1. Introduction

1.1 I welcome the opportunity to contribute to the NSW Law Reform Commission's Open Justice Review. This submission will focus on the application of the *Court Suppression and Non-publication Orders Act 2010* (NSW) (CSPO) in the context of civil litigation.

1.2 The CSPO is based on model legislation that was developed by the Standing Committee of Attorneys-General.[1] The model legislation aims to provide a comprehensive legislative regime outlining a national approach towards granting suppression and non-publication orders.[2] The CSPO was thus designed to reaffirm the principle of open justice and tighten the circumstances in which suppression or non-publication orders could be made. However, this submission will demonstrate that the legislation falls short of this objective.[3]

In summary, this submission will examine:

a) The tension between the administration of justice and the public interest in open justice
b) The effectiveness of appeal rights in achieving justice
c) The extent to which suppression and non-publication orders can remain effective in the digital environment

2. The tension between the administration of justice and the public interest in open justice:

2.1 The common law has a strong history of safeguarding the principle that proceedings should be conducted "publicly and in open view".[4] This is the essence of Australia's court system.[5] The fundamental importance of open justice has been confirmed by the High Court, which outlined that there is immense benefit in subjecting court proceedings to public and professional scrutiny.[6] Concerns relating to embarrassment, invasions of privacy or damage to reputation are secondary to the inherent public interest in adhering to an open system of justice.[7]

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[1] Senate Standing Committee on Legal and Constitutional Affairs (Cth) *Access to Justice (Federal Jurisdiction) Amendment Bill 2011 [Provisions]* Report (2012) 1.
[2] Miiko Kumar 'Keeping Mum: Suppression and Stays in the Rinehart Family Dispute' (2012) 3 *Macquarie Law Journal* 27.
[3] Jeremy Bentham 'Justice Open and Shut' (5 June 2014) *Gazette of Law & Journalism* 16.
[4] *Scott v Scott* [1913] AC 417, 441.
[5] *John Fairfax Publications Pty Ltd v District Court (NSW)* [2004] NCSWA 324, 18.
[6] *Hogan v Hinch* (2011) 243 CLR 506, 518.
[7] *John Fairfax Group Pty Ltd v Local Court (NSW)* (1991) 26 NSWLR 131, 143.

2.2 However, the principle of open justice is not absolute.[8] Courts are permitted to depart from the principle of open justice in circumstances where departure is necessary to achieve justice.[9]

2.3 There are circumstances where suppression orders are integral to the administration of justice.[10] In cases where publicity would destroy confidential subject matter, such as trade practices or sensitive commercial or personal information, suppression orders facilitate the attainment of a just outcome.[11] Without them, the purpose of litigating to protect commercial interests is defeated.[12] The courts are tasked with the challenge of balancing the public interest that is inherent in open justice with, for example, the threat of commercial competitors capitalising on the potential disclosure of trade secrets that may emerge during public litigation. The court acknowledges that it is not in the interests of justice for proceedings to "become a vehicle for advantaging or prejudicing trade rivals".[13]

2.4 The CSPO adequately protects these "exceptional" cases. However, the current breadth of the CSPO permits broad application, to the extent that suppression or non-publication orders are being made in ordinary cases that do not warrant immunity from public scrutiny. These cases are the focus of this submission.

2.5 The CSPO fails to serve as an appropriate piece of legislation for limiting the circumstances in which suppression or non-publication orders may be granted. This failure can be attributed to two key issues:

- The CSPO fails to adequately promote the principle of open justice;
- The balancing test outlined in section 8(1)(e) is susceptible to being inappropriately applied.

2.6 The frequency with which the CSPO is invoked is alarming. Consolidated data on the number of suppression and non-publication orders made in NSW courts is not available to the public.[14] This is an issue in itself. However, it is known that NSW made at least 114 suppression orders within six months of enacting the CSPO.[15] This was more than double the number of suppression orders that were known to have been made in the six months preceding the commencement of the legislation.

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[8] *Hogan v Hinch* (2011) 243 CLR 506.
[9] Ibid.
[10] Miiko Kumar and David Rolph, 'An Appetite for Suppression: Non-Publication Orders, Open Justice and the Protection of Privacy' (Legal Studies Research Paper No 14/65, Sydney Law School, July 2014) 14.
[11] See *Court Information Act 2010* (NSW) s 18 for an example of the safeguards in place to protect against the publication of personal information.
[12] BC Cairns 'Suppression and Non-publication Orders in Civil Litigation' (2018) 7 *Journal of Civil Litigation and Practice* 76.
[13] *ACCC v Origin Energy Electricity Ltd* [2015] ATPR 42, 495.
[14] Pat Bateman, 'The Rise and Rise of Suppression Orders' (13 March 2013) *Gazette of Law & Journalism*.
[15] Australia's Right To Know, Submission No 7 to Senate Standing Committee on Legal and Constitutional Affairs, *Access to Justice (Federal Jurisdiction) Amendment Bill 2011 [Provisions]*, 1 February 2011, 3.

2.7 The overuse of the CSPO continues to be an issue in NSW. Statistics demonstrate that NSW made at least 181 suppression orders in 2017, while Queensland made around 10.[16]

2.8 A key issue leading to the overuse of the CSPO is that its language does not satisfactorily endorse adherence to the principle of open justice and is therefore susceptible to being applied inappropriately.[17]

2.9 The appropriate statutory interpretation of the CSPO, particularly section 6, was at the centre of the dispute in *Rinehart v Welker* (*Rinehart*). Section 6 of the CSPO asserts that the court, in deciding whether to make a suppression order, must take into account that open justice is a primary objective of the administration of justice.[18] In *Rinehart*, Tobias AJA made a suppression order, on the grounds that

> "Open justice is not ***the*** primary objective of the administration of justice or the only objective. It is ***a*** primary objective, meaning that there are other primary objectives of the administration of justice."[19] (emphasis added).

2.10 In his judgment, Tobias AJA gave more weight to the private right of contract than to the principle of open justice. His view was overturned on appeal, and the suppression order was unanimously discharged.[20] The Court of Appeal held that the CSPO should be construed in a way that has "the least impact upon the open justice principle".[21] This decision was later endorsed by the High Court.[22]

2.11 The *Rinehart* decision affirmed the need for judicial restraint when considering whether to grant suppression or non-publication orders. It demonstrated that confidentiality clauses are not conclusive in situations where the court's jurisdiction is invoked; rather, the ultimate question to be addressed is whether confidentiality is necessary for the administration of justice.[23] *Rinehart* also highlighted the tendency of lower courts to favour an interpretation of the CSPO that more readily permits granting suppression orders. Indeed, lower courts have become laxer in granting suppression orders since the CSPO came into effect.[24] It is vital that this attitude is addressed. If it is not addressed, powerful litigants with significant resources may have the potential to receive greater protection than what is enjoyed by ordinary parties.[25]

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[16] Chris Merritt, 'Suppression Orders Rife in Victoria', *The Australian*, (Melbourne), 2 February 2018.
[17] Jason Bosland and Ashleigh Bagnall, 'An Empirical Analysis of Suppression Orders in the Victorian Courts: 2008-12' (2013) 35 *Sydney Law Review* 695.
[18] *Court Suppression and Non-Publication Orders Act 2010* (NSW) s 6.
[19] *Rinehart v Welker & Ors* [2011] NSWCA 345, 38.
[20] *Rinehart v Welker* [2011] NSWCA 403.
[21] Ibid 26.
[22] *Rinehart v Welker & Ors* [2012] HCA Trans 7 (1 February 2012).
[23] Cairns above n 11, 74.
[24] Pat Bateman, 'The Rise and Rise of Suppression Orders' (13 March 2013) *Gazette of Law & Journalism*.
[25] *John Fairfax Group Pty Ltd v Local Court of New South Wales* (1991) 26 NSWLR 131, 143.

2.12 The Commission should therefore consider recommending that section 6 be amended to more clearly endorse adherence to the principle of open justice. The amendment should outline that open justice is *the* primary objective of the Act and may only be departed from in exceptional cases, and only if the facts of the case demonstrate a clear necessity to suppress information in order to achieve justice. This could also be achieved by inserting a preamble to the same effect.

2.13 However, changing the language in the statute is only the first step in addressing the overarching issue. It is idealistic to suggest that amending the legislation can alone change a culture that tends to favour granting suppression or non-publication orders. The Commission needs to devise strategies to address the current mindset of the judiciary. An avenue to explore in pursuit of this objective is the possibility of engaging with the Judicial Commission of New South Wales and creating educational material which could then be distributed to the judiciary.

2.14 Another issue with the CSPO is the operation of section 8(1)(e) which allows for a suppression or non-publication order to be made in circumstances where the public interest in the order outweighs the public interest in open justice.[26]

2.15 An equivalent provision to section 8(1)(e) is notably absent from the model legislation, despite the fact that the model legislation mirrors many other provisions contained in the CSPO. A likely explanation for this is the fact that a balancing exercise may involve an exercise of judicial discretion; which runs a risk of leading to unintended extensions beyond its current scope.

2.16 This perspective is consistent with the view of the Hon. P.H Cummins, who asserts that a balancing act requiring the court to weigh general public interest against the public interest in open justice is "malleable and capable of significant judicial extension contrary to courts being open".[27]

2.17 The High Court has also warned of the dangers of determining whether to grant an order by way of a "balancing exercise".[28] Essentially, the authorities outline that a suppression order will either be necessary (and therefore granted), or not.[29] Granting a suppression order should not occur through a balancing exercise, or emerge from a court's discretion.

2.18 Concerns about the breadth and scope of section 8(1)(e) are widespread.[30] The Commission should consider repealing this provision.

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[26] *Court Suppression and Non-Publication Orders Act 2010* (NSW) s 8(1)(e).

[27] Hon. P.D. Cummins, 'Open Courts: Who Guards the Guardians?' (Paper presented at Justice Open and Shut: Suppression Orders and Open Justice in Australia and the United Kingdom, Sydney, 4 June 2014) 4.

[28] *Hogan v Australian Crime Commission* (2011) 243 CLR 506.

[29] Jason Bosland and Ashleigh Bagnall, 'An Empirical Analysis of Suppression Orders in the Victorian Courts: 2008-12' (2013) 35 *Sydney Law Review* 676.

[30] Bentham above n 3.

3. Appeal issues

3.1 The *Civil Procedure Act* outlines that the overriding purpose of civil proceedings is to facilitate the just, quick and cheap resolution of disputes.[31] The Appeal process outlined by the CSPO conflicts with this objective.

3.2 The CSPO allows for a decision of a court to be appealed by way of a rehearing,[32] thereby permitting the introduction of new evidence. The burden of facilitating an appeal that contains large volumes of new evidence puts significant pressure on appellant courts, particularly in terms of managing caseloads.

3.3 This issue was considered in *Ibrahim,*[33] wherein the court acknowledged that weight should be given to "practical considerations" when determining whether it is appropriate to admit additional evidence.[34] In *Ibrahim* it was highlighted that courts have the ability to manage their own procedures by granting leave to appeal conditionally,[35] thereby allowing them to control the extent to which new evidence is admitted.

3.4 Tightening the circumstances in which leave to appeal may be granted, by way of conditional appeals, has the potential to benefit both the courts and the parties to proceedings. Media organisations are the main bodies that oppose applications for suppression or non-publication orders. The media industry is highly susceptible to economic pressure, and therefore may lack the resources to embark on a costly appeal process. There is obvious benefit to the court in terms of efficiency and cost reduction. Reducing the cost of the appeal process will always be beneficial for the losing party, against whom an application for costs is permitted to be made under the *Uniform Civil Procedure Rules* r 42.7.[36]

4. The role of the media and the challenge of the digitalised world

4.1 While the principle that courts should remain open to the public is a fundamental characteristic of our justice system, in reality, the courtroom is rarely visited by members of the public.[37] Instead, the public relies on the media to provide fair and accurate reports of court proceedings.[38] The important role played by the media is reflected in section 9,[39] which outlines that news media organisations have the right to be heard on applications for suppression or non-publication orders.

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[31] *Civil Procedure Act 2005* (NSW) s 56.
[32] *Court Suppression and Non-Publication Orders Act 2010* (NSW) s 14(5).
[33] *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125, 20.
[34] Ibid [27].
[35] Ibid [24].
[36] *Uniform Civil Procedure Rules 2005* (NSW) r 42.7.
[37] Kumar above n 2, 20.
[38] Kumar and Rolph, above n 9, 2.
[39] *Court Suppression and Non-Publication Orders Act 2010* (NSW) s 9.

4.2 Prior to the development of the internet, suppression and non-publication orders had distinct efficacy.[40] However, the emergence of digital media has raised significant concerns about the extent to which suppression or non-publication orders can remain effective.[41] Section 11 of the CSPO outlines that a suppression or non-publication order can be extended to apply beyond NSW.[42] This reflects the difficulty of trying to suppress information in a digital society where interstate publications are readily available on the internet.[43] Social media has also vastly impacted the effectiveness of suppression orders; sites such as Facebook and Twitter can be devastating weapons against suppression.[44]

4.3 A suppression or non-publication order is only effective to the extent that it is enforceable outside of the courtroom.[45] If there are no consequences for breaching an order, the order is susceptible to being ignored.[46] Therefore, it is necessary to address the extent to which suppression orders can be enforced in the digital age. This is consistent with the reasoning of *Ibrahim*, which outlined that a suppression order will fail the necessity test if it is futile.[47] Recent commentary on the issue suggests that instead of determining whether information should be suppressed, a more realistic approach would consider how justice can be attained once prejudicial publicity ensues.[48]

4.4 An order cannot be made to bind "the world at large".[49] However, the court does have the power to make an order that binds an entire state, or the entire Commonwealth.[50] However, if the order is breached, an individual's conduct will only amount to contempt if the individual involved has deliberately or recklessly interfered with the order.[51] Thus, in order for suppression orders to be practical, there must be some mechanism through which to inform the public of their existence.

4.5 As such, the Commission should consider recommending the establishment of a national Register of Suppression and Non-Publication Orders. This would serve two purposes:

a) It would make it easier for news organisations to keep track of the court's orders;

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[40] Greg Barnes 'Suppression Orders: Some Recent Developments' (2013) *Precent (Sydney, NSW)* 22.
[41] Jonathan Barrett 'Open Justice or Open Season? Developments in Judicial Engagement with New Media' (2011) 11(1) *Queensland University of Technology Law and Justice Journal* 12.
[42] *Court Suppression and Non-Publication Orders Act 2010* (NSW) s 11.
[43] *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125, 33, 59.
[44] Tom Griffith, Katie Kossian and Tania Kowalczuk 'Twitter, Suppression and the Court' *Piper Alderman Internet Law Bulletin* (online) July 2012.
[45] Cairns above n 11, 66.
[46] Roxanne Burde 'Is There a Case for Suppression Orders in an Online World?' (2012) 17 *Media & Arts Law Review* 115.
[47] *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125, 39 [76].
[48] Burde above n 44, 120.
[49] *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125, 47 [95].
[50] *Court Suppression and Non-Publication Orders Act 2010* (NSW) s 11.
[51] *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* (1986) NSWLR 465, 477.

b) It would create a publicly accessible platform through which the number of orders made across Australia could be measured.[52]

4.6 However, it is impractical to expect an internet host to cross-reference material posted on their site with material restricted by a suppression order. In fact, attempting to impose this obligation would conflict with the *Broadcasting Services Act*.[53] As federal law is given paramountcy over state law in the event of inconsistency, this would render any obligations imposed on internet hosts invalid.[54] Therefore, it would need to be supplemented by a "notice and takedown" procedure.[55]

4.7 However, recommendations put forward by the UK Joint Committee on Privacy and Injunctions suggest that the issue may more readily be addressed by focusing on education and collaboration.[56] The potential to improve adherence to suppression or non-publication orders by strengthening the relationship between the courts and the press; and seeking to educate the wider community was also a recommendation of the *Open Courts Act* Review.[57]

5. Conclusion

5.1 As has been explored above, a number of issues arise with respect to the operation of suppression and non-publication orders in NSW. Legislation that permits a departure from the principle of open justice requires regular review to ensure that it is operating effectively. It is hoped that the Commission takes the issues foregrounded in this submission into consideration during their inquiry.

Yours sincerely,

Keely Duggan
[redacted]

[52] NSW Parliament Hansard, Second Reading Speech: Court Suppression and Non-publication Orders Bill 2010, Legislative Council, 23 November 2010, p 27858 (Hon M Veitch, Parliamentary Secretary).
[53] *Broadcasting Services Act 1992 (*Cth*)* sch 5.
[54] *Australian Constitution* s 109.
[55] Brian Fitzgerald and Cheryl Foong 'Suppression Orders After Fairfax v Ibrahim: Implications for Internet Communications' (2013) 37 *Australian Bar Review* 188.
[56] Joint Committee on Privacy and Injunctions, Parliament of the United Kingdom, *Privacy and Injunctions* (2012) 152.
[57] The Hon. Frank Vincent AO QC 'Open Courts Act Review' (Victoria) 2017 10.