



## *Children's Court of New South Wales*

2 September 2021

Mr Alan Cameron AO  
NSW Law Reform Commission  
GPO Box 31  
Sydney NSW 2001

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

Dear Commissioner

Thank you for providing the Children's Court of New South Wales with the opportunity to comment on the Draft Proposals developed by the NSW Law Reform Commission as a part of its Review of 'Open justice: Court and tribunal information: access, disclosure and publication' (the 'Draft Proposals Paper' or the 'Paper').

Firstly, the Children's Court would like to acknowledge the work of the Commission in formulating the Draft Proposals. I do not propose to respond to each proposal, but I have attempted to respond to the topics of most relevance to the work of the Children's Court.

### Chapter 3 – Uniform Definitions

The Children's Court is supportive in principle of the proposal to implement uniform definitions in the new proposed Act set out in Chapter 4 of the Paper, as well as in existing subject specific legislation. The Children's Court is of the view that such a shift would promote clarity and consistency across the different legislative regimes, which would have utility for court users and for court staff.

#### **Proposal 3.5**

The Children's Court is strongly supportive of proposal 3.5, and prefers the terminology 'information likely to lead to the identification of the person' to references to a person's 'name' with respect to statutory prohibitions on publication or disclosure

and provisions in existing subject-specific legislation that contain powers to make non-publication or suppression orders.

The Children's Court agrees with the proposition put forward in the Draft Proposals Paper that such an approach would assist to ensure that it is well understood that identifying information as well as a person's name is protected. In the Children's Court's view, this is of critical importance in the context of its specialised jurisdictions.

As the Children's Court outlined in its previous submissions, the Court has taken cognisance of instances where the 'jigsaw identification' of children and young people is possible or has occurred, whereby the identities of the children and young people have been pieced together through the triangulation of details which have been published in different sources. Consequently, the Children's Court endorses the inclusion of a list non-exhaustive list of factors which set out information likely to lead to the identification of a person. The Children's Court is of the view that such a list would provide practical guidance around the kind of information which cannot be published and the Children's Court is supportive of all the suggested factors listed at paragraph 3.22 of the Paper.

### **Proposals 3.6 and 3.8**

The Children's Court agrees with the rationale behind proposals 3.6 and 3.8 as set out in the Paper and is supportive of these proposals.

## **Chapter 4 – A New Act**

### **Proposal 4.1**

The Children's Court is strongly supportive of the definition of 'child' as someone who is under the age of 18 as set out in proposal 4.1 and is of the view that the consistent of this definition is highly beneficial.

### **Proposals 4.4 and 4.5**

The Children's Court supports proposals 4.4 and 4.5 and regards these proposals as a necessary component of the introduction of a new Act.

### **Proposal 4.8**

The Children's Court is supportive of courts not automatically being required to give reasons for every order made under the proposed Act. The Children's Court would like to highlight that Children's Magistrates often give ex-tempore judgments so that

the parties to the proceedings can be provided with a timely resolution of cases and this is an important consideration given the nature of the cases dealt with by the Children's Court. As such, the Children's Court suggests that there should be some specification as to when the request for written reasons needs to be made. The Children's Court notes that given the volume of work undertaken in courts of summary jurisdiction if there were to be a lapse in time between the making of the order and the making of a request for reasons, it is likely that a transcript would need to be obtained to refresh the judicial officer's mind which could contribute to an increase in time delay and cost.

The Children's Court notes that if this suggestion were not to be adopted, it seems that the alternative option would be for judicial officers to provide written reasons in every instance in order to prevent the delay in the finalisation of the issues.

### **Proposal 4.25**

The Children's Court suggests that further clarifying information is required in relation to this proposal to assist stakeholders to understand what 'posting a closed court order' would look like in practice. In particular, the Children's Court suggests further detail is needed with regards to how this proposal is intended to be implemented with regards to virtual courtrooms or courtrooms where a hybrid model of virtual and physical attendance is utilised.

## **Chapter 5 – Statutory prohibitions on publication or disclosure**

### **Proposals 5.1, 5.2 and 5.3**

The Children's Court is specifically mandated to give priority to the rehabilitation of children, such that considerations of retribution, deterrence and punishment are secondary considerations.<sup>1</sup> The Children's Court is strongly supportive of proposals 5.1, 5.2 and 5.3 to provide greater clarity around the need to protect a child's identity and not just their name and regards these Draft Proposals as a positive step towards aligning current practices with current knowledge around youth offending and rehabilitation as outlined in our previous submissions.

### **Duration of Statutory Provisions**

On page 47 of the Draft Proposals Paper, the Commission sought stakeholder views about whether it is appropriate for all statutory prohibitions to state a duration.

The Children's Court is of the firm view that it would not be appropriate for child specific legislation such as the *Children and Young Persons (Care and Protection)*

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<sup>1</sup> *Children (Criminal Proceedings) Act 1987* (NSW), s 6.

*Act 1998 (the 'Care Act') the Children (Criminal Proceedings) Act 1987 (the 'CCP Act'), the Young Offenders Act 1991 (the YOA) to state a duration for the prohibition powers which relate to publication and suppression.*

The Children's Court is of the view that where a prohibition relates to a child or young person, there should be no time limit for that statutory prohibition order because the rationale that underpins prohibition is that a child's future prospects should not be limited by something that happened or involved the person as a child.

The Children's Court suggests that such an approach would undermine its mandate to give priority to the rehabilitation of children pursuant to the *CCP Act*, and that it would be in conflict with the underpinning philosophy by which all relevant decisions are to be made under the *Care Act*, namely – that any action or decision concerning a child or young person, the safety, welfare and well-being of the child or young person are paramount.<sup>2</sup>

The Children's Court also suggests that if the statutory prohibitions contained in child specific legislation were to state a duration, that this could potentially have a negative impact on the mental health of children and young people involved in Children's Court proceedings.

The Children's Court wishes to highlight that such an approach would also be contrary to the special consideration afforded to children under the *Criminal Records Act 1991 (NSW)*.

### **Proposals 5.5, 5.7 and 5.8**

The Children's Court supports proposals 5.5 and 5.7 and supports proposal 5.8 in principle.

### **Proposal 5.9**

The Children's Court is supportive in principle of proposal 5.9. However, the Children's Court is of the view that safeguards should be incorporated into this proposal such as that found in proposal 5.12 whereby consent cannot be given if publication will result in the identification of another complainant who does not consent to the publication of their identity, or, if the person who is under 18 years of age unless the person is over the age of 16 and has given consent to the publication of their identity after receiving legal advice from an Australian legal practitioner about the implications of giving consent.

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<sup>2</sup> *Children and Young Persons (Care and Protection) Act 1998 (NSW)*, s 9(1).

### **Proposal 5.10**

The Children's Court is supportive of Proposal 5.10. However, the Children's Court seeks some further clarification with regards to whether it is intended that the provision under s 105(3)(b)(iii) of the *Care Act* whereby the Secretary of the Department of Communities and Justice can consent to the publication of the identity of a child or young person who is under the parental responsibility of the Minister if doing so may be seen to benefit the child or young person will continue to apply.

Additionally, the Children's Court queries whether further guidance should be provided to judicial officers as to what issues should be considered when determining whether the identity of a child under 16 should be published.

## Chapter 6: Other Powers to make non-publication and Suppression Orders

### **Proposal 6.3**

For the reasons outlined above, the Children's Court is of the firm view that powers to make suppression and non-publication orders contained in child specific legislation should operate indefinitely rather than for a set time period.

### **Proposal 6.4**

The Children's Court suggests that there should be some specification as to when the request for reasons needs to be made for the reasons previously articulated in our response to Proposal 4.8.

### **Proposal 6.8**

Additionally, in legal proceedings concerning children and young people, legislative non-publications provisions should also specify that the principle of open justice needs to be balanced against the best interests of the child as a 'a primary consideration'<sup>3</sup>.

## Chapter 7: Requirements and Other Powers to make exclusion orders

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<sup>3</sup> UN General Assembly, Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), Article 3.1.

The Children's Court would like to note that it is of the view that in circumstances where child specific legislation mandates that an exclusion order must be made, that it is preferable for such provisions to operate by law without the need for the court to make an order in each case. The Children's Court is of the view that this approach should be applied to Proposals 7.2, 7.3, 7.4 and 7.5 for consistency.

The Children's Court notes that requiring courts to make an order in every matter involving children and young persons under child subject-specific legislation would impose a burden on the court and is likely to result in error.

### **Proposal 7.2**

The Children's Court is strongly supportive of this proposal for the reasons articulated in our previous submissions. As outlined above, the Children's Court is of the view that such a provision should operate by way of law rather than by court order in a particular case.

### **Proposal 7.9**

For the reasons set out above in relation to proposal 4.8, the Children's Court suggests that there should be some specification as to when the request for reasons needs to be made.

### **Proposal 7.12**

The Children's Court queries whether it would be appropriate or practical for judicial officers to be mandated to consider the public interest in open justice when making an exclusion order under *the CCP Act* or the *Care Act*. The Children's Court notes that in its view, the interests of the child involved in the proceedings are arguably the more relevant consideration in circumstances where the Children's Court is making an exclusion order under ss 104,104A and 104B of the *Care Act* or s 10 of the *CCP Act*.

### **Proposal 7.13**

The Children's Court is strongly supportive of Proposal 7.13 for the reasons set out in our previous submissions.

## **Chapter 9: Requirements and Other Powers to make exclusion orders**

### **Proposal 9.3**

The Children's Court queries how the requirement to prove knowledge of the existence of the prohibition to enable an offence to be proven would operate in

practice where the prohibition was mandated in every case, as is the case in relation to proceedings involving children. In the Court's view, such a requirement would limit the effectiveness of the statutory non-publication provisions that are designed to protect the best interests of children.

### **Proposal 9.5**

The Children's Court does not support a register for all cases where a statutory non-publication provision applies. In the Court's view this would be unworkable from a practical perspective and would arguably achieve little benefit.

Notwithstanding this, the Children's Court supports in principle the concept of a register of orders for non-publication, suppression and closed court orders that are made in specific cases that fall outside mandated provisions that apply in a particular class of cases, such as Children's Court proceedings. However, allowing paid subscribers to search the register may weaken the utility of any order and further detail as to how such a register could operate would need be worked through.

### **Proposal 9.6**

The Children's Court supports the establishment of a Court Information Commissioner and believes that this would provide greater assurance that protections afforded children would be complied with.

## [Chapter 10: Access to records on the court file](#)

### **Proposal 10.1**

The Children's Court supports a new legislative framework that provides a clear foundation for access to court records but that also has sufficient flexibility to cater for particular jurisdictional requirements.

### **Proposal 10.3, 10.4, 10.5 and 10.6**

The Children's Court is not certain what is meant by 'a court order to be kept confidential or otherwise restricted from access'. The Court queries whether it is suggested that such orders would be made as part of a court's incidental powers or is it suggested that this would be an additional statutory power to limit access to parties?

### **Proposal 10.4**

The Children's Court would be concerned to ensure that there was clarity as to whether a journalist was entitled to access any records involving Children's Court proceedings as of right, given that proceedings are subject to non-publication

provisions in every case. Under laws and practices this issue can, at times, cause some confusion and inconsistency in practice. Further clarification is sought as to the relationship between proposal 10.4(1)(a) and 10.4(2)(b).

### **Proposal 10.6**

The Children's Court supports a framework whereby leave is required for members of the public to access court records. However, in the Children's Court jurisdiction requests for access to court information are often made by government agencies which might not ordinarily be considered to be a member of the public. Currently, such requests would be considered as non-party requests and treated in the same way as a member of the public but, of course, with particular regard to the reasons for the request. For clarity, it is important that all categories of requestor are captured within the framework and the Children's Court recommends that either 'a member of public' is defined in the framework or an alternative term is found.

The Children's Court also submits that there needs to be sufficient flexibility in the framework to enable the court to provide records that include information that might be captured in a statutory non-publication provision. For example, a court order that includes a child's name might be required for a variety of reasons, including to prove parental responsibility for the child.

### **Proposal 10.7**

The Children's Court supports this recommendation as it not only provides guidance but ensures that there is a broad discretion. However, the Children's Court notes that it is important that the Court retains discretion to determine whether applications for access can, and in what circumstances, be determined by a registrar. This is particularly important for the Children's Court jurisdiction given the sensitive nature of records held by the Court and the complexity of some cases, particularly in the care and protection jurisdiction.

### **Proposal 10.9**

The Children's Court supports this proposal but recommends that the Court retain discretion to determine whether a copy of a record is provided to journalists and/or a researcher given the sensitive nature of the records held by this Court.

### **Proposal 10.13**

With regard to personal identification records relating to children, the Children's Court submits that any personal identification information should only be published with permission of a court.

I apologise for the delay in providing this submission. Unfortunately, all courts have experienced enormous challenges during the current COVID-19 outbreak and we thank you for your understanding and patience. Should you have any questions



about this submission please feel free to contact [REDACTED],

Yours sincerely

[REDACTED]

Judge Peter Johnstone

**President**