Dear Sir/Madam

Thank you for the opportunity to comment on the operation of suppression and non-publication orders in New South Wales courts and tribunals.

This submission will address three main concerns in relation to the making of suppression and non-publication orders under the *Court Suppression and Non-Publication Orders Act 2010* (NSW) in the digital age:[1]

1. The insufficiency of current suppression and non-publication order arrangements to combat recent innovations in digital media
2. The widening scope of open justice and the subsequent implementation of prejudicial processes in the court room
3. The inauthentic goals of the media and their effect on the making of suppression and non-publication orders

The CSNPOA 2010 (NSW) is the statutory power for the making of suppression and non-publication orders in New South Wales. Non-publication orders prohibit or restrict the publication off information, however not the disclosure of information.[2] Suppression orders prohibit or restrict the disclosure of information, by publication or any other form.[3] The *Court Suppression and Non-Publication Orders Bill 2010* was proposed in an effort to create an equilibrium between the administration of justice, the rights of participants involved in court proceedings and the principle of open justice.[4] The provisions were to promote transparency and understanding as well as access to court information.[5] Open justice is the safe keeper of "public confidence" and "respect" – a display of the court's reasoning processes demonstrating the purity and impartiality of the Australian court system.[6] The principle requires an assessment to be made, as to the loss that could stem from the publication of particular information and the "goods" that could be "achieved" in releasing such information.[7] A concise distillation of these impacts will allow for the administration of justice to occur, the court will conclude that the positive or negative making of an order will

[1] Hereinafter *CSNPOA 2010* (NSW).
[2] *CSNPOA 2010* (NSW) s 3.
[3] Ibid.
[4] New South Wales, *Parliamentary Debates*, Legislative Assembly, 10 November 2019, 1 (Mr Barry Collier).
[5] Ibid.
[6] *Scott v Scott* [1913] AC 417, 463 (Lord Atkinson); s 6 *CSNPOA 2010 (*NSW).
[7] *John Fairfax Group Pty Ltd (Receivers & Manager Appointed) v Local Court* (NSW) (1991) 26 NSWLR 131 [163]-[164] (Mahoney JA) ('*Fairfax v Local Court*'); s 8 of the *CSNPOA 2010* (NSW).

not cause "unacceptable" consequences.[8] In respect of these principles, the media has been deemed a conduit of the publics right to open justice – the *CSNPOA 2010* (NSW) going as far as to define "news media organisation" in section 3.[9] However, as will be discussed below, 21st century media groups and their digital counterparts now prevent the effective operation of suppression and non-publication orders.[10]

Insufficient in a Digital Age

Digital media in the 21st century is developing rapidly – new and complex social and news media platforms are emerging and creating numerous issues in the consistent and effective operation of suppression and non-publication orders. In discussing generally the modern state of digital media, Leah Findlay considers the emergence of new media actors and the "unprecedented flow" of information they produce as unavoidable.[11] New media platforms firstly present the critical issue of control – online authors now possess the capacity to be anonymous, unmoderated and independent.[12] Relevantly, Justice Marilyn Warren notes that an individual's decision to publish information online, is in effect a relinquishing of control over that material.[13] Kaye J in *R v Hinch* stated that a low level of prejudice arose in the publication of prohibited material, as a mere 797 individuals accessed the material before it was 'redacted'.[14] However, this rationalisation is arguably ill-conceived and concerning – Jonathan Barret pointedly notes that online material is untraceable upon publication and permanent from then onwards.[15] Moreover, new-media groups now cater to their niche audience, reshaping information into palatable articles for their audience – in turn disseminating false and misleading material which according to Warren, exacerbates a prejudiced litigants access to a fair trial.[16] Additionally, the internet operates irrespective of

[8] *Fairfax v Local Court* (1991) 26 NSWLR 131, 355 (Mahoney JA); In addition to s 8 of the *CSNPOA 2010* (NSW), consequences include hardship or an impeding of future conduct.
[9] Sharon Rodrick, 'Achieving the Aims of Open Justice? Open Justice, The Media and Avenues Of Access To Documents On The Court Record' (2006) 29 *UNSW Law Journal* 90, 94.
[10] *Scott v Scott* [1913] AC 417, 437 (Lord Atkinson).
[11] Leah Findlay, 'Courting Social Media in Australia'S Criminal Courtrooms: the Continuing Tension Between Promoting Open Justice and Protecting Procedural Integrity' (2015) 27 *CiCrimJust* 237, 238; Yellow, 'Yellow Social Media Report 2018 – Part 1 Consumers' *Sensis* 3 (2018) 1, 4; These actors include Facebook, Twitter, Instagram, Snapchat and personal blogs.
[12] Findlay, above n 9.
[13] Justice Marilyn Warren, 'Open Justice in the Technological Age' [2014] 40 *Monash University Law Review* 45, 49.
[14] *R v Hinch* [2013] VSC 520, 101.
[15] Warren, above n 11, 13.
[16] Ibid 49.

geographical boundaries or legal jurisdictions, preventing new-media groups from being held to the same standards of accountability as traditional media giants.[17] The *CSNPOA 2010* (NSW) limitedly accounts for this issue, with orders under the Act having jurisdiction anywhere in the Commonwealth – however, the necessity of extending an order outside of New South Wales must be justified and the scope of extension clearly identified.[18] The Act does not account for the changing landscape of digital media and the subsequent capacity for information to be unexpectedly distributed both domestically and internationally by unknown individuals.

The case of *X v Twitter* encapsulates these issues and directly displays the insufficiency of orders currently made under s 8(1)(a) and (e) of the *CSNPOA 2010 (NSW)* in the wake of the digital evolution.[19] In this case, an anonymous Twitter account holder breached a non-publication order twice until the account holder was suspended from the social media platform.[20] Most critically, Twitter were bound by their privacy policy from revealing the identity or location of the account holder, such restrictions completely preventing the quick, effective and fair administration of justice under the *CSNPOA 2010* (NSW).[21] In commenting on the 'test' of 'necessity' present in s 8 of the *CSNPOA 2010* (NSW), Jason Bosland notes that post-publication orders will be deemed obsolete where published information is stored on cached websites or those out of jurisdiction.[22] Evidently, individuals who publish prohibited material can now be faceless and itinerant, subject to neither the courts authority or the authority of the platform.[23] The intricacies of digital media and a user's right to privacy now prejudices the proper administration of justice and the protection of the public interest – the *CSNPOA 2010* (NSW) does not demonstrate a symbiosis between the purpose of the Act and the digital age. S 3 does not detail the nature or liability of a "person" who publishes prohibited information – a greater level of detail may provide traction to the argument that all authors must be identified, irrespective of privacy considerations.[24] Following the comments of Bosland, *X v Twitter* provokes the suggestion that orders under the *CSNPOA 2010* (NSW)

[17] Findlay, above n 9.
[18] *CSNPOA 2010* (NSW) s 10(1)-(3).
[19] (2017) 95 NSWLR 301.
[20] Ibid [14]-[15] (Pembroke J).
[21] Ibid.
[22] Jason Bosland, 'Restraining 'Extraneous' Prejudicial Publicity: Victoria And New South Wales Compared' (2018) 41 *UNSW Law Journal* 1263, 1283; notwithstanding 'in personam' orders or orders with extra-territorial effect in superior courts.
[23] Michael Douglas, 'The Exorbitant Injunction in X v Twitter' (2017) 36 *Communications Law Bulletin* 11, 11.
[24] *CSNPOA 2010* (NSW) s 3, s 16.

possess an element of futility in the wake of the digital age.[25] However, Isaac Buckley considers the widespread, commonly untraceable reach of online news publications as an insufficient basis to find the processes ineffectual.[26] A sentiment echoed by Kirby P in *Attorney-General (NSW) v Time Inc Magazine Company Pty Ltd* who noted that irrespective of the success of orders against publication, such orders continue to uphold the legal rule and represent the principle of a fair trial.[27] However, the aforementioned idealistic considerations must flag in the wake of continually developing technology and news media. A clear and concise acknowledgement of the issue presented by this innovative industry must be unanimously held to foster accountability within new-media platforms.

Open Justice as a flexible concept

The principle of open justice is identifiably changing in tandem with the rise of digital media consumption and development, subsequently compromising the operation of suppression and non-publication orders under the *CSNPOA 2010* (NSW). S 6 of the *CSNPOA 2010* (NSW) notes that open justice is a “primary objective” to be maintained when making suppression and non-publication orders. In the digital age, the ensuring of this obligation is causing the ambit of open justice to be extended through the institution of prejudicial processes. S 6B of the *Court Security Regulation 2016* (NSW)[28] with respect to s 9A(2)(f) of the *Court Security Act 2005* (NSW) discretionarily allows media personnel to utilise the internet to communicate and publish rulings and relevant happenings within court. Justice Cowdroy in *Roadshow Films Pty Ltd v iiNet Ltd* (No 3) permitted the utilisation of Twitter by journalists within the court room as there was considerable “public interest” in the case.[29] There are perceived benefits to such concessions, Margaret Jackson and Marita Shelly lightly noting that social media supports greater communication between the courts and the public.[30] This rationalisation is statistically supported as the use of social media in Australia has reached 88 per cent,[31] with 35 per cent checking their social media a minimum of 5 times a day and 36

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[25] Bosland, above n 20.
[26] Isaac Frawley Buckley, ‘In defence of “take-down” orders: Analysing the alleged futility of the court-ordered removal of archived online prejudicial publicity’ (2014) 23 *Journal of Judicial Administration* 203, 217.
[27] [1994] NSWCA 134, 144 (Kirby P)
[28] Herein after *CSR 2016* (NSW).
[29] [2010] FCA 24, 110.
[30] Margaret Shelly and Shelly Marita, ‘The Use of Twitter by Australian Courts’ (2015/2016) 24 *Journal of Law, Information and Science* 83, 85.
[31] Yellow, above n 9, 9; This figure is with respect to the 80 per cent of individuals that use the internet each day.

per cent doing so to check the news and current affairs.[32] However, the scale of media consumption and the ability for courtroom happenings to be broadcast contemporaneously should not automatically widen the application of open justice.[33] A point of view shared by Beazley JA in *Rinehart v Welker*, here her honour importantly noted that the imposition of temporary suppression and non-publication orders, though contrasting with the media's role in open justice, will not cause "substantive harm".[34] However, her honours reasoning appears to have been in futility - Catherine Gleeson submits that concessions such as s 6B *CSR 2016* (NSW) create distinct vulnerability within the *CSNPOA 2010 (NSW)*.[35] In turn, Sharon Rodrick particularly notes that there is a heightened capacity for supressed information to be published before the making of an order due to the immediacy of social media platforms.[36] In New South Wales, there is no current provision in place to protect the operation and continued effectiveness of non-publication and suppression orders. Pointedly, rule 9B(5) of the *Supreme Court Civil Rules 2006* (SA) provides that a 15 minute delay must exist between the discussion of material and electronic media publication to account for any suppression and non-publication order made in court. According to Spieglman J, an inherent aspect of the fair trial is the courts power to control their own processes – the majority in *Walton v Gardiner* considered this power to extend to all processes that could become "instruments of injustice and unfairness".[37] The permitting of social media use by journalists in courts clearly jeopardizes the continued effective operation of orders under the *CSNPOA 2010* (NSW). In the absence of any preventive parameters like in South Australia, the New South Wales court system has created a prejudicial process whereby sensitive information, that will possibly be subject to a future order, can be communicated widely and instantaneously.[38] The capabilities of digital media must not cause open justice to take precedence over the principle of a fair trial, as whilst it is a central consideration – in the reasoning of Bromwich J, it is not the sole consideration.[39] An equilibrium between the access to a fair trial and open justice cannot be maintained if judicial officers do not remain

[32] Yellow, above n 9, 5, 10: However, 73 per cent of users view traditional media as a far more trustworthy source for news and current affairs.
[33] Rodrick, above n 7, 137.
[34] [2011] NSWCA 425, 452.
[35] Catherine Gleeson, 'Social media and the courts' (2013 Summer) 91 *Bar News* 54, 55.
[36] Rodrick, above n 7, 137.
[37] (1993) 177 CLR 378, 392-393; J Spigelman, 'The truth can cost too much: the principle of a fair trial' (2004) 78 *Australian Law Journal* 29, 30.
[38] *CSNPOA 2010* (NSW) s 8.
[39] *Roberts-Smith v Fairfax Media Publications Pty Ltd* [2018] FCA 1943, 1950.

impervious to the innovations and benefits of digital media use in the 21st century in lieu of legislative protections.[40]

Motivations of the media

The prolific utilisation of social media has compromised the intentions and motivations of the media and their interests in open justice. This issue comes to fruition in s 9(2)(d) of the *CSNPOA 2010* (NSW), which rightly allows media organisations to be heard in response to the making of a suppression or non-publication order. However, the ability for global news to be disseminated and published instantaneously internationally has created a competitive and economically driven market for information.[41] Mass media has therefore taken to saturating the readership with content; producing an "overwhelming" degree of information that allows publishers and journalists to remain visible.[42] Justice Gilmour in *Hogan v ACCC* noted that in the digital age, litigation involving high profile individuals attracts the keen attention of the media who desire information of shock-value.[43] Arguably, the commodification of current news has caused news media to abuse their role as "surrogates" for public participation in open justice.[44] In *John Fairfax Publications Pty Ltd v Ryde Local Court* Chief Justice Spigelman proclaimed that in the 21st century, the media cannot and do not have purely altruistic interests in the principle of open justice.[45] Subsequently, the economic benefits of publishing exclusive, public interest news is perhaps parallel to the value of open justice in the commercially driven media industry.[46] Simon Mount identifies that in New Zealand, the increasing power of the media has caused journalistic integrity to decrease; in turn allowing for the rise of "sensationalist" reporting as opposed to traditional, unselfish journalistic values.[47] Twitter use in Australian courts is evidence of such sensationalism, the platform facilitates the simplification and dramatization of complex legal matters – the short, bite-sized publications allowing for an ease of consumption by readers. [48] In this respect,

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[40] Collier, above n 1.
[41] Dr Pamela D Schulz, 'Trial by Tweet? Social media innovation or degradation? The future and challenge of change for courts' (2012) 22 *Journal of Judicial Administration* 29, 31.
[42] Ibid.
[43] (2009) 177 FCR 205, 224.
[44] Jonathan Barrret, 'Open Justice or Open Season? Developments In Judicial Engagement With New Media' (2010) 11 *Queensland University of Technology Law and Justice Journal* 1, 11-12.
[45] (2005) 62 NSWLR 512, 528.
[46] *John Fairfax Publications Pty Ltd v Ryde Local Court* (2005) 62 NSWLR 512, 528 (Chief Justice Spieglman)
[47] Simon Mount, 'The Interface between the Media and the Law' [2006] New Zealand Law Review 413, 414.
[48] Rodrick, above n 7, 137.

Mahoney JA notes that suppression and non-publication orders must not fall victim to the impassioned and persuasive protests of media bodies advocating for their own and the public's right to open justice.[49] Here, the persuasive reasoning of French CJ must be considered – in *Hogan v Hinch* his honour noted that the relationship between the courts and the media should not take precedence when administering orders under the *CSNPOA 2010* (NSW).[50] French J considered rather, the possible adverse effects of disclosure and publication as an equal, central goal in the making of orders.[51] If the 21st century formulation of open justice continues to be based on the media's false representation of altruistic pursuits, the operation of suppression and non-publication orders under the *CSNPOA 2010* (NSW) will cease to be effective.

Conclusion

The continued utility of suppression and non-publication orders under the *CSNPOA 2010* (NSW) is jeopardized in the digital era of the 21st century. The rapid development of new media creates inadequacy within the *CSNPOA 2010* (NSW) – the Act is not crafted to respond to the anonymity of an online authors identity and geographical location. Moreover, the permanent and elusive nature of online material prevents the complete prohibition of prejudicial material once said material has been published on an online platform. It is apparent, that in order for the *CSNPOA 2010* (NSW) to sufficiently combat these issues, a high level of specificity and foresight would be required on the behalf of party in respect of the nature and jurisdiction of any future publication. Whilst such a requirement could appear reasonable, evidently an effective order in a century where new and unfamiliar technology emerges daily, requires a level of creativity that is unreasonable where the relevant legislation is inadequate. In the digital age, the principle of open justice has been extended, leading to the enactment of prejudicial s 6B of the *CSR 2016* (NSW). Suppression and non-publication orders under the *CSNPOA 2010* (NSW) cannot operate retrospectively in the digital age, therefore the dissemination of prejudicial material threatened by the *CSR 2016* (NSW) cannot be considered reasonable in the absence of legislative protection. The scale of media consumption has compromised the values and motivations of the media, subsequently the media's role in the providing of open justice under the *CSNPOA 2010* (NSW) can no longer

[49] *Fairfax v Local Court* (NSW) (1991) 26 NSWLR 131, 164.
[50] [2011] HCA 4, 20.
[51] Ibid, 21.

be considered authentic. Judicial officers must exercise a considerable degree of conservatism and criticality when assessing the pleas of the media, however the aforementioned live publication of court room happenings indicate the contrary is occurring. Suppression and non-publication orders under the *CSNPOA 2010* (NSW) do not account for the innovations, operation and consumption of digital media in the 21st century and cannot therefore be considered effective in their continued operation.

Yours Sincerely,

Kate Jackson