to make a non-publication or suppression order on the basis of one or more of the grounds in Proposal 4.14(1), the court must take into account:

- (a) the views of the person for whose benefit an order is to be made, or
  - (b) if the person for whose benefit an order is to be made is a child, the views of the child, considered in light of the child's age and understanding.
- (3) A non-publication or suppression order must specify the ground or grounds on which the order is made.

ARTK observes again that much of this is unnecessary as it is already provided for by the CSNPO Act.

We make particular note that these provisions would make NSW an outlier, and more specifically would join NSW to Queensland regarding (e) where there are issues with such a provision.

While we agree that a specific exclusion of the defendant from the grounds for making non-publication and suppression orders is appropriate, we do not agree that 4.14(1)(e) and 4.14(1)(f) are necessary

We note the *Crimes (Domestic and Personal Violence) Act 2007* is already equipped with automatic statutory restraints, power to close the court and non-publication order making powers: it doesn't need anything further.

Re 4.14(1)(f), such children could already fall under CSNPO Act ss8(1)(a), (c) and/or (e). We therefore recommend deleting sub-sections (e) and (f) as above.

Further, as detailed previously, reasons for the making of the order must be a requirement.

### **Interim non-publication and suppression orders**

#### **Proposal 4.15: Interim orders**

The new Act should provide that:

- (1) If an application is made to a court for a non-publication or suppression order, the court may, without determining the merits of the application, make an interim order until the application is determined.
- (2) If an interim order is made, the court must determine the application as a matter of urgency.

For the benefit of open justice, ARTK recommends that interim orders be time-limited by a sunset. A period of 48 hours could be a reasonable maximum for the sunset to apply. This negates the need for the 'urgency' provision, and assists all parties, including the court, with resource allocation.

### **Where a non-publication and suppression order applies**

#### **Proposal 4.16: Where a non-publication or suppression order applies**

The new Act should provide that:

- (1) A non-publication or suppression order must specify the place where the order applies.
- (2) The place in which an order applies need not be limited to NSW, and can be made to apply anywhere inside, or outside, the Commonwealth.
- (3) ~~In determining the place in which an order applies, the court should have regard to what is necessary for achieving the purpose for which the order is made.~~ However, an order is not to be made to apply outside New South Wales unless the court is satisfied that having the order apply outside New South Wales is necessary for achieving the purpose for which the order is made.

While ARTK does not support attempts to apply laws extra-territorially we accept that CSNPO Act s 11 has had this potential effect since 2010. 4.16(3) is a watered-down version of CSNPO Act s 11(3) and any new Act must be consistent with that provision.

### Duration of non-publication and suppression orders

#### Proposal 4.17: Duration of non-publication or suppression orders

The new Act should provide that:

- (1) A non-publication or suppression order ~~(not including an interim order)~~ must specify the period for which the order operates.
- (2) An order must not be specified, **or by effect**, to operate indefinitely.
- (3) A court, in deciding the period for which an order is to operate, must ensure that the order operates for no longer than is reasonably necessary to achieve its purpose.
- (4) The period for which an order operates is to be determined by reference to:
  - (a) a fixed or **readily** ascertainable period, or
  - (b) the occurrence of a specified future event (not including the making of a further order).

ARTK agrees that non-publication and suppression orders cannot be specified, or by effect, operate indefinitely, including by reference to further order/s which may or may not be made.

We recommend that consideration to '*specific future event*' must consider all possible outcomes for that event. For example, a specified future event that was "the conclusion of the matter" or even "verdict" would not be acceptable given these do not encapsulate all possible outcomes to proceedings that may occur.

Further, we disagree with the statement at [4.67] that this proposal should not apply to interim orders. As per our response to Draft Proposal 4.15 above, we strongly hold that interim orders must be time-limited by sunset to ensure certainty of a further order being made (or not made as the case may be) in a timely manner.

### Review of non-publication and suppression orders

#### Proposal 4.18: Review and revocation of non-publication and suppression orders

The new Act should provide:

- (1) A court that made a non-publication or suppression order may review the order on:
  - (a) the court's own initiative, or
  - (b) the application of a person who is entitled to apply for the review.
- (2) The following people can apply for, and appear and be heard on, a review:
  - (a) the applicant for the order
  - (b) a party to the proceedings in which the order was made
  - (c) the government (or an agency of the government) of the Commonwealth or of a state or territory
  - (d) a journalist or legal representative of a news media organisation, and
  - (e) any other person who, in the court's opinion, has a sufficient interest in the question of whether an order should have been made or should continue to operate.



- (3) On a review, the court may confirm, vary or revoke the order and may in addition make any other order that the court can make under the new Act.
- (4) On a review, a court must revoke an order if:
- (a) unless the review is on the court's own motion, the application for the review is made, or supported by, by a complainant of a prescribed sexual offence or a domestic violence offence or a protected person in an apprehended violence order proceeding, and
  - (b) the court is satisfied that the complainant or protected person:
    - (i) is aged 18 years or above and consents to the revocation of the order
    - (ii) is aged 16 years or above but is under the age of 18 years and consents to the revocation of the order after receiving legal advice from an Australian legal practitioner about the implications of doing so, and
    - (iii) it is otherwise appropriate in all the circumstances for the order to be revoked.
- ~~(5) Despite Proposal 4.18(4), the court must not revoke an order if the revocation of the order would result in the disclosure or publication of the identity of any person against whom a prescribed sexual offence or domestic violence offence was allegedly committed and that was dealt with in the same proceeding, or the identity of a person who is also a protected person in the same apprehended violence order proceeding:~~
- ~~(a) who does not give permission to that disclosure or publication, or~~
  - ~~(b) is under 18 years of age, unless the person is over the age of 16 and has given permission for disclosure or publication after receiving legal advice from an Australian legal practitioner about the implications of giving permission, or~~
  - ~~(c) if it is not appropriate in all the circumstances.~~

We observe that an applicant for review *and revocation* of non-publication and suppression orders should be consistent with the applicant/s for the order itself. For that reason, ARTK recommends the addition, as above to sub-section (4)(a). However, we do not suggest that this may be the only amendment required to minimise perverse incentives and outcomes.

Regarding sub-section (5), while it may be well intentioned, such circumstances should be able to be dealt with without it restricting identifying the applicant in the absence of such a provision.

### Grounds for making exclusion orders

#### Proposal 4.19: Grounds for making an exclusion order

The new Act should provide:

- (1) A court may make an exclusion order on one or more of the following grounds:
- (a) the order is necessary to prevent prejudice to the proper administration of justice
  - (b) the order is necessary to protect the safety of any person
  - (c) the order is necessary to support a child or a person with a mental health impairment or cognitive impairment to give evidence, or
  - (d) the order is otherwise necessary in the public interest and that public interest significantly outweighs the public interest in open justice.
- (2) Where relevant, when determining whether to make an exclusion order on one or more of the grounds set out above, the court must take into account:
- (a) the views of the person for whose benefit the order is to be made, or

- (b) if the person for whose benefit the order is to be made is a child, the views of the child, considered in light of the child’s age and understanding, or
- (c) if the person for whose benefit the order is to be made has a mental health impairment or cognitive impairment, the views of that person, considered in light of the person’s mental health impairment or cognitive impairment.

(3) An exclusion order must specify the ground or grounds on which the order is made.

ARTK appreciates that Proposal 3.1 includes the definition of exclusion order as ‘(a) means an order to exclude a specified person or class of people from the whole of any part of proceedings, and (b) does not, of itself, restrict or prohibit the disclosure (by publication or otherwise) of information in that part of proceedings.’ [our emphasis added]. Further, we support the specific reference at (b).

We make limited comment about exclusion orders at this time, but reserve the right to do so in future.

### Grounds for making closed court orders

#### Proposal 4.22: Grounds for making a closed court order

The new Act should provide that:

- (1) A court may make a closed court order on one or more of the following grounds and only where the ground cannot be addressed by other reasonably available means:
  - (a) the order is necessary to prevent prejudice to the proper administration of justice
  - (b) the order is necessary to prevent prejudice to the interests of the Commonwealth or a state or territory in relation to national or international security
  - (c) the order is necessary to protect the safety of any person, or
  - (d) the order is otherwise necessary in the public interest and that public interest significantly outweighs the public interest in open justice.
- (2) A closed court order must specify the ground or grounds on which the order is made.
- (3) “Other reasonably available means” includes a non-publication, suppression or exclusion order.

As clearly stated above, ARTK does not agree with the proposal that a closed court order – which sweeps up a range of long-standing and well understood ways a court deals with the environs, witnesses and information – has the effect of automatically suppressing information. This is the opposite of open justice and lacks the due process required to make non-publication and suppression orders.

We acknowledge there are circumstances when such orders are appropriate. But they must be applied for and made by the court in a process separate to applying restrictions to the court as a physical place. The status of the court must not, in and of itself, restrict or prohibit the disclosure of information, by publications or otherwise.

### Where and when a closed order applies

#### Proposal 4.23: Where and when a closed court order applies

The new Act should provide that:

- (a) a closed court order must specify the proceedings, or part of the proceedings, from which all people, except those whose presence is required for purposes of the proceedings, are excluded, and

- (b) unless the court orders otherwise under Proposal 4.7(4), a closed court order has the effect of prohibiting all information in that part of proceedings from being disclosed (by publication or otherwise) anywhere inside, or outside, the Commonwealth.

Given that the proposal inextricably links a closed court order with suppression, suppression of all information during closed court would apply indefinitely as there is no mechanism for it to not apply indefinitely. This is untenable. It deprives the court from making its own nuanced and circumstance-appropriate decisions. It is anathema to open justice.

### Review of closed court orders

#### Proposal 4.24: Reviews of closed court orders

The new Act should provide:

- (1) The court that made a closed court order may review the order on:
  - (a) the court's own initiative, or
  - (b) on the application of a person who is entitled to apply for the review.
- (2) The following people are entitled to apply for and appear and be heard by the court ~~or tribunal~~ on the review of an order:
  - (a) the applicant for the order
  - (b) a party to the proceedings in which the order was made
  - (c) the government (or an agency of the government) of a state or territory or the Commonwealth
  - (d) a journalist or a legal representative of a news media organisation, and
  - (e) any other person who, in the court's opinion, has a sufficient interest in the question of whether an order should have been made or should continue to operate.
- (3) On a review the court may confirm, vary or revoke the order and may in addition make any other order that the court can make under the new Act.

As we have said, we do not support the closed court orders.

Closed court orders, in any form, must be appealable not merely reviewable.

We do not accept that a tribunal is an appropriate body to hear an appeal or review closed court orders.

## CHAPTER 5 – STATUTORY PROHIBITION ON PUBLICATION OR DISCLOSURE

### Identity of children and young people

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

- (1) The prohibition in s 15A of the *Children (Criminal Proceedings) Act 1987* (NSW) should be amended to prohibit the publication of information likely to lead to the identification of a person in a way that connects them with a criminal investigation, if the person under investigation was a child when the alleged offence was committed, unless the publication is necessary to ensure the safety and welfare of them or any other person.
- (2) "Criminal investigation" should be defined to mean an investigation conducted by police officers, or other persons charged with the duty of investigating, into whether a person should be charged with an offence.

ARTK does not support this Draft Proposal. Such a proposal fixes news media organisations and others with potential criminal liability and it is uncertain that the law could be complied with.

For example, it is not unusual for police to provide the media with CCTV stills or footage of young people committing crimes such as robberies for the purpose of identifying and locating the subjects of the footage. Post the offence occurring, no-one's health or safety is necessarily at risk (accepting that while the offence was occurring the health and safety of the victim was so effected). Media organisations would have to give serious thought to cooperating with such requests where the offenders appear as if they could be minors. Conversely, if the media were to publish stills/footage and, post-arrest, it became apparent that the offender was a minor at the time of committing the offence, the media will have committed an offence themselves all in the cause of assisting police.

Media aside, it is also commonplace for small business owners to post CCTV stills of shop-lifters either on their premises or on social media accounts as a means to prevent further theft and to identify offenders. The same questions about whether such a person presents a risk to the health and safety of others would, naturally, arise and they would run the same risks in relation to the accidental identification of a child as outlined above.

Lastly, while ARTK appreciates the attempt to define "criminal investigation" above it lacks the bright-line that is the point of a charge being laid. Exactly when a criminal investigation commences could be unclear. Is it when a complaint is made? Does it require further steps to be taken by those investigating? What is the investigator in undertaking the investigation as a matter or interest as opposed to in the course of his/her employment? This uncertainty is untenable when the intention is to fix those who identify a child contrary to the proposed amended section with criminal liability.

### **Identity of sexual offence complainants**

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

The prohibition in s 578A of the *Crimes Act 1900* (NSW) should be amended to prohibit the publication of any matter which identifies a complainant of a prescribed sexual offence:

- (a) where a complaint has been made to the police, and
- (b) regardless of whether legal proceedings have commenced for that offence.

It is important to note that survivors of sexual offences can only be identified with their consent, and only if they are over the age of 14.

Additionally, regarding the specific proposal, it is important that any provision is certain and fixable in time. This important aspect is lacking in Draft Proposal 5.3.

### **When statutory prohibitions do not apply**

#### **Duration of all statutory prohibitions**

Regarding the Draft Proposals suggested at [5.19] that it '*may not be appropriate for all statutory prohibitions to state a duration*' and that some information '*should be protected from publication or disclosure for a long, or indefinite, period of time.*', we do not support an option for indefinite suppression. We recommend a maximum of 5 years, and even then, such a timeframe should only be ordered in the rarest of circumstances.

## Duration of certain prohibitions

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

The prohibitions in s 15A of the *Children (Criminal Proceedings) Act 1987* (NSW), s 45 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) and s 65 of the *Young Offenders Act 1997* (NSW) should be amended to:

- (a) prohibit the publication of information likely to lead to the identification of the person ~~before~~, during and after proceedings, and
- (b) not apply to publishing information likely to lead to the identification of the person if:
  - (i) that person is deceased, and
  - (ii) the publication does not identify any other living person whose identity must not be published.

We are uncertain what 'before' actually means in this context. As we have said previously, it is important that any provision is certain and fixable in time. 'Before' could be significantly earlier than once a criminal investigation (as discussed above) commences and may indeed not be able to be complied with and/or reasonable. On these grounds alone 'before' should be deleted from the above.

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

The prohibition in s 578A of the *Crimes Act 1900* (NSW) should be amended to prohibit the publication of information likely to lead to the identification of a complainant even if they are deceased.

ARTK does not support this Draft Proposal which would automatically prohibit the identification of complainants of sexual offences upon their death.

Again, the Draft Proposal sheds no light on the reasons why this change to the law has been recommended; nor sets out a principled, evidence based case for it to occur.

There are few people in New South Wales over the age of 20 who would not know the names Anita Cobby, Janine Balding, Jill Meagher or Eurydice Dixon. Each of these women lost their lives to shocking acts of sexual violence which resulted in legal and social changes in NSW and Victoria, respectively. There is a genuine public interest in these women being named because their identification allows the public to follow the outcomes resulting from their deaths in the courts, parole boards, parliament and elsewhere. The community is, consequently, provided with assurance that the justice system is responsive and that their deaths were not in vain.

If any restraint is to be introduced then ARTK submits the better way forward would be to allow for an application for a non-publication order to be sought, allowing the court to assess the necessity of such an order on a case-by-case basis.

As a society we have only very recently begun to grapple with the prevalence of sexual and domestic violence, particularly but not exclusively against women. To automatically prohibit the identification of deceased victims of sexual offences – rather than consider a more proportionate response – would be a significant step backwards.

### Exception for official report of proceedings

### Proposal 5.7: Exception for official reports of proceedings

All statutory prohibitions should contain an exception where the publication or disclosure of the relevant information is in an official report of proceedings.

We note here our previous comments about official reports of proceedings and how those come about. We continue to support official reports of proceedings to be as usually understood rather than the previous Draft Proposal.

### Exception where the court can grant leave for disclosure or publication or the subject of the prohibition can give consent

### Proposal 5.8: Consent exceptions in statutory prohibitions

Statutory prohibitions that prohibit the disclosure or publication of information likely to lead to the identification of a person should include an exception that enables the court to grant leave for disclosure or publication of such information ~~and/or~~ the subject of the prohibition to consent to disclosure or publication of such information.

We are of the view the Draft Proposal at [5.31] does not clearly convey that the consent of the person the subject of an automatic statutory prohibition should always be sufficient to authorise publication. We do not support any version of Draft Proposal [5.31] that adds a requirement to obtain a court order authorising identification even where the subject of the automatic statutory restraint has consented to be identified

The way to encourage people to tell their stories is to promote open justice rather than close the door and make people open it in a process that would likely prove so costly that few would ever contemplate engaging with it.

### Limitation on consent exception in statutory prohibitions where proceedings are ongoing

### Proposal 5.9: Limitations on the consent exceptions in statutory prohibitions

~~Statutory prohibitions that include an exception that enables the court to grant leave to disclose or publish the person's identity, and/or the person to give consent to disclosure or publication of their identity, should be amended to provide that:~~

~~(a) — where the proceedings are ongoing, only the court can grant leave to disclose or publish the person's identity, and~~

~~(b) — where the proceedings have concluded:~~

~~———— (i) ——— the court can grant leave for disclosure or publication of the person's identity, or~~

~~———— (ii) ——— the person can give consent to disclosure or publication of their identity.~~

We do not support this Draft Proposal.

Regarding sub-section (a) – If a person can currently consent in these circumstances, the ability to consent must not be taken away and the power given solely to the court.

To suggest, as is stated at [5.34] that the court must be the sole arbiter of whether a person is identified during proceedings – removing the ability for the person to independently consent – is patriarchal and must not be tolerated. Further, it is overblown to suggest, as [5.34] does, that someone consenting to identifying themselves could risk the integrity of the trial.

We note that the Victorian legislature found itself on the receiving end of the “nanny state” label in 2019 when it amended *Judicial Proceeding Reports Act 1958* (Vic) s 4 to require all sexual offence survivors to

obtain a court order before they could consent to being identified. Advocates who were themselves survivors of abuse and who had been speaking on behalf of other survivors (in some cases, for decades) found themselves abruptly silenced. After an extensive public outcry, that section was amended again to allow survivors to consent to being identified in the manner and to the extent that they wished.

Regarding sub-section (b) – this is unnecessary in any circumstance.

Again, we are profoundly disappointed by Draft Proposals such as these which would see NSW take another backward step regarding open justice.

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

~~The consent exception in s 578A(4)(f) of the *Crimes Act 1900* (NSW) should be amended to provide that a court may grant leave to the publication of a complainant's identity, if satisfied:~~

~~(a) that it has taken into account:~~

~~—— (i) the views of the deceased complainant, if those views are known and ascertainable, and~~

~~—— (ii) what the deceased complainant would have wanted if they had been alive; and~~

~~(b) that it has taken into account the views of family members, unless the family member is also the alleged or convicted offender~~

~~(c) that another complainant who is under the age of 18 or who has not given consent to publication would not be identified, and~~

~~(d) it is not contrary to the public interest.~~

Like Draft Proposal 5.6 above, ARTK does not support this proposal which would automatically prohibit the identification of complainants of sexual offences upon their death.

A better way would be for there to be no prohibition, rather an application for a non-publication order can be sought – allowing the court to assess the merits on a case-by-case basis.

As a society we have only very recently begun to grapple with the prevalence of sexual and domestic violence, particularly but not exclusively against women. To automatically prohibit the identification of deceased victims of sexual offences – rather than consider a more proportionate response – would be a significant step backwards.

## **CHAPTER 6 – OTHER POWERS TO MAKE NON-PUBLICATION AND SUPPRESSION ORDERS**

### **Court powers to make non-publication and suppression orders**

#### **Proposal 6.1: Procedures for making non-publication or suppression orders**

Subject-specific legislation containing powers for courts to make non-publication and suppression orders should be amended to provide that:

(1) A court may make an order on its own initiative or on the application of:

(a) a party to the proceedings concerned, or

(b) any other person that the court considers has a sufficient interest in the making of the order.

(2) The following people are entitled to appear and be heard when a court is considering whether to make an order, either on its own initiative or on the application of a person listed in Proposal 6.1(1)(a)–(b):



- (a) the applicant for the order
  - (b) a party to the proceedings concerned
  - (c) the government (or an agency of the government) of the Commonwealth or of a state or territory
  - (d) a journalist or legal representative of a news media organisation, and
  - (e) any other person who, in the court's opinion, has a sufficient interest in the question of whether an order should be made.
- (3) An order can be made at any time during or after proceedings.
  - (4) An order can be made subject to such exceptions or conditions as the court sees fit.
  - (5) An order must specify the information to which the order applies with sufficient particularity to ensure the order is limited to achieving the purpose for which it is made.

There must be a requirement that detailed reasons be made accessible and available for all non-publication and suppression orders. This includes detailing why they were made and being very clear as to why making the order outweighs the public interest in open justice.

#### Proposal 6.2: Where a non-publication or suppression order applies

Subject-specific legislation containing powers for courts to make non-publication and suppression orders should be amended to provide that:

- (1) A non-publication or suppression order must specify the place where the order applies.
- (2) The place in which an order applies need not be limited to NSW, and can be made to apply anywhere inside, or outside, the Commonwealth.
- (3) **However, an order is not to be made to apply outside New South Wales unless the court is satisfied that having the order apply outside New South Wales is necessary for achieving the purpose for which the order is made**

As per our comments at Draft Proposal 4.16, while ARTK does not support attempts to apply laws extra-territorially we accept that CSNPO Act s 11 has had this potential effect since 2010. 4.16(3) is a watered-down version of CSNPO Act s 11(3) and any new Act must be consistent with that provision.

#### Proposal 6.3: Duration of non-publication or suppression orders

Subject-specific legislation containing powers for courts to make non-publication and suppression orders should be amended to provide that:

- (1) A non-publication or suppression order must specify the period for which the order operates.
- (2) An order must not be specified, **or by effect**, to operate indefinitely.
- (3) A court, in deciding the period for which an order is to operate, must ensure that the order operates for no longer than is reasonably necessary to achieve its purpose.
- (4) The period for which an order operates is to be determined by reference to:
  - (a) a fixed or **readily** ascertainable period, or
  - (b) the occurrence of a specified future event (not including the making of a further order).

As per our comments at Draft Proposal 4.17, ARTK holds that non-publication and suppression orders cannot be specified, or by effect, operate indefinitely, including by reference to further order/s which may or may not be made.

We recommend that consideration to ‘*specified future event*’ must consider all possible outcomes for that event. For example, a specified future event that was the conclusion of the matter would not be acceptable given all possible outcomes including that this is not a fixed or ascertainable outcome, and may not even occur.

Further, we disagree with the statement at [4.67] that this Draft Proposal should not apply to interim orders. As per our response to Draft Proposal 4.15 above, we strongly hold that interim orders must be time-limited by sunset to ensure certainty of a further order being made (or not made as the case may be) in a timely manner.

#### Proposal 6.4: Requirement to give reasons for non-publication or suppression orders

Subject-specific legislation containing powers for courts to make non-publication and suppression orders should be amended to provide that a court must provide reasons for making an order. ~~when requested by:~~

- ~~(a) the applicant for the order~~
- ~~(b) a party to proceedings in which the order was made~~
- ~~(c) the government (or an agency of the government) of the Commonwealth or of a state or territory~~
- ~~(d) a journalist or legal representative of a news media organisation, or~~
- ~~(e) any other person who, in the court’s opinion, has a sufficient interest whether an order should have been made or should continue to operate.~~

As strongly conveyed in multiple places in this document, it must be a requirement for the court to provide detailed written reasons for making the order, those reasons must be sufficiently detailed, must give reasons as to why the making of the order outweighs the public interest in open justice, and the reasons must be easily accessible and available in a timely manner.

#### Proposal 6.8: Safeguarding the public interest in open justice

Subject-specific legislation containing powers to make non-publication and suppression orders should be amended to provide that a court, in deciding whether to make an order, must take into account the public interest in open justice.

This is inadequate. Open justice must have primacy, and when deciding to make an order the court must be convinced that the making of an order outweighs the public interest in open justice.

Anything other than this is to merely give lip service to open justice.

#### Tribunal powers to make non-publication and suppression orders

#### Proposal 6.9: Duration of non-publication or suppression orders

Section 64 of the *Civil and Administrative Tribunal Act 2013* (NSW) and s 151 of the *Mental Health Act 2007* (NSW) should be amended to provide that:

- (1) A non-publication or suppression order must specify the period for which the order operates.
- (2) An order must not be specified, **or by effect**, to operate indefinitely.
- (3) A court, in deciding the period for which an order is to operate, must ensure that the order operates for no longer than is reasonably necessary to achieve its purpose.
- (4) The period for which an order operates is to be determined by reference to:

- (a) a fixed or **readily** ascertainable period, or
- (b) the occurrence of a specified future event (not including the making of a further order).

We note that the threshold for NCAT to make an order is not necessary. This must be changed to bring NCAT into line with courts.

Also, we do not receive notifications of orders from NCAT so we are unsure and unable to comment on the other elements, except that there should be consistency with our suggestions for courts to make orders clearer and fit for purpose.

## **CHAPTER 7 – REQUIREMENTS AND OTHER POWERS TO MAKE EXCLUSION ORDERS**

ARTK makes the following, shorthand, comments about exclusion orders. These are more fully articulated previously in our submission regarding non-publication and suppression orders:

- Duration of orders must be easily ascertainable
- There must be a requirement that the court make available / provide detailed reasons regarding the making of an order – this is not something that should only be required ‘on request’
- The court must be satisfied that the making of an order outweighs the public interest in open justice.

## **CHAPTER 8 – REQUIREMENTS AND OTHER POWERS TO MAKE CLOSED COURT ORDERS**

ARTK expresses in the strongest way that we do not support the proposal for closed court orders. We appreciate that courts have various ways of closing the court to accommodate the giving of evidence and other matters. However, we do not support the Draft Proposal promoted in this paper for a number of reasons already articulated in this submission.

For the purpose of completion here we again articulate that we cannot contemplate the gathering together of a range of measures available to the court into the proposed ‘closed court order’ and that such an order automatically suppresses all information.

The court must make a separate suppression order, and the order must only be made for what is absolutely necessary in the circumstances.

We refer to other material in this submission regarding this matter. We also express, again in shorthand, regarding the physical environs of closed court:

- Duration of orders must be easily ascertainable and
- There must be a requirement that the court make available / provide detailed reasons regarding the making of an order – this is not something that should only be required ‘on request’
- The court must be satisfied that the making of an order outweighs the public interest in open justice.

## **CHAPTER 9 – MONITORING AND ENFORCING DEPARTURES FROM OPEN JUSTICE**

### **Clarifying and standardising offences**

#### **Proposal 9.1: Maximum penalties for offences**

All statutory offences for breaching a prohibition on publication or disclosure, or a non-publication, suppression, exclusion or closed court order made under subject-specific legislation, should have a maximum penalty of no more than:

- (a) for an individual: two years' imprisonment and/or a fine of 100 penalty units, and
- (b) for a corporation (where relevant): a fine of 500 penalty units.

This should not be a criminal offence. Jail terms should not be included, particularly where there currently are none.

#### **Proposal 9.2: Conduct cannot be punished as both a statutory offence and contempt**

All statutory offences for breaching a non-publication, suppression, exclusion or closed court order made under subject-specific legislation should provide:

- (a) conduct constituting this offence may be punished as a contempt of court even though it could be punished as an offence
- (b) conduct constituting this offence may be punished as an offence even though it could be punished as a contempt of court, and
- (c) if conduct constitutes both an offence and a contempt of court, the offender is not liable to be punished twice.

This should not be a criminal offence. This should not constitute both a criminal offence and a contempt of court.

#### **Proposal 9.3: Standardised offences**

- (1) All statutory prohibitions on publication or disclosure, and provisions in existing subject-specific legislation that relate to non-publication, suppression, exclusion or closed court orders should include an offence of breaching the prohibition or order.
- (2) All such offences should provide that a person contravenes the offence if the person:
  - (a) engages in conduct that breaches the prohibition or order, and
  - (b) knows of the existence of the prohibition or order.
- (3) All such offences should provide that if a corporation contravenes the offence, each person who is a director of the corporation or who is concerned in the management of the corporation is taken to have committed the same offence, unless the person satisfies the court that:
  - (a) the person was not in a position to influence the conduct of the corporation in relation to its contravention of the offence, or
  - (b) the person, if in such a position, used all due diligence to prevent the contravention by the corporation.

We note for proposals 9.1, 9.2 and 9.3, consent should always be an exception.

#### **Addressing barriers to prosecuting offences**

#### **Proposal 9.4: Time limit for commencing proceedings for an offence**

All statutory prohibitions on publication or disclosure and provisions in existing subject-specific legislation that relate to non-publication, suppression, exclusion or closed court orders should be amended to provide that proceedings for an offence of breaching a prohibition or order must be commenced within ~~one two~~ years of the date of the alleged offence.

We recommend proceedings must be commenced within one year of the date of the alleged offence. This would make this consistent with actions in defamation law.

### Proposal 9.5: A register of orders

- (1) An online register of non-publication, suppression and closed court orders made by NSW courts and tribunals should be established.
- (2) **Individuals or organisations should be entitled to access the register on payment of an annual subscription fee.**
- (3) Paying subscribers of the register should be able to:
  - (a) search the register to see whether an order has been made in a specific case
  - (b) record interest in specific cases before NSW courts and tribunals, and
  - (c) view the details of orders (subject to Proposal 9.5(4)).
- (3) Every time a court or tribunal makes a non-publication, suppression or closed court order (or an order varying or revoking an earlier order), the details of the order should be entered on the register.
- (4) The register should include sufficient detail to identify the information protected by the order, except where this would frustrate the purpose of the order.
- (5) After an order is entered on the register, notifications should be sent to:
  - (a) each person who has registered an interest in the case in which an order has been made, and
  - (b) any other relevant person.

While we support an online register of orders we disagree in the strongest terms with the requirement from media to pay for access. Media must have full access to the register without payment. We have highlighted the relevant text above in red to note this must be amended.

Regarding the functionality and information accessible via the register we recommend the following:

- The register must have functionality fit for 2021 and beyond, including;
  - Notification function – or push – of all orders to media organisations (see point below – those that have ‘subscribed’ to a notification service) via an automated email distribution list
  - Subscription function – to receive notifications sent on a daily basis
- The register must be searchable by:
  - Name of offender
  - File number – usually year/ 0000000000#
    - We note the zeros are to enable sufficient numbers to be allocated throughout a year, however, it would be infinitely more usable to ditch the zeros preceding the number
  - The date the order was made
  - The date the order was entered into the register
- Other information the register should provide:
  - Name of person who made the order, and location of the court
  - PDF of the order including detailed reasons for the order including when it expires and the statutory grounds open which it was made.

### Proposal 9.6: A Court information Commissioner

A Court Information Commissioner should be established to, or an existing body should, carry out the following functions:

- (a) monitor and investigate breaches of prohibitions on publication or disclosure and non-publication, suppression, exclusion or closed court orders, including those occurring online
- (b) liaise with publishers and content hosts to remove material that is in breach of prohibitions and orders
- (c) commence proceedings for alleged breaches of prohibitions and orders, in appropriate cases

- (d) produce educational material about the risks and consequences of breaching prohibitions and orders, and
- (e) maintain and update a register of orders and control access to it.

ARTK observes that the system already operates in this way via the Office of the Director of Public Prosecutions and does not require a new bureaucracy and unnecessary administrative requirements.

## CHAPTER 10 – ACCESS TO RECORDS ON THE COURT FILE

### Streamlining the access regimes

#### Proposal 10.1: New legislative framework for access to records on the court file

- (1) There should be a new legislative framework governing access to records on the court file, which would apply to most NSW courts.
- (2) The legislative framework should be:
  - (a) contained within the new Act proposed in chapter 4, and
  - (b) supplemented by individual court rules, policies or practice notes.

As expressed in previous ARTK written and oral submissions to the NSWLRC Review of Open Justice, the keystone of our concerns is the systemic issue regarding access to documents including egregious misinterpretation/misunderstanding of the existing frameworks. We have provided detailed examples of these issues and the impact on open justice.

It is most disappointing that the Draft Proposals do not address the systemic deficiencies and issues with accessing court records. Rather, the Draft Proposals focus on forum over substance. We recommend in the strongest terms that attention be given to the operation of the current (or new) rules and not merely the rules themselves.

How access to court documents actually works is fundamental to open justice. The absence of attention to the operation of access to court documents is a gaping hole in the draft proposals which must be rectified.

#### Definitions of key terms

#### Proposal 10.2: Definitions of key terms

The access framework should include the following definitions:

- (1) “Court file” means the hard copy or electronic file **in the court’s possession or custody** maintained by the relevant court for the relevant proceedings and includes ~~any of the following records relating to the proceedings that the court has in its possession or custody:~~
  - (a) a record filed or tendered in the court by a party or a record of submissions made by a party
  - (b) a record admitted into evidence in connection with the proceedings
  - (c) a record of any judgment given and any directions given or orders made in proceedings before the court, and
  - (d) a record of the proceedings (including any transcript or recording of the proceedings).

“Court file” does not include:

- (a) any notes, working papers or deliberations produced by or for a judicial officer, or
  - (b) a record produced on subpoena that is not admitted in evidence.
- (2) “Personal identification information” **is includes:**

- (a) tax file number
  - (b) Centrelink customer reference number
  - (c) Medicare number
  - (d) financial account numbers
  - (e) passport number
  - (f) contact information
  - (g) date of birth (other than year of birth), and
  - (h) particulars of titles of land holdings.
- (3) “Record” means any document (or copy of a document) or other source of information compiled, recorded or stored in written form, or by electronic process, or in any other manner or by any other means.
- (4) “Researcher” means a person who makes a request for access to a record on a court file for the purposes of academic research.
- The factors that indicate a request is for the purposes of academic research include:
- (a) the person making the request works within a university or other institution that has research as one of its purposes
  - (b) a significant proportion of that person’s professional activity involves research, and
  - (c) the person is required to comply with recognised ethical or other professional standards in the course of their professional activity.
- (5) “Statutory prohibition on publication” means any provision in or made by or under any other statute or law that prohibits or restricts the publication of information.
- (6) “Statutory prohibition on disclosure” means any provision in or made by or under any other statute or law that prohibits or restricts the disclosure of information.

Both what constitutes ‘*court file*’ at (1) and ‘*personal identification information*’ require definitive closed sets. Regarding the latter, this should reflect other definitions already available.

### Records available to different types of applicants

#### Proposal 10.4: Records available to journalists

The access framework should provide:

- (1) Subject to Proposal 10.4(3)–(4), a journalist:
- (a) is entitled to access the following records on the court file:
    - (i) a statement of facts or any similar document summarising the prosecution case
    - (ii) an indictment, court attendance notice, summons or other document commencing criminal proceedings
    - (iii) subject to section 89 of the *Bail Act 2013* (NSW), any bail conditions imposed on an accused person
    - (iv) an originating process, defence or other pleading filed in civil proceedings
    - (v) a notice of motion
    - (vi) written submissions or transcript of oral submissions made by the parties
    - (vii) a transcript of proceedings in open court
    - (viii) any record admitted into evidence, and



(ix) a record of the judge's summing up, oral directions to a jury, and any orders and judgments, including remarks on sentence, and

(b) may access any other record on the court file only with leave of the court, including a record that contains information subject to a non-publication order or statutory prohibition on publication.

(2) For the avoidance of doubt, a pleading filed in civil proceedings does not include an affidavit or witness statement.

(3) Access to any record on the court file by a journalist is subject to:

(a) any condition imposed by the court in a particular case

~~(b) any prescribed fee for the provision of access to the record, and~~

~~(c) any prescribed fee for the deletion or removal of personal identification information from a record on the file, where the court imposes a condition requiring the journalist to access a copy of the record from which personal identification information has been deleted or removed.~~

(4) A journalist is not permitted in any case to access:

~~(a) a transcript of proceedings that were closed pursuant to a closed court order~~

~~(b) a record on the court file that contains information subject to a suppression order or prohibition on disclosure, and it is not reasonably practicable for the court to provide that part of the record that does not contain information subject to the order or statutory prohibition~~

(c) a record on the court file that is subject to a claim of privilege that has not yet been decided

(d) a record on the court file that a court has decided contains matter that is privileged, and

(e) a record on the court file that is the subject of a court order ~~to be kept confidential or otherwise restricted from access.~~

We offer the following:

- Regarding subsection (3)(b) – We disagree in the strongest terms with the requirement from media to pay for access via a prescribed fee or any other way. Media must have full access without payment. This is key as the media participates in and promotes open justice. It is perverse that roadblocks would be put in the way to such an important principle. Therefore, subsection 3(b) must be deleted.
- Regarding subsection (3)(c) – Again, we disagree in the strongest terms with the requirement from media to pay for access via a prescribed fee or any other way. To the extent there is an issue it can easily be solved by putting a notice on the front of the file. Therefore subsection (3)(c) must be deleted.
- Regarding subsection (4)(a) – As expressed very clearly above, we do not agree that a closed court order has the automatic effect of suppression. Therefore subsection (4)(a) must be deleted.
- Regarding subsection (4)(b) – Again, to the extent there is an issue it can easily be solved by putting a notice on the front of the file. Therefore subsection (4)(b) must be deleted.
- Regarding subsection (4)(e) – Either the record is subject to a court order or it is not. Therefore 'to be kept confidential' and 'or otherwise restricted from access' must be deleted.

### Considerations in deciding whether to grant leave for access

#### Proposal 10.7: Considerations in deciding whether to grant leave for access

~~The access framework should provide that, in deciding whether to grant leave to access a record on the court file, the judicial officer or registrar dealing with the application must take the following matters into account:~~

~~(a) the public interest in open justice~~

~~(b) the impact on the administration of justice, including the right to a fair trial~~

~~(c) the impact on an individual's privacy or safety~~

- ~~(d) where relevant, the impact on the safety, welfare, wellbeing, privacy and future prospects of a child~~
- ~~(e) the reasons for which access is sought~~
- ~~(f) the nature of the record sought, including whether it has been admitted in evidence or contains scandalous, frivolous, vexatious, irrelevant or otherwise oppressive material~~
- ~~(g) any conditions that can be imposed on access to or use of the record, and~~
- ~~(h) any other matter the judicial officer or registrar considers relevant in the circumstances.~~

ARTK makes the following comments:

- This proposal is unnecessary at best and at worst is highly probable to diminish the already subjective – but legally and procedurally allowed and legitimate – access to court documents by the media.
- If access to documents other than those above, it would be adequate that there is the capacity to apply for leave to be heard, and a decision to be made on a case-by-case basis.
- We therefore recommend deleting Draft Proposal 10.7.

#### Proposal 10.8: Procedures for access

The access framework should provide:

- (1) All requests for access to a record on the court file must:
  - (a) be in writing, and
  - (b) provide details of:
    - (i) the relevant proceeding or proceedings
    - (ii) the record or records sought, and
    - (iii) the reasons for making the request.
- (2) If the request is by a researcher, it must also include such information as will assist the court in determining whether the request is for the purposes of research.
- ~~(3) In an appropriate case, the court may notify parties to the proceedings and allow them to be heard in relation to the request.~~

We are concerned by the statement at [10.35] which infers the systems are not a right of access, which therefore undermines open justice.

Further, and linked to the above, if access to a document requires leave to obtain that access, then subsection (3) is appropriate. However, subsection (3) in its current format and context suggests that any and all requests for access – including access to documents captured within the framework for which access to is legally and procedurally allowed and legitimate – to documents, not *only* those outside of the framework.

For that reason subsection (3) should be deleted.

#### Proposal 10.10: Conditions on access to and use of court records

The access framework should provide:

- (1) In relation to a record on the court file that the applicant is entitled to access, or for which the applicant has been granted leave to access, a court may impose:

- (a) a condition requiring the applicant to inspect or copy the record on a court file under supervision
  - (b) a condition prescribing the time and place for inspecting or copying the record
  - (c) a condition on use of the record, including disclosure and publication
  - (d) a condition requiring the applicant to access a copy of the record from which personal identification information has been deleted or removed, and
  - (e) any other condition considered appropriate.
- (2) Any applicant who is given access to a record on a court file must not breach any condition imposed by the court.
- (3) The maximum penalty for breaching a condition is:
- (a) for an individual: a fine of 100 penalty units, and
  - (b) for a corporation: a fine of 500 penalty units.
- (4) A breach of a condition may be punished as a contempt of court even though it could be punished as an offence.
- (5) A breach of a condition may be punished as an offence even though it could be punished as a contempt of court.
- (6) If a breach of a condition constitutes both an offence and a contempt of court, the offender is not liable to be punished twice.

Regarding subsections (4) and (5) see our previous comments. We restate here that a breach of a condition must only be punished as an offence.

## Access fees

### Proposal 10.11: Access fees

The access framework should provide:

- (1) Regulations may prescribe fees for:
- (a) the provision of access to a record on the court file, and
  - (b) the deletion or removal of personal identification information from a record on the file, where the court imposes a condition requiring the applicant to access a copy of the record from which personal identification information has been deleted or removed.
- (2) Any prescribed fees should not exceed what is reasonably necessary to cover the cost of providing access to a record on the court file or deleting or removing personal identification information from a record on the court file.

Again, we express in the strongest terms that the media must not be changed for accessing files or documents, in hard or digital format, including accessing registers and databases.

## Offences

### Proposal 10.13: Offence of disclosure of personal identification information

The access framework should provide:

- (1) Any applicant who is given access to a record on a court file must not disclose (including by publication) any personal identification information contained in it except with the permission of:
- (a) the court, or
  - (b) the person to whom the personal identification information relates, unless:
    - (i) such information also includes personal identification information of another person, ~~and~~
    - (ii) that other person does not consent to disclosure of their personal identification information, ~~or~~

(iii) if material disclosed in open court.

- (2) The maximum penalty for disclosing personal identification information contained in a court record without permission is:
- (a) for an individual: a fine of 100 penalty units, and
  - (b) for a corporation (where relevant): a fine of 500 penalty units.

It should not be an offence to disclose or publish material that was disclosed in open court.

## **CHAPTER 11 – TECHNOLOGICAL ISSUES AND OPEN JUSTICE**

Journalists should be able to record proceedings for the purpose of note taking. This could be subject to Practice Directions issued by the court, and should be consistent across all courts.

It should be noted this is the practice in Queensland and the Northern Territory and has not caused any undue issues.

We encourage NSWLRC to consider this important operational issue to support open justice.