

OPEN JUSTICE

Court and tribunal information: access, disclosure and publication

New South Wales
Law Reform Commission

DRAFT PROPOSALS

June 2021

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Email: nsw-lrc@justice.nsw.gov.au

Post: GPO Box 31, Sydney NSW 2001

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The Law Reform Commission is an independent statutory body that provides advice to the NSW Government on law reform in response to terms of reference given to us by the Attorney General. We undertake research, consult broadly, and report to the Attorney General with recommendations.

For more information about us, and our processes, see our website:
www.lawreform.justice.nsw.gov.au

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Terms of reference

Pursuant to section 10 of the *Law Reform Commission Act 1967*, the NSW Law Reform Commission is to review and report on the operation of:

1. legislative prohibitions on the disclosure or publication of NSW court and tribunal information,
2. NSW court suppression and non-publication orders, and tribunal orders restricting disclosure of information, and
3. access to information in NSW courts and tribunals;

In particular, the Commission is to consider:

- a) Any NSW legislation that affects access to, and disclosure and publication of, court and tribunal information, including:
 - The Court Suppression and Non-Publication Orders Act 2010 (NSW);
 - The Court Information Act 2010 (NSW); and
 - The Children (Criminal Proceedings) Act 1987.
- b) Whether the current arrangements strike the right balance between the proper administration of justice, the rights of victims and witnesses, privacy, confidentiality, public safety, the right to a fair trial, national security, commercial/business interests, and the public interest in open justice.
- c) The effectiveness of current enforcement provisions in achieving the right balance, including appeal rights.
- d) The appropriateness of legislative provisions prohibiting the identification of children and young people involved in civil and criminal proceedings, including prohibitions on the identification of adults convicted of offences committed as children and on the identification of deceased children associated with criminal proceedings.
- e) Whether, and to what extent, suppression and non-publication orders can remain effective in the digital environment, and whether there are any appropriate alternatives.
- f) The impact of any information access regime on the operation of NSW courts and tribunals.
- g) Whether, and to what extent, technology can be used to facilitate access to court and tribunal information.
- h) The findings of the Royal Commission into Institutional Responses to Child Sexual Abuse regarding the public interest in exposing child sexual abuse offending.
- i) Comparable legal and practical arrangements elsewhere in Australia and overseas.
- j) Any other relevant matters. *[Received 27 February 2019]*

Glossary of key terms

Departures from open justice

Departures from open justice: We use this as a “catch-all” term for statutory prohibitions and orders relating to non-publication or suppression, as well as requirements and powers to make exclusion orders and closed court orders.

Non-publication of information

Non-publication order: We use this term to refer to an order that prohibits or restricts the publication of information (to the public or a section of the public) but does not otherwise prohibit or restrict the disclosure of information.

Statutory prohibition on publication of information: We use this to refer to legislation that automatically prohibits the publication of certain information, without a court needing to make an order.

Suppression of information

Suppression order: This term refers to an order that prohibits or restricts the disclosure of information by any means, including by publication.

Statutory prohibition on disclosure of information (suppression): We use this to refer to legislation that automatically prohibits the publication or disclosure of certain information, without a court needing to make an order.

Excluding people from proceedings

Exclusion order: We use this term to refer to an order to exclude a specified person or class of people from the whole or any part of the proceedings (whether the proceedings are being conducted in person, by telephone or virtually). Unlike closed court orders, exclusion orders do not have the effect of suppression.

Power to make an exclusion order: We use this term to refer to legislation that allows a court discretion to make an exclusion order. The court is not required to do so.

Statutory requirement to make an exclusion order: We use this to refer to legislation where the court must make an exclusion order.

Closing the court

Closed court order: We use this to refer to an order to exclude all people from the whole or any part of the proceedings, except those who are required for the proceedings. This also has the effect of suppression over information provided in the part of the proceedings that occurs while the court is closed. We use “closed court” in preference to expressions such as “in camera”, “in private” or “in the absence of the public”.

Power to make a closed court order: We use this to refer to legislation that allows a court discretion to make an order. The court is not required to do so.

Statutory requirement to make a closed court order: We use this term to refer to legislation where the court must make a closed court order.

Other terms

Forensic patient: This is defined in the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW) as a person who has been:

- found unfit to be tried for a criminal offence and ordered to be detained in a mental health facility, correctional centre, detention centre or other place
- nominated a limiting term (the maximum period for which the person may be detained) and ordered to be detained or has been released from custody subject to conditions, or
- the subject of a special verdict of criminal act proven but not criminally responsible and is detained or has been released from custody subject to conditions.

Inherent powers: These are the powers of a superior court (such as the Supreme Court of NSW) to regulate its proceedings or control its own processes. Inherent powers do not come from legislation but from the very nature of the court as a superior court of law. A superior court may exercise its inherent powers to depart from open justice (for example, by making a closed court order).

Implied powers: These are the powers of inferior courts (such as the District or Local Court of NSW) that enable them to do what is necessary to exercise their statutory functions and control their own processes. Implied powers are similar to the inherent powers of a superior court but are more limited.

1. Introduction

This paper and the next steps

- 1.1 The Attorney General has asked us to review the laws relating to open justice in courts and tribunals. This paper outlines the proposals we are considering in relation to departures from open justice.
- 1.2 We are publishing this paper to give people the opportunity to consider these proposals for reform. It is also an opportunity to consider the appropriateness of the existing provisions that we propose be retained.
- 1.3 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 proposals included in this paper.
- 1.4 Once we have received and considered your views on these proposals, we will write our final report with recommendations to the Attorney General. The report will explain our recommendations in detail.
- 1.5 We seek your views on our draft proposals by **2 AUGUST 2021**.

Our review so far

- 1.6 To help us identify issues relevant to the review, we invited submissions on our terms of reference. We received 45 preliminary submissions. We also undertook 17 preliminary consultations.
- 1.7 In December 2020, we released a Consultation Paper, which invited comment on the issues we had identified. We received 33 submissions in response.
- 1.8 Between March and April 2021, we conducted 20 consultations with a wide range of people and groups. These included judicial officers, court and tribunal administration staff, legal practitioners, government representatives, journalists, community organisations and academics.
- 1.9 In April 2021, we also published an online survey to encourage people who otherwise might not participate in a law reform process to have their say about issues relating to open justice. We received 189 responses. The survey has now closed.
- 1.10 We thank everybody who has taken the time to write or speak to us.

What is open justice?

- 1.11 In chapter 1 of our consultation paper, we discuss the principle of open justice: that justice should not only be done, but should be seen to be done.¹ This is fundamental to the maintenance of confidence in our courts and the administration of justice.
- 1.12 The key elements of open justice include open courts, fair and accurate reporting of court proceedings, and access to court records. These elements ensure that justice is administered in public, which serves several important purposes, including that:
- public confidence in the justice system is maintained,
 - the public knows about what is happening in the courts and how justice is administered (serving a public education function), and
 - the courts are subject to public scrutiny and kept accountable.
- 1.13 Many of our proposals recognise the significant role of the media in facilitating open justice by publishing fair and accurate reports of court proceedings. Few members of the public have the time, or even the inclination, to attend courts in person.²
- 1.14 However, open justice is not an absolute principle. The common law and legislation recognise that the open justice principle must give way to other interests in certain circumstances. These include the administration of justice, the need to protect certain types of sensitive or confidential information, personal safety, and the need to protect certain categories of vulnerable people.
- 1.15 The “administration of justice” is a broad concept. In our consultation paper, we refer to two features of the administration of justice that are particularly relevant to departures from open justice: that criminal trials are fair and that people who can assist in the justice process are encouraged to do so.³ 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.
- 1.16 While we focus on these two features of the administration of justice, other features include the need to encourage the reporting of offences and the right to a fair hearing in civil proceedings.
- 1.17 Recent developments have led to increased public awareness and discussion of open justice issues. In particular, the trial involving Cardinal George Pell raised questions about the geographical effectiveness of non-publication and suppression orders.

1. *R v Sussex Justices; ex parte McCarthy* [1924] KB 256, 259 (Lord Hewart CJ).

2. *R v Davis* (1995) 57 FCR 512, 514.

3. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Consultation Paper 22 (2020) [1.32]–[1.38].

- 1.18 In that case, the County Court of Victoria made an order to prohibit publication of information about a trial in which Cardinal George Pell was the defendant until the conclusion of a second trial involving Cardinal Pell. International media reported Cardinal Pell's convictions following the first trial.⁴
- 1.19 Several Australian media organisations published reports that did not name Cardinal Pell but said a high profile person had been convicted of serious crimes and that reporting had been suppressed. In response, the Victorian Director of Public Prosecutions initiated contempt proceedings against various media organisations, editors, journalists and television and radio presenters. Cardinal Pell's convictions were later overturned by the High Court of Australia.⁵
- 1.20 Twelve Australian news media organisations, who pleaded guilty to 21 charges of contempt of court, were recently convicted and sentenced.⁶ The judgment was delivered as we were in the final stages of preparing this paper for public release. We will discuss the case further in our final report, and we welcome any submissions about it in response to this paper.

Defining the departures from open justice

- 1.21 In this paper, we identify four categories of common departures from open justice. These are ordered below in a hierarchy from the least to most significant departure from the open justice principle:

- (1) Non-publication of information:** This means that information cannot be published. However, it does not otherwise prohibit or restrict the disclosure of information.
- This may be pursuant to a non-publication order or a statutory prohibition on publishing certain information.
 - This is a lesser restriction than suppression of information because it only prevents the publication of information to the wider community and not the disclosure of information to an individual.
 - The new Act proposed in chapter 4 includes a power to make a non-publication order, which can include a requirement to use a pseudonym to protect a person's identity (where necessary and appropriate).
- (2) Suppression of information:** This means that information cannot be disclosed by any means, including by publication.

4. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Consultation Paper 22 (2020) [12.49]–[12.50].

5. *Pell v R* [2020] HCA 12.

6. *R v The Herald and Weekly Times Pty Ltd* [2021] VSC 253.

- This may be pursuant to a suppression order or a statutory prohibition on disclosing certain information.
- Non-disclosure of information is a more significant restriction than non-publication of information, as it prohibits a person from disclosing information to another person (as well as prohibiting publication).
- The new Act proposed in chapter 4 includes a power to make a suppression order, which can include a requirement to use a pseudonym to protect a person's identity (where necessary and appropriate).

(3) Excluding people from proceedings: This involves exclusion of a specified person or class of people from the whole or any part of the proceedings (whether the proceedings are being conducted in person, by telephone or virtually). Unlike closing the court, excluding people from proceedings does not also have the effect of suppression (prohibiting disclosure, including by publication, of information in the proceedings).

- This is a new definition, which we propose be used uniformly across legislation where the primary purpose is to assist certain categories of witness to give evidence (for example, a complainant in prescribed sexual offence proceedings).
- A person may be excluded from proceedings pursuant to an order made by the court, either in exercise of its inherent or implied powers or under powers provided by legislation. Some legislation requires a court to make an exclusion order, while other legislation gives courts discretion to do so.
- Certain provisions contain an exemption allowing the media to be present or remain in the proceedings where the general public are excluded.

(4) Closing the court: This involves excluding all people from the whole or any part of the proceedings, except those who are required for the proceedings (for example, the parties to the proceedings). This also has the effect of suppression (preventing disclosure, including by publication, of information provided in the closed proceedings).

- We use “closed court” in preference to expressions such as “in camera”, “in private” or “in the absence of the public”.
- A court may be closed pursuant to an order made by the court, either in exercise of its inherent or implied powers or under powers provided by legislation.
- Some legislation requires a court to make a closed court order, while other legislation gives courts discretion to do so.

A new distinction between excluding certain people from proceedings and closing the court

- 1.22 Through the course of our research, case law analysis and consultations it has become clear that there is some uncertainty about the effect of closing the court; specifically whether or not this also has the effect of suppression (prohibiting disclosure, including by publication, of information in the closed proceedings). This uncertainty may have developed due to different approaches taken in the development of the common law and the different rationales for a range of statutory provisions. This results in inconsistencies in the approach to closing the court, which can flow on to impact the effectiveness of compliance and enforcement.
- 1.23 Our proposals attempt clarify the position by reserving the use of the term “closed court” for any orders made by courts that have the effect of both excluding all people from the proceedings and suppressing information provided in the proceedings. We propose using the term “exclusion” for orders made by courts that only have the effect of excluding a specified person or class of people from the proceedings (but do not restrict disclosure or publication).

Summary of draft proposals

- 1.24 The aims of our draft proposals are to:
- **Promote open justice**, subject to minimal necessary departures from it.
 - Propose **modern** legislation that is responsive to societal and technological changes.
 - Achieve **uniformity** in terminology and definitions to ensure **consistency** across different statutes.
 - Provide **clarity** about the effect and operation of departures from open justice to ensure **confidence** in the system.
 - Increase **transparency** by providing mechanisms for review and appeal of departures from open justice.
 - Retain **unique provisions in existing subject-specific legislation**, which recognise special circumstances.
 - **Enhance or extend some protections** for certain categories of vulnerable people.
 - **Empower people** to tell their stories, should they wish to (wherever possible).
 - Create **effective regimes** for compliance and enforcement of departures from open justice and access to records on the court file.
- 1.25 Our key draft proposals are:

- There should be uniform definitions used in departures from open justice, wherever appropriate (see chapter 3).
- There should be a new Act containing general powers to make non-publication, suppression, exclusion and closed court orders. However, these powers should be different for each type of departure, given their different purposes and intended effects (see chapter 4).
- The new Act should include principles to guide decision making (**Proposal 4.2**), and consistent procedures for making orders (**Proposal 4.7**), giving reasons (**Proposal 4.8**), appeals (**Proposal 4.9**), costs (**Proposal 4.10**) and enforcement (**Proposals 4.11–4.12**).
- The new Act should enhance protections for domestic violence complainants, children and people with cognitive impairment who are giving evidence (**Proposal 4.19**).
- Some changes should be made to extend the existing statutory prohibitions on publishing or disclosing certain information regarding the identities of child defendants and complainants in certain sexual offence proceedings to earlier in the criminal justice process (**Proposals 5.1 and 5.3**).
- Existing subject-specific legislation should include exceptions to enable the court to grant leave for disclosure or publication of a person's identity or for a person to consent to their identity being revealed (where appropriate) (**Proposals 5.8–5.14**).
- Provisions in existing subject-specific legislation that relate to non-publication, suppression, exclusion or closed court orders should be amended in a uniform way to achieve consistency (**Proposals 6.1–6.8, 7.7–7.12 and 8.3–8.9**).
- Some changes should be made to requirements to make exclusion and closed court orders in subject-specific legislation, including clarifying the meaning and effect of these orders (**Proposals 7.1–7.5, 7.13–7.16 and 8.1**).
- There should be a register of non-publication, suppression and closed court orders that is searchable by authorised parties (**Proposal 9.5**).
- There should be a Court Information Commissioner, who would perform a range of functions related to the enforcement and prosecution of breaches of restrictions on publication and disclosure of information (**Proposal 9.6**). Alternatively, this responsibility and appropriate resourcing could be given to an existing office such as the Prothonotary of the Supreme Court.
- There should be a new legislative framework governing access to records on the court file, which applies to most NSW courts, and is supplemented by court rules (see chapter 10). This framework should be included in a single Act, combined with the new Act proposed in chapter 4.

- The new access framework should outline the types of records on the court file that are available to different types of applicant, and the considerations courts must take into account in deciding whether to grant leave (**Proposals 10.3–10.7**).

Guiding principles

- 1.26 The guiding principles we have adopted for our approach to proposals are:
1. Open justice, as a principle that is fundamental to the integrity of and confidence in the administration of justice, should only be departed from where necessary.
 2. Departures are appropriate to protect certain sensitive information, vulnerable people and the administration of justice.
 3. The power and discretion of the judicial officer to control court proceedings and to determine open justice issues, in accordance with the circumstances of each case, should be preserved to the maximum extent possible.
 4. Any legislation that departs from the principle of open justice and/or limits the discretion of judicial officers should (so far as practicable) be uniform and consistent.
 5. Any departure from open justice should be the least restrictive approach, as appropriate for the circumstances of the case.
 6. Any departure from the open justice principle (so far as practicable) should be exercised in a way that is transparent, accessible and subject to scrutiny.

2. Application of proposals to courts and tribunals

- 2.1 This proposals paper includes mostly separate proposals for courts and tribunals. This is for two reasons. First, although in some respects tribunals have similarities to courts, conceptually tribunals are part of the administrative decision making process, not the judicial system. The principle of open justice is a feature of judicial, not administrative, decision making. Secondly, tribunals are specialised jurisdictions which usually have less formal procedures than courts, and increasing procedural complexity and formality in tribunal proceedings may negatively impact these jurisdictions.
- 2.2 This review has considered two NSW tribunals: the NSW Civil and Administrative Tribunal (“NCAT”) and the Mental Health Review Tribunal (“MHRT”).
- 2.3 NCAT hears a broad range of civil and administrative cases in NSW including tenancy and consumer disputes, guardianship and financial management proceedings, professional disciplinary matters and administrative review of government decisions. Due to its broad jurisdiction, NCAT has established four Divisions (the Administrative and Equal Opportunity Division, the Consumer and Commercial Division, the Guardianship Division and the Occupational Division) as well as an Appeal Panel.
- 2.4 NCAT is established and governed by the *Civil and Administrative Tribunal Act 2013* (NSW) (“*Civil and Administrative Tribunal Act*”), which is currently the subject of a statutory review by the Department of Communities and Justice. Around 160 other Acts also confer jurisdiction on NCAT.
- 2.5 The MHRT is a specialist tribunal constituted and governed by the *Mental Health Act 2007* (NSW) (“*Mental Health Act*”). It exercises two separate jurisdictions. In its jurisdiction under the *Mental Health Act*, the MHRT can make orders requiring a person to receive involuntary mental health treatment and can also conduct reviews for people who have been long-term voluntary patients.
- 2.6 In its forensic jurisdiction, under the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW) (“*Mental Health and Cognitive Impairment Forensic Provisions Act*”), the MHRT can make orders in relation to the treatment, care, detention and release of forensic patients.
- 2.7 This review has considered the following courts: the Local Court, the Children’s Court, the Coroners Court, the District Court (including the Dust Diseases Tribunal and the Drug Court), the Land and Environment Court, the Supreme Court, the Court of Criminal Appeal and the Court of Appeal.

- 2.8 None of the proposals in this paper is intended to apply to the Coroners Court, due to the unique nature of its jurisdiction (see below).

Proposals that apply to courts and tribunals

- 2.9 We propose that legislation applying to courts, and the two enabling acts for NCAT and the MHRT (that is, the *Civil and Administrative Tribunal Act* and the *Mental Health Act*), should include uniform definitions of certain key terms contained in chapter 3. For example, all references to restricting the publication or disclosure of a person’s “name” should be replaced with “information likely to lead to the identification of a person”. This would ensure greater consistency between the statutes without impacting on the operation of courts or tribunals.
- 2.10 We also propose uniform approaches to offences outlined in chapter 9, which include offences in the *Civil and Administrative Tribunal Act* and the *Mental Health Act*.¹ This includes proposals in relation to:
- maximum penalties
 - standardised offences, and
 - all offences being punishable as a statutory offence or contempt, but not both.

Proposals that apply to courts

- 2.11 In chapter 4, we propose a new Act that would contain general powers to make non-publication, suppression, exclusion and closed court orders. We also propose that uniform provisions be included in provisions in existing subject-specific legislation that relate to non-publication, suppression, exclusion and closed court orders (see chapters 6, 7 and 8).
- 2.12 The proposals concerning uniform provisions in these chapters would apply only to courts. This is because many of the proposals relate to uniform procedures by which such orders can be made. While such procedures may be appropriate for courts, applying them to tribunals may be inappropriate, given the informal nature of tribunal proceedings.
- 2.13 In chapter 10, we propose a new legislative framework governing access to court information, which would apply to most NSW courts but not to tribunals. The reasons for this include:
- Parties to proceedings in NCAT are often self-represented, whereas parties in court proceedings are more likely to be legally represented and have documents

1. *Civil and Administrative Tribunal Act 2013* (NSW) s 65, s 70, s 72; *Mental Health Act 2007* (NSW) s 161–162, s 189.

filed by a lawyer. An access framework designed for court records may therefore be unworkable in the NCAT context.²

- NCAT rules include a provision governing access to documents that is tailored to the nature and operation of NCAT.³
- Proceedings in the MHRT are highly specialised, such that an access framework with general provisions would be inappropriate.⁴ MHRT proceedings are different from civil and criminal proceedings heard by courts, and from the types of proceedings heard by NCAT.⁵
- In practice, the MHRT receives few access requests from the public or the media.⁶ It occasionally receives requests from researchers and takes an informal approach to these requests, which appears to work well in practice.⁷
- As indicated above, the principle of open justice is of reduced applicability to tribunals as distinct from courts exercising judicial power.

Proposals that apply to tribunals

- 2.14 We propose that statutory prohibitions on publishing or disclosing information relating to certain tribunal proceedings, and tribunal powers to hold proceedings in private or make non-publication or suppression orders, be retained within tribunal-specific legislation.
- 2.15 In chapter 5, we propose amendments to two statutory prohibitions set out in s 65 of the *Civil and Administrative Tribunal Act* and s 162 of the *Mental Health Act*, which apply to information relating to certain tribunal proceedings.
- 2.16 In chapter 6, we propose amendments to tribunal powers to make non-publication and suppression orders that are set out in s 64 of the *Civil and Administrative Tribunal Act* and s 151(4)(b)–(d) of the *Mental Health Act*.
- 2.17 The proposals are intended to improve the clarity and operation of these provisions.

Coroners Court not included

- 2.18 This paper does not include proposals in relation to the Coroners Court.

2. NSW Civil and Administrative Tribunal, *Consultation CIC15*.
3. *Civil and Administrative Tribunal Rules 2014* (NSW) r 42.
4. Mental Health Review Tribunal, *Consultation CIC10*.
5. Mental Health Review Tribunal, *Submission CI06*, 3.
6. Mental Health Review Tribunal, *Consultation CIC10*.
7. Mental Health Review Tribunal, *Submission CI33*, 4.

- 2.19 Coroners Court proceedings are governed by the *Coroners Act 2009* (NSW) (“*Coroners Act*”), which includes:
- powers to hear proceedings in a place that is not open to the public and exclude people from the place in which proceedings are being heard⁸
 - powers to make non-publication orders in relation to certain information,⁹ and
 - statutory prohibitions on publishing certain information.¹⁰
- 2.20 The Coroners Court jurisdiction is both investigative and judicial. The role of the coroner is to investigate and make determinations about certain matters (such as suspicious deaths or missing persons). The procedure is different, the rules of evidence do not apply and the Coroners Court cannot convict someone of an offence. Therefore, our proposals may be inappropriate in the coronial context.
- 2.21 We propose a legislative framework for access to court records, proposed in chapter 10, may also be unworkable in the Coroners Court. The Coroners Court has its own access regime, which reflects the nature of the matters it deals with.¹¹ For example, in deciding whether to grant a person access to the coroner’s file, the coroner or assistant coroner must consider the impact on the relatives of the deceased person of allowing access, if the file relates to a deceased person.¹²
- 2.22 Further, the Coroners Act is currently the subject of a statutory review by the Department of Communities and Justice, which could have regard to the general principles and proposals in our final report (to the extent they are applicable).

8. *Coroners Act 2009* (NSW) s 47(2), s 74(1)(a).

9. *Coroners Act 2009* (NSW) s 74(1)(b)–(c), s 75(1)–(2).

10. *Coroners Act 2009* (NSW) s 75(5), s 76.

11. *Coroners Act 2009* (NSW) s 65.

12. *Coroners Act 2009* (NSW) s 65(3)(b).

3. Uniform definitions

- 3.1 In this chapter, we outline our proposals for uniform definitions of key terms used in:
- the new Act proposed in chapter 4
 - statutory prohibitions on publishing or disclosing information (see chapter 5)
 - provisions in existing subject-specific legislation relating to non-publication, suppression, exclusion and closed court orders (see chapters 6-8), and
 - the legislative framework for access to court records proposed in chapter 10.
- 3.2 Introducing uniform definitions aligns with our guiding principle that departures from open justice should be made uniform and consistent, where practicable (see chapter 1).
- 3.3 Some of the definitions proposed in this chapter would be incorporated in legislation applying to both courts and tribunals.

Orders

- 3.4 We propose uniform definitions of “non-publication order”, “suppression order”, “exclusion order” and “closed court order” (**Proposal 3.1**). These definitions should be included in:
- the new Act proposed in chapter 4, which would contain general powers to make non-publication, suppression, exclusion and closed court orders, and
 - the legislative framework governing access to records on the court file proposed in chapter 10.
- 3.5 The definitions of “non-publication order” and “suppression order” should align with those in s 3 of the *Court Suppression and Non-publication Orders Act 2010* (NSW) (“*CSNPO Act*”) (**Proposal 3.1(1)–(2)**).
- 3.6 The *CSNPO Act* does not include a definition of “exclusion order” or “closed court order”, as the Act does not contain powers to make such orders (see chapter 4). The definitions in **Proposal 3.1(3)–(4)** reflect the distinction we have drawn between exclusion orders and closed court orders (see chapter 1).

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).

Publish and disclose

3.7 Several statutes use the term “publish”, “publish or broadcast”, or “disclose”. Such terms are often defined differently, or not at all, which may create confusion and uncertainty.¹

3.8 New, uniform definitions of these terms (**Proposal 3.2**) should be included in:

- the new Act proposed in chapter 4
- statutory prohibitions on publication or disclosure of information (see chapter 5), and
- provisions in existing subject-specific legislation relating to non-publication, suppression, exclusion and closed court orders (see chapters 6–8).

3.9 In consultations, we received support for uniform definitions of these terms.²

Proposal 3.2 is meant to improve consistency and clarity across different statutes and lead to greater compliance with publication and disclosure restrictions. The definitions “publish” and “disclose” should make it easier for people to understand what actions are prohibited.

1. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Consultation Paper 22 (2020) [3.59]–[3.61].

2. Roundtable 1, *Consultation CIC02*; Roundtable 2, *Consultation CIC03*; Mental Health Review Tribunal, *Consultation CIC10*.

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.

Party

- 3.10 Many of our proposals refer to a “party” in proceedings. For example, we propose that a party to proceedings should have standing to appear in applications for orders (**Proposal 4.7(2)(b)**, **Proposal 6.1(2)(b)**, **Proposal 7.7(2)(b)** and **Proposal 8.3(2)(b)**).
- 3.11 **Proposal 3.3** is that a uniform definition of “party” be included in the new Act proposed in chapter 4 and provisions in existing subject-specific legislation relating to suppression, non-publication, exclusion and closed court orders (see chapters 6–8). The definition of “party” should be similar to s 3 of the *CSNPO Act*.
- 3.12 Unlike the *CSNPO Act*, “party” should also include a “protected person” (**Proposal 3.3(a)**). This is to reflect this additional category of people referred to in various proposals throughout this paper (see, for example, **Proposal 4.14(1)(e)**).
- 3.13 The definition of “party” in **Proposal 3.3** should not be included in the legislative framework governing access to court records proposed in chapter 10 because it includes people who are not traditionally considered “parties”, such as complainants and victims. Given the access framework would confer broad access entitlements on parties, a separate definition of “party” is proposed in chapter 10.

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.

Complainant, victim and protected person

- 3.14 We propose uniform definitions of “complainant”, “victim”, “protected person”, “prescribed sexual offence” and “domestic violence offence” (**Proposal 3.4**). These definitions should be included in:
- the new Act proposed in chapter 4
 - provisions in existing subject-specific legislation relating to non-publication, suppression, exclusion or closed court orders (see chapters 6–8), and
 - the legislative framework for accessing records on the court file proposed in chapter 10.
- 3.15 The definitions of “complainant” and “protected person” should be the same as those in the *Criminal Procedure Act 1986* (NSW) (“*Criminal Procedure Act*”) and the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) (“*Crimes (Domestic and Personal Violence) Act*”) respectively (**Proposal 3.4(1)** and **Proposal 3.4(3)**).
- 3.16 The term “complainant” is used in connection with, and defined by reference to, prescribed sexual offences and domestic violence offences.³ “Protected person” is used in connection with, and defined by reference to, an apprehended violence order.⁴ The definitions of “prescribed sexual offence” and “domestic violence offence” should also be the same as those in the *Criminal Procedure Act* and the *Crimes (Domestic and Personal Violence) Act*.⁵
- 3.17 Our proposed approach is meant to avoid any confusion or inconsistency with the existing definitions of “complainant”, “protected person”, “prescribed sexual offence” and “domestic violence offence”. It is also meant to be clear and specific about the categories of people and offences that we intend to capture in various proposals in this paper (see, for example, **Proposal 4.14(1)(e)** and **Proposals 7.4–7.5 and 7.14–7.15**).
- 3.18 We propose that “victim” be defined to include “a person against whom an offence is alleged to have been committed” (**Proposal 3.4(2)**). This 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).

3. *Criminal Procedure Act 1986* (NSW) s 3 definition of “domestic violence complainant”, s 290A(1) definition of “complainant”.

4. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 3 definition of “protected person”.

5. *Criminal Procedure Act 1986* (NSW) s 3 definition of “prescribed sexual offence”; *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 11.

- 3.19 We have adopted the approach of referring to definitions in other legislation, rather than repeating the definitions, so that if the definition is amended elsewhere, the amended definition will be automatically picked up. We consider this outweighs the disadvantage of having to refer to another Act to find the definition.

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).

Information likely to lead to the identification of a person

- 3.20 Several statutory prohibitions on publication or disclosure protect a person’s “name” (see chapter 5).⁶ Existing subject-specific legislation also contains powers to make non-publication or suppression orders in respect of a person’s “name”. However, these provisions may define what information is to be protected differently, or not at all.⁷
- 3.21 The provisions should use the term “information likely to lead to the identification of a person” instead of a person’s “name” (**Proposal 3.5**). This is meant to clarify that identifying information as well as a person’s name is protected.
- 3.22 We are also seeking views about whether the provisions should include a list of information likely to lead to the identification of a person. Such a list could include, for example:

6. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Consultation Paper 22 (2020) [3.10]–[3.37].

7. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Consultation Paper 22 (2020) [3.62].

- the person’s name, title or alias
- the address of premises where the person lives or works, or the premises’ locality
- the address of a school attended by the person or the school’s locality
- any employment or occupation engaged in, profession practised or calling pursued by the person, or any official or honorary position held
- the person’s relationship to identified relatives or the person’s association with identified friends or businesses, or the person’s official or professional acquaintances
- the recreational interests or the political, philosophical or religious beliefs or interests of the person
- any real or personal property in which the person has an interest or with which the person is associated, and
- the person’s biometric information, such as the fingerprints, facial patterns or voice of the person.

3.23 On one hand, such a list could make it easier for people to understand exactly what kinds of identifying information must not be published or disclosed, in accordance with the statutory prohibition or suppression or non-publication order. The list could be non-exhaustive, to avoid the perception that anything not listed can be disclosed or published. In consultations, we received support for such a list.⁸

3.24 On the other hand, such a list may result in suppression of relevant information that does not identify or tend to identify a person. For example, publishing the address of a school attended by the person, or their employment or occupation, may not necessarily lead to the identification of that person, or even tend to do so.

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”.

Contact information

3.25 The *Criminal Procedure Act 1986* (NSW) (“*Criminal Procedure Act*”) limits the disclosure of certain people’s addresses or telephone numbers in criminal proceedings:

8. Children’s Court of NSW, *Consultation CIC11*; NSW Civil and Administrative Tribunal, *Consultation CIC15*.

- Section 149B and s 247S limit disclosure of “personal details” in prosecution notices. The prosecutor is not to disclose the address or telephone number of any witness proposed to be called by the prosecutor, or of any other living person, in a notice.
- Under s 280, a witness in criminal offence proceedings, or person who has made a written statement that is likely to be produced in such proceedings, is not required to disclose their address or telephone number.
- Under s 280A, a person to whom a subpoena is addressed is not required to disclose any “personal information” in any document or thing produced in compliance with the subpoena. “Personal information” means the address or telephone number of the person to whom the subpoena is addressed or of any other living person.⁹

3.26 There are some exceptions, including where:

- the address or telephone number is a materially relevant part of the evidence or the court makes an order permitting or requiring disclosure of it,¹⁰ and
- the disclosure of an address does not identify it as a particular person’s address, or it could not reasonably be inferred from the matters disclosed that it is a particular person’s address.¹¹

3.27 The general purpose of these provisions is to prevent witnesses from being contacted improperly, including by the accused person in the proceedings. To reflect technological changes in the way people can be contacted, **Proposal 3.6** is that s 149B, s 247S, s 280 and s 280A of the *Criminal Procedure Act*:

- employ the term “contact information”, instead of “personal details”, “address or telephone number” or “personal information”, and
- expand the definition of “contact information” to include a person’s email address and social media profile.

3.28 This reflects our aim of developing modern legislation that is responsive to societal and technological changes (see chapter 1).

3.29 The framework for accessing court records proposed in chapter 10 should include the same definition of “contact information”, which should be included in the definition of “personal identification information” (**Proposal 10.2(2)**).

9. *Criminal Procedure Act 1986* (NSW) s 280A(6) definition of “personal information”.

10. *Criminal Procedure Act 1986* (NSW) s 149B(1), s 247S(1), s 280(1), s 280A(1).

11. *Criminal Procedure Act 1986* (NSW) s 149B(4), s 247S(4), s 280(6), s 280A(5).

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.

Journalist and news media organisation

- 3.30 Some statutes include certain entitlements for “media representatives” and “news media organisations”. For example, media representatives can access certain proceedings that are otherwise closed to the public and are also entitled to inspect certain documents in criminal proceedings.¹² News media organisations are entitled to appear and be heard in applications for suppression and non-publication orders.¹³
- 3.31 **Proposal 3.7** is that uniform definitions of “journalist” and “news media organisation” should be included in the new Act proposed in chapter 4, in all statutory prohibitions on publication or disclosure of information (see chapter 5), in all provisions in existing subject-specific legislation that relate to non-publication, suppression, exclusion and closed court orders (see chapters 6–8), and in the access framework proposed in chapter 10. This is meant to ensure clarity and consistency.
- 3.32 The term “journalist” should be used instead of “media representative” (**Proposal 3.7(a)**) to clarify that the entitlements are available to individual journalists and not only to a legal representative of a news media organisation, for example. There should also be a non-exhaustive list of factors that indicates a person is a “journalist” (**Proposal 3.7(c)**). This is meant to be flexible enough to cover a range of journalistic practices, but distinct enough to exclude practices that do not constitute journalism (for example, individual members of the public posting about a case on social media).
- 3.33 The definition of “news media organisation” should be similarly flexible and include any enterprise or service that broadcasts or publishes news (**Proposal 3.7(d)**). It should not be limited to commercial organisations.

12. *Criminal Procedure Act 1986* (NSW) s 291C, s 314; *Children (Criminal Proceedings) Act 1987* (NSW) s 10(1)(b); *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 104C.

13. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 9(2)(d).

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 observationthe 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.

Accreditation of journalists

3.34 There should be a list of accredited journalists that can be used by each court for the purpose of enabling journalists to exercise proposed and certain existing entitlements (**Proposal 3.8**). These include:

- standing to appear and be heard in applications for non-publication, suppression and closed court orders (see **Proposal 4.7(2)(d)**, **Proposal 6.1(2)(d)** and **Proposal 8.3(2)(d)**)
- entitlements to access certain court proceedings from which members of the public have been excluded¹⁴, including those where we have proposed a change from a requirement make a closed court order to a requirement to make an exclusion order (see **Proposals 7.3(d)**, **7.4(d)** and **7.5(d)**).
- an entitlement to access certain court records (see **Proposal 10.4**), and

14. See, eg, *Children (Criminal Proceedings) Act 1987* (NSW) s 10(1)(b); *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 104C.

- certain entitlements under the *Court Security Act 2005* (NSW), including transmitting sounds, images or information forming part of court proceedings from the court for the purposes of a media report.¹⁵

3.35 The proposal is not intended to constrain a court in determining whether a person is a “journalist”, in accordance with **Proposal 3.7** above.

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.

Official report of proceedings

3.36 Many statutory prohibitions have an exception if the publication or disclosure of the relevant information is in an official report of proceedings (see chapter 5). The term “official report of proceedings” is not defined.

3.37 **Proposal 3.9** is for these prohibitions to define “official report of proceedings”, as a report of proceedings intended primarily for use in a law report or approved by the court or tribunal (including unreported judgments published online). It would not include a news article. This has been adapted from the *Family Law Act 1975* (Cth).¹⁶

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.

15. *Court Security Act 2005* (NSW) s 9A(2)(f); *Court Security Regulation 2016* (NSW) reg 6(a).

16. *Family Law Act 1975* (Cth) s 121(9)(e), s 121(9)(g).

4. A new Act

A new general Act

- 4.1 In this chapter, we propose a new Act that would set out “general” powers to make orders to:
- prohibit or restrict the publication or disclosure of information (“non-publication orders” and “suppression orders”)
 - exclude certain people, or classes of people, from the whole or any part of proceedings (“exclusion orders”), and
 - both exclude all people from the whole or any part of proceedings *and* operate as suppression orders to prohibit the disclosure of information given in those proceedings (“closed court orders”).
- 4.2 By “general” powers, we mean powers that operate in circumstances that are not otherwise covered by existing subject-specific legislation. In other chapters, we outline our proposals relating to those powers to make orders that are contained in subject-specific legislation (see chapters 6, 7 and 8).
- 4.3 Provisions in the new Act should be modelled on the *Court Suppression and Non-publication Orders Act 2010* (NSW) (“*CSNPO Act*”), with some changes, as outlined in this chapter.
- 4.4 Unlike the *CSNPO Act*, the new Act should contain powers to make exclusion and closed court orders. While courts can make such orders in exercise of their inherent or implied powers, including these powers in the new Act is meant to ensure there is greater transparency in relation to:
- the grounds on which these orders can be made
 - how such orders can be applied for, and
 - whether and how they can be lifted.
- 4.5 The approach under the new Act should also reflect the distinction we have drawn between exclusion orders and closed court orders (see chapter 1).
- 4.6 The new Act should include some provisions that are specific to non-publication and suppression orders (**Proposals 4.14–4.18**), some that are specific to exclusion orders (**Proposals 4.19–4.21**), and some that are specific to closed court orders (**Proposals 4.22–4.25**), given their different purposes and intended effects.
- 4.7 The new Act should apply only to certain NSW courts and not to tribunals or the Coroners Court (see chapter 2).

Provisions applicable to all types of orders

Definitions

- 4.8 We propose that the new Act define key terms (**Proposal 4.1**).
- 4.9 The new Act should define a “court” as the Supreme Court, Land and Environment Court, District Court, Local Court and Children’s Court (**Proposal 4.1(1)(a)**). This would include sub-jurisdictions of those courts (such as the Drug Court, which is part of the District Court). The Coroners Court should be explicitly excluded, for the reasons outlined in chapter 2.
- 4.10 The definition of “court” we propose is similar to the definition of “court” in s 3 of the *CSNPO Act*. Unlike s 3 of the *CSNPO Act*, only “other judicial bodies” should be able to be prescribed as a “court” by regulations (**Proposal 4.1(1)(b)**). This is to ensure future application of the Act is limited to judicial bodies like courts and tribunals.
- 4.11 Some of the terms and definitions in the new Act should remain the same as those in s 3 of the *CSNPO Act*. This includes the definitions of “proceeding” and “information”. Submissions and consultations did not indicate any need to change these definitions (**Proposal 4.1(2)–(3)**).
- 4.12 The new Act should include the same definitions of “non-publication order” and “suppression order” as s 3 of the *CSNPO Act* (**Proposal 3.1(1)–(2)**). The new Act should also include definitions of the additional types of orders that can be made, that is:
- An “exclusion order”, which is an order to exclude a specified person, or class of people, from the whole or any part of proceedings. An exclusion order does not have the effect of suppression (prohibiting disclosure, including by publication, of information in the proceedings) (**Proposal 3.1(3)**).
 - A “closed court order”, which is an order to exclude all people from the whole or any part of proceedings, except those who are required for the proceedings. This also has the effect of suppression (prohibiting disclosure, including by publication, of information provided in the proceedings) (**Proposal 3.1(4)**).
- 4.13 The new Act should include the definitions of “publish”, “disclose”, “party”, “journalist” and “news media organisation” proposed in chapter 3.
- 4.14 The new Act should include the definitions of “complainant”, “victim” and “protected person” proposed in chapter 3 (**Proposal 3.4(1)–(3)**). Instead of the term “offence of a sexual nature” (which is currently used in s 8(1)(d) of the *CSNPO Act*), we propose that the new Act use “prescribed sexual offence”, and include the definition proposed in chapter 3 (**Proposal 3.4(4)**). The new Act should also use the term “domestic violence offence” and include the definition proposed in chapter 3 (**Proposal 3.4(5)**). This is to be clear and specific about the types of sexual and domestic violence offences that we intend to be captured by certain provisions that we propose be included in the new Act.

- 4.15 The new Act should also include definitions of “child” as well as “mental health impairment” and “cognitive impairment”. The definitions of “mental health impairment” and “cognitive impairment” align with the definitions in s 4 and s 5 of the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW) (**Proposal 4.1(5)–(6)**).

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).

Principles

- 4.16 The new Act should have a “principles” section, which outlines that, when making an order under the new Act, a court must take into account that:
- open justice is a fundamental aspect of the administration of justice
 - orders should only be made where, and to the minimum extent, necessary, and
 - orders should be made in a way that is clear, consistent and of a limited scope and duration (**Proposal 4.2**).
- 4.17 This would replace s 6 of the *CSNPO Act*, which requires a court, when deciding whether to make a non-publication or suppression order, to “take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice”. We heard that this provision is unclear and does not sufficiently express the importance of the principle of open justice.¹

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

1. Roundtable 1, *Consultation CIC02*.

- (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.

Other preliminary provisions

- 4.18 The new Act should include preliminary provisions similar to s 4 and s 5 of the *CSNPO Act*.
- 4.19 The new Act should provide that it does not affect a court's inherent jurisdiction or powers to regulate its proceedings or deal with contempt of court (**Proposal 4.3**). A court can use its inherent jurisdiction (if it is a superior court) or implied powers (if it is an inferior court) to depart from open justice where it is necessary to secure the proper administration of justice.²
- 4.20 The new Act should provide that statutory prohibitions on publication or disclosure of information, requirements to make exclusion or closed court orders and powers to make non-publication, suppression, exclusion or closed court orders in existing subject-specific legislation are not affected by the powers in the new Act (**Proposal 4.4**).
- 4.21 The new Act should also include a new provision that provides that a court must, before making an order under the new Act, consider whether:
- another Act already automatically prohibits or restricts publication or disclosure of the relevant information
 - an exclusion or closed court order is required to be made under another Act, or
 - a non-publication, suppression, exclusion or closed court order could be made under another Act (**Proposal 4.5(a)**).
- 4.22 This, along with the notes in **Proposal 4.5(b)**, are intended to avoid duplication and ensure that orders are only made under the new Act when necessary.

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.

2. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Consultation Paper 22 (2020) [1.40]–[1.44], [2.17].

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.

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.

Powers

- 4.23 The new Act should include a provision outlining powers to make non-publication, suppression, exclusion and closed court orders (**Proposal 4.6**). The provision should be similar to s 7 of the *CSNPO Act* but include additional powers to reflect the other types of orders that can be made under the new Act (that is, powers to make exclusion and closed court orders).
- 4.24 In relation to non-publication and suppression orders, the new Act should clarify that such an order can include, where necessary and appropriate, a requirement to use a pseudonym to protect a person's identity (**Proposal 4.6(1)(a)**).
- 4.25 Further, the new Act should allow the court to make non-publication and suppression orders to prohibit or restrict the publication and/or disclosure of "information, whether or not received into evidence, given in proceedings before the court" (**Proposal 4.6(1)(b)**). This is intended to expand the current provision in s 7(b) of the *CSNPO Act*, so a non-publication or suppression order could be made in relation to *any* information given in proceedings (not just evidence in the proceedings).
- 4.26 Further, in relation to non-publication and suppression orders, the new Act should allow courts to make such orders in relation to "information that comprises evidence that may be adduced or given in proceedings before the court" (**Proposal 4.6(1)(c)**). This responds to a concern that parties may find it difficult to obtain an order in

relation to evidence that will be served on another party as part of the brief of evidence, but has not yet been given in proceedings before the court.³

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.

Procedures for making orders

- 4.27 The new Act should outline procedures for making orders that specify who can apply for, and appear and be heard, in an application for all types of orders that can be made under the Act (**Proposal 4.7**). These procedures should be similar to those outlined in s 9 of the *CSNPO Act*.
- 4.28 We do not propose to include a provision allowing “open standing”; that is, the ability for any person to appear and be heard on an application for an order. We consider that the current provisions in the *CSNPO Act* provide appropriate scope for interested people to appear and be heard in applications for orders (**Proposal 4.7(2)(e)**).
- 4.29 Unlike the *CSNPO Act*, the new Act should use the terms “journalist” and “legal representative of a news media organisation”, instead of just “news media organisation” (**Proposal 4.7(2)(d)**). This is to clarify that individual journalists, who are often the ones present in court, as well as legal representatives from news media organisations, can appear and be heard in relation to applications.
- 4.30 The new Act should allow a court to make an order subject to such “exceptions and conditions” as it sees fit (**Proposal 4.7(4)**) and require the court to specify the information the order applies to with sufficient particularity (**Proposal 4.7(5)**). These are also features of s 9 of the *CSNPO Act*.

3. Commonwealth Director of Public Prosecutions, *Submission CI21*, 1.

Proposal 4.7: Procedure for making an order

The new Act should 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 4.7(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 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.

Requirement to give reasons on request

- 4.31 The new Act should include a requirement for the court to give reasons for orders when requested to do so. The people entitled to make a request for reasons should be the same as those who have standing to appear and be heard on applications, reviews and appeals of orders (**Proposal 4.8**).
- 4.32 The *CSNPO Act* does not include a provision for reasons, although s 8(2) does require that the order state the ground on which it is made.
- 4.33 In consultations, we heard that orders made under the *CSNPO Act* are sometimes unclear and courts do not always specify the ground or grounds on which the order is made. This creates issues for the media and others as they cannot determine the reasons why orders are made, and consequentially, whether they should apply for a review of the order.⁴
- 4.34 Our proposal would not require a court to give reasons in every case, as this may not be necessary and may be time-consuming. For example, orders made in relation to interlocutory applications are usually uncontroversial. Requiring the court to give reasons for such orders may disrupt proceedings and impact court resources.

4. Roundtable 2, *Consultation CIC03*; Australia's Right to Know Coalition, *Submission CI27 (Response to chapters 1–4)*, 55.

- 4.35 Instead, our proposal would allow a person who has standing to decide whether to apply for or appear in a review or appeal of the order.
- 4.36 Further, this proposal may encourage courts to consider whether an order is “necessary” in every case, as reasons may be requested. This may ensure better practice and improve confidence that orders are only made when appropriate.

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.

Appeals

- 4.37 The new Act should set out procedures for appeals (**Proposal 4.9**). These procedures should be similar to those set out in s 14 of the *CSNPO Act*.
- 4.38 Unlike the *CSNPO Act*, the new Act should specify the relevant appellate court for each original court (**Proposal 4.9(2)**). We heard that the *CSNPO Act* is unclear about which is the correct appellate court, particularly where there may be more than one possible court to which appeals against an order of the original court may lie.⁵
- 4.39 Section 14 of the *CSNPO Act* does not specify who can apply for leave to appeal. This is different to s 13(2) of the *CSNPO Act*, which provides a list of people who are entitled to apply for a review. The new Act should provide that the same people who can appear and be heard in an appeal can also apply for leave to appeal (**Proposal 4.9(3)**). This is meant to provide more clarity and specificity.
- 4.40 The new Act should provide that an appeal is to be made by rehearing (**Proposal 4.9(5)**). Unlike s 14(5) of the *CSNPO Act*, we propose that fresh evidence should be able to be given only with leave of the court.
- 4.41 In addition, the new Act should provide that 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 (**Proposal 4.9(6)**). This is to encourage flexibility for the courts to make rules to provide greater clarity for applicants.
- 4.42 The appeal procedures we propose be included in the new Act would cover all types of orders that could be made under the Act. On the one hand, enabling all types of

5. Office of the Director of Public Prosecutions, *Submission C17*, 13.

orders to be appealed is important from a natural justice perspective. On the other hand, appeals against exclusion and closed court orders may result in delays, as proceedings may need to be stayed whilst the appeal is determined. However, appeals would only be able to be made with leave of the appellate court, which may mitigate this risk. We seek your views about whether this is appropriate.

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).

Costs

- 4.43 The new Act should provide that costs are generally not awardable in proceedings under the new Act, except where a person’s involvement in the application is frivolous or vexatious (**Proposal 4.10**). This is intended to ensure the risk of a costs order does not discourage people from seeking review or appeal of non-publication, suppression, exclusion or closed court orders.
- 4.44 The *CSNPO Act* does not include a provision about costs.

Proposal 4.10: Costs in proceedings for orders

The new Act should provide that a court must not make a costs order against a person in proceedings for the application, review or appeal of an order (including an interim order), unless the court is satisfied that the person's involvement in the application is frivolous or vexatious.

Breaches of orders

- 4.45 The new Act should provide that contravening an order made under the new Act is an offence and outline procedures for dealing with such offences (**Proposals 4.11–4.12**).
- 4.46 The new Act should provide that a person commits an offence if they engage in conduct that contravenes an order and they know of the existence of that order. The maximum penalty for breaching an order should be 100 penalty units or imprisonment for two years (or both) for an individual and 500 penalties for a body corporate (**Proposal 4.11(2)**).
- 4.47 The new Act should also provide that proceedings for an offence under the new Act should be brought before the Local Court or the Supreme Court in its summary jurisdiction within two years of the date of the offence.
- 4.48 **Proposals 4.11–4.12** are similar to s 16 and s 17 of the *CSNPO Act* and are consistent with our proposals for other similar offences (see chapter 9).

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.

Proposal 4.12: Proceedings for offences

The new Act should provide that:

- (1) Proceedings for offences are to be dealt with:
 - (a) summarily before the Local Court, or
 - (b) summarily before the Supreme Court in its summary jurisdiction.

- (2) The Local Court can only impose a maximum penalty of 100 penalty units, for an individual, and 500 penalty units for a body corporate, despite any higher maximum penalty provided by this Act.
- (3) Proceedings for an offence under this Act brought before the Local Court or Supreme Court in its summary jurisdiction must be commenced within two years of the date of the offence.

Disclosures not prevented by suppression and closed court orders

- 4.49 The new Act should exempt the disclosure of certain information, in specified circumstances, from being prohibited by suppression and closed court orders (**Proposal 4.13**). This is largely the same as s 15 of the *CSNPO Act*, with the only difference being the inclusion of closed court orders.

Proposal 4.13: Disclosures that are not prevented by suppression and closed court orders

The new Act should provide that:

- (1) A suppression or closed court order does not prevent a person from disclosing information if it is not by publication and is in the course of performing duties or exercising powers in a public official capacity:
 - (a) in connection with the conduct of proceedings or the recovery or enforcement of a penalty imposed in proceedings, or
 - (b) in compliance with a procedure adopted by a court for informing journalists or news media organisations of non-publication, suppression, exclusion or closed court orders made by the court.
- (2) A suppression or closed court order does not prevent disclosure of information to the Bureau of Crime Statistics and Research if it is not by publication and the disclosure is made for the purposes of the compilation of statistical data.

Provisions applicable to non-publication and suppression orders

- 4.50 Some provisions in the new Act should apply only to orders prohibiting or restricting disclosure or publication of information (that is, non-publication and suppression orders) (**Proposals 4.14–4.18**). This is because these types of orders have different purposes and intended effects to exclusion and closed court orders.
- 4.51 Other subject-specific legislation also sets out powers to make non-publication or suppression orders in specific circumstances. In chapter 6, we propose that these other powers should be amended in a uniform way, to achieve consistency with the new Act.

Grounds for making non-publication and suppression orders

- 4.52 The new Act should set out certain grounds for making non-publication and suppression orders (**Proposal 4.14**).
- 4.53 Many of the grounds in **Proposal 4.14** are the same as, or similar to, existing grounds in s 8(1) of the *CSNPO Act*. They include if an order is necessary: to prevent prejudice to the proper administration of justice; to prevent prejudice to the interests of Commonwealth or state or territory national or international security or to protect the safety of a person; or where it is otherwise necessary in the public interest and

that public interest significantly outweighs the public interest in open justice
(Proposal 4.14(1)(a)–(c) and Proposal 4.14(1)(g)).

- 4.54 Section 8(1)(d) of the *CSNPO Act* allows non-publication or suppression orders to be made where this is necessary to avoid causing undue distress to a party (including a complainant) or witness in criminal proceedings *for an offence of a sexual nature*. The new Act should instead allow orders to be made where this is necessary to avoid causing undue distress or embarrassment to complainants and witnesses in “any legal proceeding that involves, or relates to, a prescribed sexual offence” **(Proposal 4.14(1)(d))**. This recognises that potentially sensitive information, which may cause a complainant or witness significant distress or embarrassment can be revealed during civil proceedings that relate to a prescribed sexual offence.
- 4.55 Unlike s 8(1)(d) and s 8(3) of the *CSNPO Act*, the new Act should not expressly allow an order to be made on the ground that the order is necessary to avoid causing undue distress or embarrassment to a *defendant* in sexual offence proceedings (in exceptional circumstances). We do not consider that protecting defendants in such cases, solely on the basis of distress or embarrassment, is a sufficient ground to justify a departure from the principle of open justice.
- 4.56 While orders should not be available to protect defendants on the basis of undue distress or embarrassment, a court should still be able to make orders in relation to defendants on other grounds. These include if the order is necessary to prevent prejudice to the proper administration of justice (including a defendant’s right to a fair trial) or to protect the safety of the defendant (this includes psychological safety, such as aggravation of a pre-existing medical condition or avoiding an increased risk of suicide or other self-harm).⁶
- 4.57 The new Act should also contain a new provision allowing an order to be made where it is necessary to avoid causing undue distress or embarrassment to:
- a complainant, protected person or witness (not including a defendant) in any legal proceedings relating to a domestic violence offence **(Proposal 4.14(1)(e))**, and
 - a child who is a party or witness in any civil proceeding **(Proposal 4.14(1)(f))**.
- 4.58 **Proposal 4.14(1)(e)** reflects the fact that complainants of domestic violence related offences, like complainants of sexual offences, often experience stigma, distress and humiliation as a result of being involved in court proceedings. Our proposal is also meant to encourage reporting of domestic violence related offences, by making it clear that suppression and non-publication orders are available to protect complainants in domestic violence related proceedings.
- 4.59 In some, but not necessarily all, civil cases involving a child it may be necessary to make an order to protect the child’s identity to avoid causing them undue distress or

6. *AB v R (No 3)* [2019] NSWCCA 46, 97 NSWLR 1046 [59]. See also NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Consultation Paper 22 (2020) [4.79].

embarrassment. **Proposal 4.14(1)(f)** aligns with the guiding principle that departures from open justice are appropriate to protect vulnerable people, including children (see chapter 1).⁷ The identity of children involved in criminal proceedings is already protected by a statutory prohibition on publishing this information.⁸

- 4.60 The new Act should require the court, in determining whether to make an order to protect the identity of a person, to take into account the views of the person (**Proposal 4.14(2)**). While courts may already do this in practice, specifying this in legislation should ensure the person's views are considered every time and that the person has some autonomy in the process.

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.

Interim non-publication and suppression orders

- 4.61 The new Act should allow a court to make an interim non-publication or suppression order (**Proposal 4.15**). This aligns with s 10 of the *CSNPO Act*.

7. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Consultation Paper 22 (2020) [7.1]–[7.3].

8. *Children (Criminal Proceedings) Act 1987* (NSW) s 15A.

- 4.62 Interim orders are an important mechanism to enable information to be protected in the short-term while the non-publication or suppression order application is finally determined. The qualification that a court “must determine the application as a matter of urgency” is meant to ensure that such orders do not operate for long periods of time (**Proposal 4.15(2)**).

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.

Where a non-publication and suppression order applies

- 4.63 The new Act should require the court to specify the geographic application of non-publication and suppression orders (**Proposal 4.16(1)**). This is similar to s 11(1) of the *CSNPO Act*.
- 4.64 Unlike s 11(2) of the *CSNPO Act*, the new Act should expressly allow courts to make orders that apply outside of the Commonwealth, where necessary (**Proposal 4.16(2)–(3)**). This reflects the aim behind many of our proposals, which is to develop modern legislation that is responsive to societal and technological changes (see chapter 1).
- 4.65 In contemporary society information is frequently shared across international borders via the internet and social media. To ensure information is protected effectively, it may be necessary in some cases for orders to apply outside Australia.

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.

Duration of non-publication and suppression orders

- 4.66 The new Act should require the court to specify the period for which the non-publication or suppression order applies (**Proposal 4.17(1)**). This is similar to s 12(1) of the *CSNPO Act*.
- 4.67 The new Act should provide that orders cannot be specified to operate indefinitely (**Proposal 4.17(2)**) and that orders should not be able to be made “until further order” (**Proposal 4.17(4)(b)**). This would prevent the situation where an order operates indefinitely (unintentionally) because a “further order” is never made. This is

consistent with the proposed principles, namely that orders should only be made to the minimum extent necessary and should be clear, consistent and of a limited scope and duration (**Proposal 4.2**). However, this proposal should not apply to interim orders, as it may often be appropriate for an order to apply until a further order is made.

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

Review of non-publication and suppression orders

- 4.68 The new Act should include provisions for reviews of orders (**Proposal 4.18**), which are largely the same as those in s 13 of the *CSNPO Act*.
- 4.69 Unlike the *CSNPO Act*, the new Act should require a court, when reviewing an order, to revoke the order if requested by a complainant of a prescribed sexual offence or a domestic violence offence, or a protected person in an apprehended violence order proceeding, subject to certain limitations (**Proposal 4.18(4)**). Complainants and protected people would have standing to apply for, appear and be heard, in relation to a review, as they would fall within the proposed definition of “party” to the proceedings (see **Proposal 3.3(a)**). We heard that it is particularly important that complainants of sexual and domestic violence related offences can tell their stories, where they choose to do so.⁹
- 4.70 A court should not be required to revoke an order if this would reveal the identity of another complainant in the same proceeding who does not consent to their identity being revealed, who is under 18 (unless they are over 16 and have given permission on the advice of an Australian legal practitioner) or it is not otherwise appropriate in the circumstances (**Proposal 4.18(5)**).

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.

9. See, eg, knowmore, *Preliminary Submission PCI35*, 4; Victims of Crime Assistance League Inc NSW, *Preliminary Submission PCI32*, 4.

- (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 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.

Provisions applicable to exclusion orders

- 4.71 As with non-publication and suppression orders, some provisions in the new Act should apply only to exclusion orders (**Proposals 4.19–4.21**).
- 4.72 The *CSNPO Act* does not contain any provisions in relation to exclusion orders. To date these have been made under the inherent or implied jurisdiction of the relevant court, the court's procedure legislation or other subject-specific legislation that sets out powers to make exclusion orders in specific circumstances. In chapter 7 we propose that these other powers should be amended in a uniform way, to achieve consistency with the new Act proposed in this chapter.

Grounds for making exclusion orders

- 4.73 The new Act should include specific grounds for making exclusion orders (**Proposal 4.19(1)**). Exclusion orders should be made primarily for the purpose of enabling people to participate safely in court proceedings and support them to give evidence.

Making an exclusion order would not, of itself, operate to also suppress information provided in the proceedings.

- 4.74 The new Act should include similar grounds to some of the grounds in s 8(1) of the *CSNPO Act*. These are where it is necessary to prevent prejudice to the administration of justice or to protect the safety of any person, or where it is otherwise necessary in the public interest and that public interest significantly outweighs the public interest in open justice (**Proposal 4.19(1)(a)–(b)** and **Proposal 4.19(1)(d)**).
- 4.75 The new Act should include an additional ground where the exclusion order is necessary to support a child or a person with a mental health impairment or cognitive impairment to give evidence in any proceeding (criminal or civil) (**Proposal 4.19(1)(c)**). Children and people with a mental health or cognitive impairment may find giving evidence in public distressing or challenging, and this may adversely impact their ability to communicate.
- 4.76 NSW law already recognises that children and people with a cognitive impairment may require support to give evidence.¹⁰ Among other things, children and people with a cognitive impairment are in some circumstances entitled to give evidence in the form of a recording of the police interview, outside the courtroom via CCTV or in the courtroom using alternative arrangements such as screens or planned seating arrangements.¹¹
- 4.77 The addition of new grounds for exclusion orders in the new Act should not displace existing entitlements (such as the entitlement to give evidence via CCTV).
- 4.78 The new Act should also require a court, in determining whether to make an exclusion order for the benefit of a child or person with a mental health or cognitive impairment, to take into account the views of the child (considered in light of their age and understanding) or person with mental health or cognitive impairment (considered in light of their mental health or cognitive impairment)(**Proposal 4.19(2)(b)–(c)**).

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.

10. *Criminal Procedure Act 1986* (NSW) ch 6 pt 6.

11. *Criminal Procedure Act 1986* (NSW) s 306U, s 306ZB, s 306ZH. See also NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Consultation Paper 22 (2020) [8.43]–[8.48], [8.67].

- (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.

Duration of exclusion orders

- 4.79 The new Act should require the court to specify the period for which the exclusion order applies (**Proposal 4.20(1)**). This could be determined by reference to a period of time (for example, a day) or fixed to a future event (for example, the conclusion of a particular witness' evidence) (**Proposal 4.20(3)**). This proposal is meant to provide certainty around the length of time the order operates and ensure it only operates for as long as necessary.

Proposal 4.20: Duration of exclusion orders

The new Act should provide:

- (1) An exclusion order must specify the period for which the order operates.
- (2) 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.
- (3) The period for which an order operates is to be determined by reference to:
 - (a) a fixed or ascertainable period, or
 - (b) the occurrence of a specified future event.

Review of exclusion orders

- 4.80 The new Act should enable exclusion orders to be reviewed (**Proposal 4.21(1)**). A review power enables the court to examine whether an order should be made in a particular case and may help to ensure orders are only made, or only operate, where appropriate in the circumstances of the case.
- 4.81 The person or people who are excluded by an order would have standing in a review of the order, with leave of the court, as they would have "sufficient interest" in the order (**Proposal 4.21(2)(e)**).
- 4.82 Reviews of exclusion orders should not result in significant delays to proceedings, given that such reviews can be determined by the court that made the original order.

Proposal 4.21: Review of exclusion orders

The new Act should provide that:

- (1) A court that made an exclusion 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.

Provisions applicable to closed court orders

- 4.83 As with non-publication, suppression and exclusion orders, we propose that some provisions in the new Act should apply only to closed court orders (**Proposals 4.22–4.25**).
- 4.84 The *CSNPO Act* does not contain any provisions in relation to closed court orders. To date, these have been made under the inherent or implied jurisdiction of the relevant court, the court's procedure legislation, or other subject-specific legislation that sets out powers to make closed court orders in specific circumstances. In chapter 8, we propose that these other powers should be amended in a uniform way to achieve consistency with the new Act.

Grounds for making closed court orders

- 4.85 The new Act should include certain grounds for making closed court orders (**Proposal 4.22(1)**).
- 4.86 Courts should only be able to make a closed court order where the ground cannot be addressed by other reasonably available means (that is, a non-publication, suppression, or exclusion order). This is because closed court orders are the most significant departure from open justice, as they prevent both the public and the media from physically accessing the court and have the effect of suppression. This reflects our guiding principles that open justice should only be departed from where necessary and the least restrictive approach should be used, appropriate to each case (see chapter 1).
- 4.87 The grounds for making a closed court order should be similar to existing grounds in s 8(1) of the *CSNPO Act* (**Proposal 4.22(1)(a)–(d)**), including the "necessity" test.

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.

Where and when a closed court order applies

- 4.88 The new Act should require the closed court order to specify the proceedings or part of proceedings from which all people (except those whose presence is required for the purposes of proceedings) must be excluded (**Proposal 4.23(a)**). A closed court order should have the effect of prohibiting any information in that part of proceedings from being disclosed (including by publication) anywhere inside, or outside, the Commonwealth, unless the court orders otherwise (**Proposal 4.23(b)**).
- 4.89 We seek your views about **Proposal 4.23**. This proposal would mean that closed court orders are a significant departure from open justice as the information suppressed by a closed court order would, by default, be prohibited from being disclosed anywhere in the world, indefinitely.
- 4.90 However, the new Act would allow a court to depart from this default position, as it could make an order subject to such exceptions and conditions as it sees fit (**Proposal 4.7(4)**) The new Act would also require the court, when deciding whether to make the order, to take into account the proposed principle that orders should be made in a way that is clear, consistent and of limited scope and duration (**Proposal 4.2(c)**).
- 4.91 Further, we envisage that a closed court order would only be made in limited cases, as a matter of last resort, as the new Act would require the court to consider whether there are other “reasonably available means” to address the ground on which the order would be made (**Proposal 4.22(1)** and **Proposal 4.22(3)**).
- 4.92 In addition, a closed court order could be subject to a review (**Proposal 4.24**) or appeal (**Proposal 4.9**).

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.

Review of closed court orders

- 4.93 The new Act should expressly allow closed court orders to be reviewed (**Proposal 4.24(1)**). This may help to ensure orders are only made, or only operate, where appropriate in the circumstances of the case.
- 4.94 Reviews of closed court orders should not result in significant delays to proceedings, given that such reviews can be determined by the court that made the original order.

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.

Requirement to post notice of a closed court order

- 4.95 The new Act should include a requirement for courts to post a notice of a closed court order (**Proposal 4.25**).
- 4.96 This is intended to increase awareness of the existence of the order and reduce the likelihood that it will be breached (for example, by someone walking into the court who is not aware the court is closed).

Proposed 4.25: Requirement to post notice of a closed court order

The new Act should provide that a court must post notice of a closed court order, whether the proceedings are held in a courtroom or virtually.

Other provisions should be retained in subject-specific legislation

- 4.97 Other subject-specific legislation containing provisions relating to non-publication, suppression, exclusion and closed court should not be incorporated into the new Act.

- 4.98 There are many powers and requirements to make orders, and statutory prohibitions, which are specific to certain types of information and proceedings. One of the aims of our proposals is to retain special provisions that recognise specific circumstances (see chapter 1). Attempting to create a single piece of legislation that adequately responds to each circumstances risks over-generalising.
- 4.99 In addition, there is a risk that, by pulling these disparate provisions together, the new Act will become overly complex and lengthy, leading to provisions being overlooked.
- 4.100 Instead, we propose amending existing subject-specific legislation in a uniform way to achieve greater consistency in key areas. We outline these proposals in later chapters.
- 4.101 Some grounds on which orders can be made in subject-specific statutes may overlap with the new Act. For example, s 71 of the *Civil Procedure Act 2005* (NSW) ("*Civil Procedure Act*") contains a list of circumstances in which civil proceedings can be conducted "in the absence of the public". One of these circumstances is "if the presence of the public would defeat the ends of justice".¹² This may overlap with the proposed ground for making an exclusion or closed court order under the new Act where it is "necessary to prevent prejudice to the proper administration of justice" (see **Proposal 4.19(1)(a)** and **Proposal 4.22(1)(a)**).
- 4.102 One way to address this overlap is to omit the "if the presence of the public would defeat the ends of justice" ground from s 71 of the *Civil Procedure Act*, as it does not require the court to engage in a "necessity" test. Our view is that it is appropriate for the court to determine whether it is necessary, in the circumstances of the particular case, for an exclusion or closed court order to be made "to prevent prejudice to the proper administration of justice".
- 4.103 We seek your views on whether there are any other statutory provisions that raise a similar issue, that is, they may conflict or overlap with the grounds we propose be included in the new Act, and could be brought into the new Act instead.

12. *Civil Procedure Act 2005* (NSW) s 71(b).

5. Statutory prohibitions on publication or disclosure

- 5.1 This chapter outlines our proposals relating to “statutory prohibitions” on publication or disclosure. By “statutory prohibitions” we mean any legislation that automatically prohibits the publication or disclosure of certain information, without the court needing to make an order (see glossary of terms). Statutory prohibitions are contained in subject-specific legislation.¹ They operate to protect information identifying certain people or other types of information.
- 5.2 The proposals in chapter 3 that statutory prohibitions should use consistent terms and definitions, including “publish” and replacing “name” with “information likely to lead to the identification of a person”, should also apply to the statutory prohibitions outlined in this chapter.

Identifying information protected by statutory prohibitions

- 5.3 **Proposals 5.1–5.4** relate to the information protected by certain statutory prohibitions on publishing or disclosing the identity of certain people.

Identity of children and young people

- 5.4 Legislation automatically prohibits publishing the identity of children in a way that connects them with criminal proceedings (as a defendant, witness, victim or if they are otherwise mentioned in the proceedings).² There are strong arguments in favour of this prohibition, including:
- reducing community stigma for child defendants, facilitating their rehabilitation and reintegration into society, and
 - protecting child victims and other children connected with criminal proceedings from the stigma of being associated with a crime.³

1. See, eg, *Children (Criminal Proceedings) Act 1987* (NSW) s 15A; *Children and Young Persons (Care and Protection Act) 1998* (NSW) s 105.

2. *Children (Criminal Proceedings) Act 1987* (NSW) s 15A(1).

3. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Consultation Paper 22 (2020) [7.9].

- 5.5 The application of the existing statutory prohibition should be extended to cover the period of investigation before charges are laid (**Proposal 5.1**). This is similar to the approach in the United Kingdom.⁴
- 5.6 Our proposal is meant to ensure that the identity of a child is protected for the entire time they are involved with the criminal justice system. This is appropriate because the policy reasons behind the existing statutory prohibition (for example, to prevent stigmatisation) also apply to the period before a charge is laid, and there is often media interest at this stage. We have received support for this proposition.⁵
- 5.7 As the prohibition only applies to publication of identifying information, and not disclosure, our proposed approach would still enable police to disclose the child's name in the course of the investigation (for example, in internal police discussions and while interviewing another witness).
- 5.8 There should also be an exception to allow the publication of the name or other details of a child under investigation where a person's safety and welfare is in danger, for example, in the case of a missing person.

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.

- 5.9 The existing statutory prohibition on publishing the name or identifying information of a child involved in apprehended violence order ("AVO") proceedings,⁶ which currently applies to a "child" (defined as a person under the age of 16),⁷ should be amended to also apply to a young person (aged between 16 and 18) (**Proposal 5.2**).
- 5.10 Some other statutory prohibitions protect the identity of both children and young people.⁸ We agree that providing different protections to children and young people based on whether they are below, or over, the age of 16 is "unfair and creates an unhelpful disparity".⁹ The policy rationale for protecting the identity of children in AVO

4. *Youth Justice and Criminal Evidence Act 1999* (UK) s 44(1).

5. See, eg, NSW Council for Civil Liberties, *Submission CI02*, 6; Public Interest Advocacy Centre, *Submission CI14*, 2; Legal Aid NSW, *Submission CI24*, 15.

6. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 45.

7. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 3 definition of "child".

8. See, eg, *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 3 definition of "young person", s 105(1); *Young Offenders Act 1997* (NSW) s 4 definition of "child", s 65(1).

9. Legal Aid NSW, *Submission CI24*, 21–22.

proceedings applies equally to young people. This is also consistent with our principle that departures from open justice are appropriate to protect vulnerable people, including children and young people (see chapter 1).

Proposal 5.2: Prohibition on publishing information likely to lead to the identification of a child involved in apprehended violence order proceedings

The prohibition in s 45 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) should be amended to apply to information likely to lead to the identification of a child or young person who is under the age of 18.

Identity of sexual offence complainants

- 5.11 Legislation prohibits publishing the identity of sexual offence complainants.¹⁰ There are strong public policy reasons for this prohibition, including that such complainants often experience significant stigma, distress and humiliation, and protecting their identity may encourage people to report sexual offences.¹¹
- 5.12 The application of the prohibition should be extended to include the period before proceedings have commenced, from the time that the alleged offence is reported to police (**Proposal 5.3**). A key barrier to reporting sexual offences is the fear of being identified publicly as a complainant of a sexual offence. Our proposal is meant to ensure the identity of complainants is protected for the entire time they are involved with the criminal justice system, and in turn, encourage reporting.

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.

Identity of people involved in mental health, guardianship or community welfare proceedings

- 5.13 Some types of proceedings involve sensitive and personal issues relating to a person's mental health or decision-making capacity. Departures from open justice are appropriate to protect the identity of people involved in such proceedings (see chapter 1).¹²
- 5.14 The current statutory prohibitions on publishing the identity of people involved in Mental Health Review Tribunal ("MHRT") proceedings, and guardianship or

10. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Consultation Paper 22 (2020) [3.6], [3.15], [8.49], [9.4]–[9.5].

11. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Consultation Paper 22 (2020) [9.3].

12. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Consultation Paper 22 (2020) [3.23], [3.26].

community welfare proceedings in the NSW Civil and Administrative Tribunal (“NCAT”), should be amended (**Proposal 5.4**).

- 5.15 These prohibitions should apply to publications that *connect* the person with the proceedings. This is meant to clarify that information that identifies a person as having appeared before NCAT or the MHRT is prohibited from publication, but other types of information (for example, the fact that a forensic patient has appeared before a court) are not.

Proposal 5.4: Prohibition on publishing information likely to lead to the identification of people involved in mental health, guardianship or community welfare proceedings

- (1) The prohibition in s 162 of the *Mental Health Act 2007* (NSW) should apply to publishing information likely to lead to the identification of a person involved in proceedings before the Mental Health Review Tribunal in a way that connects the person with the proceedings.
- (2) The prohibition in s 65 of the *Civil and Administrative Tribunal Act 2013* (NSW) should apply to publishing information likely to lead to the identification of a person involved in proceedings in the Guardianship Division, or proceedings for a decision for the purposes of the community welfare legislation, in a way that connects the person with the proceedings.

When statutory prohibitions do not apply

- 5.16 **Proposals 5.5–5.14** relate to when statutory prohibitions do not apply. This may be because a prohibition comes to an end after a fixed duration, it does not apply in certain circumstances or it is lifted because an exception applies.

Duration of all statutory prohibitions

- 5.17 We seek your views about whether it is appropriate for all statutory prohibitions to state a duration. The duration of a statutory prohibition could be specified by reference to a fixed or ascertainable period (such as a certain number of years) or to a future event (such as the conclusion of proceedings, the conclusion of an appeal or an appeal period, or the subject of the prohibition’s death).
- 5.18 If it is considered appropriate for all statutory prohibitions to state a duration, the duration for each prohibition should depend on the nature and purpose of the prohibition. The duration should be set at the minimum period required to achieve that purpose. This would align with our guiding principle that departures from open justice should take the least restrictive approach (see chapter 1).
- 5.19 However, it may not be appropriate for all statutory prohibitions to state a duration. Some statutory prohibitions may apply to particularly sensitive information that should be protected from publication or disclosure for a long, or indefinite, period of time. We seek your views about whether there are statutory prohibitions on publication or disclosure that may fall into this category.

Duration of certain prohibitions

- 5.20 **Proposals 5.5–5.6** set out specific recommendations about the duration of some statutory prohibitions that protect the identity of certain people.
- 5.21 Certain statutory prohibitions on publishing the identity of children and young people involved in certain types of proceedings (such as apprehended domestic violence order proceedings) should be amended so that they apply before, during and after proceedings (**Proposal 5.5(a)**). This is consistent with the aim of the prohibitions, including protecting children from stigma and promoting rehabilitation.¹³
- 5.22 In addition, these prohibitions should be amended so that they do not prohibit publishing the identity of the child or young person once they are deceased, as long as this publication does not identify another living person whose identity is protected (for example, a sibling of the deceased) (**Proposal 5.5(b)**). This is because some of the rationale, such as improving rehabilitation prospects, is no longer relevant following the person's death, and there are fewer privacy concerns.¹⁴ We seek your views as to whether the criminal conduct of a person while a child should be able to be published after their death, notwithstanding that they have been totally rehabilitated.

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.

- 5.23 The prohibition on publishing the identity of a sexual offence complainant does not apply to a publication made after a complainant's death.¹⁵ The prohibition should be amended so that it prohibits publication of a deceased complainant's identity (**Proposal 5.6**).
- 5.24 Some submissions highlight that complainants may want their identity protected even after death.¹⁶ The need to encourage reporting of sexual offences may justify applying the prohibition to the identity of deceased complainants. We also heard that

13. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Consultation Paper 22 (2020) [7.9].

14. See, eg, Advocate for Children and Young People, *Submission CI05*, 2–3; NSW Council for Civil Liberties, *Submission CI02*, 6.

15. *Crimes Act 1900* (NSW) s 578A(4)(f).

16. Rape and Domestic Violence Services Australia, *Submission CI08*, 6; knowmore, *Submission CI10*, 6; Office of the Director of Public Prosecutions, *Submission CI17*, 23.

sexual assault offences can have a significant impact on the complainant's family and community, beyond the person's life, particularly in Aboriginal and Torres Strait Islander communities.¹⁷

- 5.25 An exception should apply if the court grants leave for publication of the deceased complainant's identity, taking into consideration the complainant's views (if known), what they would have wanted if they were alive, and the views of their family (see **Proposal 5.13** below).

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.

Statutory prohibitions should be subject to exceptions

- 5.26 **Proposals 5.7–5.14** relate to exceptions to statutory prohibitions; that is, circumstances where disclosure or publication of the protected information is permitted. Currently, some statutory prohibitions that protect similar types of information do not include the same exceptions and others do not have any exceptions at all.

Exception for an official report of proceedings

- 5.27 Many statutory prohibitions have an exception if the publication or disclosure of the relevant information is in an official report of proceedings. This exception should be inserted into all statutory prohibitions that protect certain information in or relating to both court and tribunal proceedings (**Proposal 5.7**).
- 5.28 We also propose a uniform definition of this term (see chapter 3). We seek your views about whether there are any specific statutory prohibitions that should not include the proposed exception.

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.

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

- 5.29 When discussing exceptions related to consent, we use the term "identity" in place of "information likely to lead to the identification of a person".

17. Rape and Domestic Violence Services Australia, *Submission C108*, 6; knowmore, *Submission C110*, 6.

- 5.30 As a general principle, statutory prohibitions that prohibit the disclosure or publication of a person’s identity should contain a “consent exception” – that is:
- an exception enabling a court to grant leave for disclosure or publication of the person’s identity, and/or
 - a provision allowing the subject of the prohibition to give consent to their identity being revealed (**Proposal 5.8**).
- 5.31 This proposal supports our aim that people should be empowered to tell their stories, should they wish to and where possible (see chapter 1). However, we recognise there may be circumstances where only the court should be able to decide whether the prohibition should be lifted (for example, where there are concerns about the subject person’s capacity to consent or if the subject person is deceased).
- 5.32 There may also be some circumstances where the court should not be able to grant leave for publication of the person’s identity and nor should the subject person be able to consent (for example, if the prohibition applies to information identifying a person involved in a covert police operation).

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.

Limitations on consent exceptions in statutory prohibitions where proceedings are ongoing

- 5.33 Where proceedings are ongoing, we propose that the consent exceptions should be limited so that only the court can grant leave for the publication or disclosure of the person’s identity (**Proposal 5.9(a)**).
- 5.34 It is important for the court to exercise oversight in these circumstances, as revealing the person’s identity during proceedings could expose them to media scrutiny, which may cause stress and re-traumatisation. It could also risk disclosing the identity of other witnesses in the proceedings, which may pose a risk to the integrity of the trial.
- 5.35 The subject of a prohibition should be able to consent to the disclosure or publication of their identity once proceedings have concluded (**Proposal 5.9(b)**).
- 5.36 **Proposal 5.9** would apply in addition to **Proposal 5.8**, such that all statutory prohibitions that protect a particular person’s identity would be amended to include a consent exception and the limitation.

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.

5.37 Below, we have included some specific proposals relating to certain statutory prohibitions that prohibit the disclosure or publication of a person's identity. Our proposals are to include, or amend, the consent exception that enables a court to grant leave and/or the subject of the prohibition to give consent for disclosure or publication of their identity (**Proposals 5.10–5.14**).

5.38 There are a number of statutory prohibitions that we have not specifically addressed, which would be captured by **Proposals 5.8–5.9**. We seek your views about whether there are any specific statutory prohibitions where this approach would not be appropriate.

Consent exceptions in certain statutory prohibitions

5.39 Existing consent exceptions in various statutory prohibitions relating to the identity of children and young people should be amended, so that:

- Where a child is under 16 at the time of publication, their identity can be published if the court grants leave, after taking into account the child's wishes, considered in light of their age and understanding (**Proposal 5.10(a)**).
- Where a child is over 16 but under 18 at the time of publication, the child can consent to publication of their identity on the advice of an Australian legal practitioner (**Proposal 5.10(b)**). The legal practitioner:
 - must give advice about the implications of giving consent, and
 - does not have to be chosen by the child (for example, the lawyer could be a Legal Aid lawyer appointed to the child's case).
- Where a person is over the age of 18 at the time of publication, they can consent to the publication of their identity (without needing the court to grant leave or to obtain advice from an Australian legal practitioner) (**Proposal 5.10(c)**).

5.40 Our proposal is consistent with our aim of empowering people to tell their stories, should they wish to (see chapter 1). It seeks to strike a balance between allowing children and young people the autonomy to tell their stories, while ensuring their identity is not exposed before they fully understand the implications.

5.41 Children under the age of 16 are less likely to understand the long-term implications and may be more easily influenced. As such, oversight from a court is necessary to ensure their best interests can be considered and their views are taken into account. Children between the ages of 16 and 18 are likely to have greater comprehension of the risks involved in revealing their identity and to understand legal advice.

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

The consent exceptions in s 15D(1)(b) and s 15D(3) of the *Children (Criminal Proceedings) Act 1987* (NSW), s 45(4)(b) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW), s 105(3)(b)(i)–(ii) of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) and s 65(3)(b) of the *Young Offenders Act 1997* (NSW) should be amended to provide:

- (a) in the case of a child under the age of 16 at the time of publication, a court can grant leave for publication of the child's identity, taking into account the views of the child, considered in light of the child's age and understanding
- (b) in the case of a child over the age of 16 but under the age of 18 at the time of publication, the child can give consent to the publication of their identity on the advice of an Australian legal practitioner about the implications of giving consent, and
- (c) in the case of a person over the age of 18 at the time of publication, the person can give consent to the publication of their identity.

- 5.42 A consent exception should be added to the prohibition on publishing the identity of a participant involved in a declaration of parentage hearing (**Proposal 5.11**). This exception should be limited, as such matters may involve several people who are connected (and often related to) each other. As a result, identifying one person may identify another person in the same proceedings.
- 5.43 We propose that only people aged over 18 should be able to give consent to the publication of their identity. This is different to the consent exceptions in s 52(3)–(4) of the *Surrogacy Act 2010* (NSW) and s 180(4)–(5) of the *Adoption Act 2000* (NSW).¹⁸ These Acts allow the person with parental responsibility for the child to consent to the publication of the child's identity on their behalf. This would not be appropriate in a declaration of parentage hearing, where the identity of the person with parental responsibility may be the subject in dispute.
- 5.44 Additionally, this consent exception should only enable the court to grant leave or the person to give consent to publication if it does not identify another person who does not consent to being identified. This is similar to s 52(3)(b) of the *Surrogacy Act 2010* (NSW) and s 180(4)(b) of the *Adoption Act 2000* (NSW).

Proposal 5.11: Consent exception added to certain provisions protecting the identity of children and young people

Section 25 of the *Status of Children Act 1996* (NSW) should be amended to provide that:

- (1) A participant in a hearing for a declaration of parentage or annulment of a parentage order can give consent to publication of their identity if they are over the age of 18 at the time of publication.
- (2) A person cannot give consent under Proposal 5.11(1) if publication will result in the identification of another person who is a participant in the hearing and who has not consented to the publication of their identity.

18. *Adoption Act 2000* (NSW) s 180(5); *Surrogacy Act 2010* (NSW) s 52(4).

- 5.45 The consent exception for living complainants in sexual offence proceedings should be amended to provide that:
- where a complainant of a sexual offence is under 16 at the time of publication, their identity can be published if a court grants leave, after taking into account the complainant's views (**Proposal 5.12(1)(a)**)
 - where a complainant of a sexual offence is over 16 but under 18 at the time of publication, they can consent to publication of their identity on the advice of an Australian legal practitioner, whether or not of their own choosing (**Proposal 5.12(1)(b)**), and
 - where a complainant of a sexual offence is over the age of 18 at the time of publication, they can consent to the publication of their identity (**Proposal 5.12(1)(c)**).
- 5.46 A complainant aged 16 and older should not be permitted to give consent to publication of their identity if this will also lead to the identification of another complainant who:
- who has not given consent to publication, or
 - is not over the age of 18 (unless they are over 16 and have given consent on the advice of an Australian legal practitioner) (**Proposal 5.12(2)**).
- 5.47 This proposal aims to ensure that living sexual offence complainants who are children or young people have access to advice, either from the court or a legal practitioner, before they consent to their identity being published. This proposal is also consistent with the proposed consent exceptions to statutory prohibitions that protect the identity of children and young people (**Proposals 5.10–5.11**).

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

- (1) The consent exception in s 578A(4)(b) of the *Crimes Act 1900* (NSW) should be amended to provide:
- (a) in the case of a living complainant of a sexual offence, who is under the age of 16 at the time of publication, a court can grant leave to publish the complainant's identity, taking into account their views, considered in light of their age and understanding
 - (b) in the case of a living complainant of a sexual offence, who is over the age of 16, but under the age of 18, at the time of publication, the complainant can give consent to publishing their identity on the advice of an Australian legal practitioner about the implications of giving consent, and
 - (c) in the case of a living complainant over the age of 18 at the time of publication, the complainant can give consent to publication of their identity.
- (2) A living complainant cannot give consent under Proposal 5.12(1) if publication will result in the identification of another complainant:
- (a) who does not give consent to the publication of their identity, or

(b) 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

- 5.48 In relation to a complainant of a sexual offence who is deceased, a court should be able to grant leave for publication of their identity, having regard to the wishes of the complainant (either actual or anticipated) and their family (**Proposal 5.13**).
- 5.49 The court should be required to consider what the complainant would have wanted had they been alive (**Proposal 5.13(a)(ii)**). This approach acknowledges that the complainant may not have explicitly discussed whether they would want their identity to be published before their death. However, the court may be able to infer what they would have done based on their known views, values and attitudes.
- 5.50 The court cannot grant leave for publication of a deceased complainant's identity if this would also lead to the identification of another complainant who:
- who has not given consent to publication, or
 - is not over the age of 18 (unless they are over 16 and have given consent on the advice of an Australian legal practitioner) (**Proposal 5.15(c)**).

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.

- 5.51 **Proposal 5.14** relates to the exception to the prohibition on publishing the identity of a person involved in MHRT proceedings and NCAT proceedings, where the MHRT or NCAT grants leave for publication of the person's identity.
- 5.52 The exception should be amended so that, if the person to be identified is the subject of proceedings, the tribunal must consider whether the person consents to publication, (in light of the person's capacity to consent) (**Proposal 5.14(1)(a)** and **Proposal 5.14(2)(a)**). This proposal aims to ensure the person has some autonomy in the process, even if they do not have the capacity to give consent themselves.
- 5.53 The tribunal should also be able to consider any other factor that it considers relevant (**Proposal 5.14(1)(b)** and **Proposal 5.14(2)(b)**). We note that these prohibitions are

broad and protect the identity of anyone who appears or is otherwise mentioned in proceedings (for example, medical professionals who are witnesses).

Proposal 5.14: Consent exception in relation to publishing the identity of a person involved in mental health, guardianship or community welfare proceedings

- (1) Section 162 of the *Mental Health Act 2007* (NSW) should be amended to provide that, in deciding whether to consent to publication of the identity of a person involved in proceedings before the Mental Health Review Tribunal, the Tribunal must consider:
 - (a) if the person to be identified is the person to whom the proceedings relate, whether that person consents to publication, considered in light of the person's capacity to give consent, and
 - (b) any other factor that the Tribunal considers relevant.
- (2) Section 65 of the *Civil and Administrative Tribunal Act 2013* (NSW) should be amended to provide that, in deciding whether to consent to publication of the identity of a person involved in proceedings before the NSW Civil and Administrative Tribunal, the Tribunal must consider:
 - (a) if the person to be identified is the person to whom the proceedings relate, whether that person consents to publication, considered in light of the person's capacity to give consent, and
 - (b) any other factor that the Tribunal considers relevant.

6. Other powers to make non-publication and suppression orders

6.1 In this chapter, we outline our proposals relating to other powers that enable courts and tribunals to make non-publication and suppression orders. By “other powers”, we mean those that are contained in subject-specific legislation and apply in specific circumstances. They are separate to those we propose be included in a new Act (see chapter 1).

6.2 We deal first with courts, before turning to tribunals. Aside from **Proposals 6.9–6.10**, we do not propose that any of the other proposals in this chapter apply to tribunals. We seek your views on whether this is appropriate or if tribunal-specific legislation should be amended in additional ways.

Court powers to make non-publication and suppression orders

6.3 The proposals below relate to powers of courts to make non-publication and suppression orders that are contained in subject-specific legislation and apply in specific contexts. We propose that powers to make non-publication and suppression orders contained in subject-specific legislation should be amended in a uniform way.

6.4 The aim of **Proposals 6.1–6.8** is to achieve some consistency between these statutes and the non-publication and suppression provisions in the new Act. As these matters are largely procedural in nature, we see no reason for them to differ across the statutes. **Proposals 6.1–6.8** reflect our guiding principle that any legislation that departs from the principle of open justice should be uniform and consistent (see chapter 1).

6.5 As with the new Act proposed in chapter 4, provisions in existing subject-specific legislation that relate to non-publication and suppression orders should:

- Outline the procedures (**Proposal 6.1**) including who can apply for, appear, and be heard in an application. Many existing statutes do not detail the procedure for making these orders.¹ Amending these statutes in a uniform way is meant to provide clear guidance to interested parties.
- Provide that a court must specify the geographic application of the non-publication or suppression order (**Proposal 6.2**). A court would be able to make an order that applies outside the Commonwealth, where necessary.

1. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Consultation Paper 22 (2020) [4.35], [4.37]–[4.38].

- Provide that a court must specify the duration of an order and that orders cannot apply indefinitely (**Proposal 6.3**). This is intended to provide certainty and ensure that orders operate only as long as is necessary.
- Require a court to give reasons for non-publication and suppression orders when requested by people who have standing to appear and be heard in applications, reviews and appeals (**Proposal 6.4**). This would enable interested people to understand why an order has been made and facilitate reviews and appeals. This proposal would not apply where an order is required to be made by statute, as opposed to being a discretionary power.²
- Outline the procedures for reviews of orders (**Proposal 6.5**). An express review power would allow a court to examine whether an order should have been made in a particular case or should continue to operate. This should help to ensure orders are only made or only operate where appropriate in the circumstances of the case.
- Outline the procedures for the appeal of orders (**Proposal 6.6**). This includes specifying the relevant appellate court for each original court.
- Provide that costs cannot be awarded in proceedings, except where a person's involvement in the application is frivolous or vexatious (**Proposal 6.7**).

6.6 We also propose including a requirement for courts to consider the public interest in open justice before making a non-publication or suppression order (**Proposal 6.8**). This is meant to ensure orders are only made where necessary and appropriate.

6.7 We do not propose that the grounds for making non-publication and suppression orders be made uniform across the statutes. Such grounds should remain specific to the circumstances in which the power operates. This is consistent with our aim of retaining unique provisions in existing statutes where appropriate (see chapter 1).

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

2. See, eg, *Law Enforcement (Controlled Operations) Act 1997* (NSW) s 28(1)(b); *Law Enforcement and National Security (Assumed Identities) Act 2010* (NSW) s 34(1)(b).

- (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.

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) 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.

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

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.

Proposal 6.5: Reviews of non-publication and suppression orders

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

- (1) The court that made an 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.

Proposal 6.6: Appeals 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:

- (2) 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 subject of appeal.
- (5) On appeal, a court may confirm, vary or revoke the order.
- (6) An appeal is to be by way of rehearing, and fresh evidence may be given by leave.

- (7) 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).

Proposal 6.7: Costs in proceedings for non-publication or suppression orders

Subject-specific legislation containing powers to make non-publication and suppression orders should be amended to provide that a court must not make a costs order against a person in proceedings for the application, review or appeal of an order unless the court is satisfied that the person's involvement in the application is frivolous or vexatious.

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.

Tribunal powers to make non-publication and suppression orders

- 6.8 We also propose some amendments to the powers of the NSW Civil and Administrative Tribunal ("NCAT") and the Mental Health Review Tribunal ("MHRT") to make suppression and non-publication orders, contained in s 64 of the *Civil and Administrative Tribunal Act 2013* (NSW) ("*Civil and Administrative Tribunal Act*") and s 151(4)(b)–(d) of the *Mental Health Act 2007* ("*Mental Health Act*").
- 6.9 Section 64 of the *Civil and Administrative Tribunal Act* and s 151 of the *Mental Health Act* should be amended to require orders to specify their duration and prohibit orders from operating indefinitely (**Proposal 6.9**). This is the same as **Proposal 6.3**, which applies to orders made by courts. The rationales for this proposal, including providing greater certainty and ensuring orders do not operate for longer than necessary, apply equally to orders made by tribunals.
- 6.10 The NCAT and the MHRT should be able to make procedural rules in relation to applications, reviews and appeals of orders (**Proposal 6.10**). This proposal is meant to provide greater clarity for people involved in tribunal proceedings or who are the subject of orders. It may, for example, help them to understand the mechanisms available to them to seek a review.
- 6.11 **Proposal 6.10** does not prescribe the content of such rules. Given that tribunals are specialised jurisdictions and operate differently from courts, it is important that tribunals are allowed flexibility in setting their own procedures.

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

Proposal 6.10: Procedures for making non-publication and suppression orders

The NSW Civil and Administrative Tribunal and the Mental Health Review Tribunal should be able to make procedural rules for applications, reviews and appeals of orders.

7. Requirements and other powers to make exclusion orders

- 7.1 In this chapter, we outline our proposals relating to other requirements and powers to make exclusion orders. By this, we mean requirements and powers to make exclusion orders that are contained in subject-specific legislation and apply in specific contexts. These are separate to the powers to make exclusion orders that we propose be included in a new Act (see chapter 4).
- 7.2 As we discuss in chapter 1, exclusion orders are orders to physically exclude certain people from the whole or any part of proceedings. Unlike closed court orders, exclusion orders do not have the effect of suppression (prohibiting disclosure or publication of information given in proceedings) (see chapter 1).
- 7.3 As we discuss in chapter 1, there are two situations where exclusion orders arise:
- Situations where a court *must* make an exclusion order: in these cases, it is mandatory for a court to make an exclusion order. There are limited circumstances where the court has discretion to order otherwise. We also refer to these as “requirements to make an exclusion order”.¹
 - Situations where a court *may* make an exclusion order: in these cases, a court has discretion to make an exclusion order, but is not required to do so. We also refer to these as “powers to make an exclusion order”.²
- 7.4 The proposals in this chapter apply only to exclusion orders in court proceedings. They would not apply to exclusion orders in tribunal proceedings. We seek your views on whether this is appropriate. We discuss our approach to courts and tribunals further in chapter 2.

Where a court must make an exclusion order

- 7.5 **Proposals 7.1–7.5** apply to existing or proposed requirements to make an exclusion order, which are contained in subject-specific legislation and apply in specific contexts.

1. See, eg, *Children (Criminal Proceedings) Act 1987* (NSW) s 10(1)(a); *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 104B.

2. See, eg, *Court Security Act 2005* (NSW) s 7(1); *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 104(1)–(2).

Meaning and effect of a requirement to make an exclusion order

- 7.6 **Proposal 7.1** is for existing subject-specific legislation that provides that a specified person or class of people must be excluded from the whole or any part of proceedings to be amended to:
- provide that a court *must* make an exclusion order in these cases, and
 - define an “exclusion order” as an order to exclude a specified person or class of people from the whole or any part of the proceedings, and that does not, of itself, restrict or prohibit the disclosure (by publication or otherwise) of information in that part of the proceedings.
- 7.7 Currently, some provisions state that a specified person or class of persons “must be excluded” from the proceedings. Our proposal for the provisions to instead provide that a court must make an exclusion order in these cases, is not intended to change the practical effect of these provisions. For example, a court would not be given discretion *not* to make an exclusion order if it does not have such discretion currently.
- 7.8 Instead, our proposal is meant to ensure that legislation is expressed in a consistent way. This aligns with our aim to achieve uniformity in terminology and definitions to ensure consistency across different statutes (see chapter 1).

Proposal 7.1: Where a court must make an exclusion order

Legislation that provides that a specified person or class of people must be excluded from the whole or any part of proceedings should be amended to provide that:

- (a) a court must make an “exclusion order” in those proceedings or part thereof, and
- (b) an “exclusion order”:
 - (i) means an order to exclude a specified person or class of people from the whole or any part of the proceedings, and
 - (ii) does not, of itself, restrict or prohibit the disclosure (by publication or otherwise) of information in that part of the proceedings.

Requirement to make an exclusion order in children’s criminal proceedings for traffic offences

- 7.9 **Proposal 7.2** provides for a requirement to make an exclusion order in traffic offence proceedings against a child. Currently, members of the public are generally excluded from criminal proceedings against a child.³ However, this does not apply to traffic offence proceedings (except in some cases).⁴
- 7.10 The justification for the current approach is that any child old enough to drive should be dealt with in the same way as an adult. In other words, because the ability to obtain a licence is a privilege extended to adults, all traffic offenders should be dealt with as adults.

3. *Children (Criminal Proceedings) Act 1987* (NSW) s 10(1)(a).

4. *Children (Criminal Proceedings) Act 1987* (NSW) s 10(3).

- 7.11 However, allowing members of the public to be present in traffic offence proceedings may cause distress to child defendants. Providing that an exclusion order must be made in such cases aligns with the principle that departures from open justice are appropriate to protect vulnerable people, such as children involved in court proceedings (see chapter 1). Further, some children charged with traffic offences may not in fact be legally old enough to drive.

Proposal 7.2: Requirement to make an exclusion order in children’s criminal proceedings

Section 10 of the *Children (Criminal Proceedings) Act 1987* (NSW) should be amended to provide that a court must make an exclusion order (in the terms of s 10(1)) in proceedings for a traffic offence (heard in any court) to which a child is a party.

Requirement to make exclusion orders instead of closed court orders in certain proceedings

- 7.12 **Proposals 7.3–7.5** are for certain provisions that use closed court language to be treated as requirements to make *exclusion orders* instead. These are provisions in:
- adoption proceedings, proceedings relating to a declaration of parentage, proceedings concerning surrogacy arrangements, and apprehended violence order proceedings involving children⁵
 - domestic violence offence proceedings and apprehended domestic violence order proceedings,⁶ and
 - proceedings for a prescribed sexual offence.⁷
- 7.13 Under our proposed approach, while the general public would still be excluded from these proceedings, journalists would be able to be present (unless the court directs otherwise). This is to enable journalists to report on such proceedings. Publicity concerning proceedings involving children, domestic violence and sexual offending is often in the public interest. Facilitating media access to and reporting of these proceedings may generate public awareness and discussion of these issues, encourage reporting of offences and reduce the stigma that might otherwise lead to underreporting.
- 7.14 **Proposals 7.3–7.5** also align with existing requirements to make exclusion orders applying to proceedings involving children, which contain exceptions for the media.⁸

5. *Adoption Act 2000* (NSW) s 119(1); *Status of Children Act 1996* (NSW) s 24(1); *Surrogacy Act 2010* (NSW) s 47; *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 41(2), s 41AA(1), s 58(1)(a).

6. *Criminal Procedure Act 1986* (NSW) s 289U(1).

7. *Criminal Procedure Act 1986* (NSW) s 291(1); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30I(1).

8. *Children (Criminal Proceedings) Act 1987* (NSW) s 10(1)(b); *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 104C.

- 7.15 All of the proceedings to which **Proposals 7.3** and **7.5** relate have existing prohibitions on publishing the identity of people involved in these proceedings.⁹ We do not propose to remove these prohibitions. This means that while the media would be allowed to be present in these proceedings, the identities of participants could not be published. A court could also make non-publication or suppression orders over other aspects of the proceedings (for example, evidence given in the proceedings), either under existing legislation or under the new Act (see chapter 4). This approach balances the privacy of participants in these proceedings with the ability for such proceedings to be reported.
- 7.16 **Proposals 7.3–7.5** would create a significant change to the existing law. We seek your views on whether this desirable or whether other options may be more appropriate; for example, whether these provisions should be converted to a discretionary power to make an exclusion order, rather than a requirement to do so.
- 7.17 There is currently a requirement to close the court where a complainant gives evidence in domestic violence offence or apprehended domestic violence order (“ADVO”) proceedings, but the latter only applies if the defendant in the proceedings is a person charged with a domestic violence offence and the protected person is the alleged victim of the offence.¹⁰ In **Proposal 7.4**, as well as proposing that this is converted to a requirement to make an exclusion order, we also propose that it extends to *all* ADVO proceedings. This is a departure from the existing law.¹¹ This ensures there are equal protections for complainants in all domestic violence offence and ADVO proceedings.

Proposal 7.3: Requirement to make an exclusion order in certain proceedings concerning children

Section 119 of the *Adoption Act 2000* (NSW), s 24 of the *Status of Children Act 1996* (NSW), s 47 of the *Surrogacy Act 2010* (NSW) and s 41, s 41AA and s 58 of the *Crimes (Domestic and Personal Violence) Act 2007* should be amended to:

- (a) require a court to make an order that all people (other than journalists and those whose presence is required for the purposes of the proceedings) are to be excluded from the proceedings, unless the court directs otherwise
- (b) allow the court to direct that a person (other than a journalist or a person whose presence is required for the purposes of the proceedings) may enter or remain in the whole or any part of proceedings if the court is satisfied that special reasons in the interests of justice require them to be present in the whole or any part of the proceedings
- (c) provide that the principle that proceedings should generally be open or public in nature, or that justice should be seen to be done, does not of itself constitute special reasons in the interests of justice requiring a person (other than a journalist or a person whose presence is required for the purposes of the proceedings) to be present in the whole or any part of the proceedings, and

9. *Adoption Act 2000* (NSW) s 180(1); *Status of Children Act 1996* (NSW) s 25; *Surrogacy Act 2010* (NSW) s 52(1); *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 45(1); *Crimes Act 1900* (NSW) s 578A(2).

10. *Criminal Procedure Act 1986* (NSW) s 289T(1)(b), s 289U(1).

11. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 58(1)(b).

- (d) provide that a journalist is entitled to enter or remain in the proceedings, unless the court directs otherwise.

Proposal 7.4: Requirement to make an exclusion order in domestic violence related proceedings

Section 289U of the *Criminal Procedure Act 1986* (NSW) (in relation to domestic violence offence proceedings) should be amended, and a new section in the *Crimes (Domestic and Personal Violence Act) 2007* (NSW) (in relation to apprehended domestic violence order proceedings, whether or not they are connected to domestic violence offence proceedings) should be added, to:

- (a) require a court to make an order that all people (other than journalists and those whose presence is required for the purposes of proceedings) are to be excluded from any part of the proceedings in which the complainant gives evidence, or a recording of the complainant's evidence is heard, unless the court directs otherwise
- (b) allow the court to direct that a person (other than a journalist or a person whose presence is required for the purposes of proceedings) may enter or remain in part of proceedings if:
 - (i) the court is satisfied that special reasons in the interests of justice require them to be present in that part of the proceedings, or
 - (ii) the complainant consents
- (c) provide that the principle that proceedings should generally be open or public in nature, or that justice should be seen to be done, does not of itself constitute special reasons in the interests of justice requiring a person (other than a journalist or a person whose presence is required for the purposes of the proceedings) to be present in the part of the proceedings
- (d) provide that, unless the court directs otherwise, a journalist is entitled to be present in the courtroom from which the public has been excluded if the complainant's evidence is given via a recording, and
- (e) allow a court to make such arrangements as the court considers reasonably practicable to allow journalists to view or hear the complainant's evidence while it is given, or a recording of the evidence, so long as they are not present in the courtroom or other place where the evidence is given.

Proposal 7.5: A requirement to make an exclusion order in prescribed sexual offence proceedings

Section 291 of the *Criminal Procedure Act 1986* (NSW) and s 30I of the *Crimes (Sentencing Procedure) Act 1999* (NSW) should be amended to:

- (a) require a court to make an order that all people (other than journalists and those whose presence is required for the purposes of proceedings) are to be excluded from any part of the proceedings in which:
 - (i) the complainant gives evidence
 - (ii) an audio visual recording of the complainant's evidence is heard by the court, or
 - (iii) the complainant reads out their victim impact statementunless the court directs otherwise
- (b) allow the court to direct that a person (other than a journalist or a person whose presence is required for the purposes of proceedings) may enter or remain in that part of the proceedings if:

- (i) the court is satisfied that special reasons in the interests of justice require them to be present in that part of the proceedings, or
- (ii) the complainant consents to this
- (c) provide that the principle that proceedings for an offence should generally be open or public in nature, or that justice should be seen to be done, does not of itself constitute special reasons in the interests of justice requiring a person (other than a journalist or a person whose presence is required for the purposes of proceedings) to be present in that part of the proceedings
- (d) provide that, unless the court directs otherwise, a journalist is entitled to be present in the courtroom from which the public has been excluded if the complainant's evidence is given via a recording, and
- (e) allow the court to make such arrangements as the court considers reasonably practicable to allow journalists to view or hear the complainant's evidence or victim impact statement while it is given, or a record of the evidence or victim impact statement, so long as they are not present in the courtroom or other place where the evidence is given or the victim impact statement is read.

Where a court may make an exclusion order

7.18 **Proposals 7.6–7.16** apply to existing or proposed discretionary powers to make an exclusion order, which are contained in subject-specific legislation and apply in specific contexts.

Amending powers to make exclusion orders in a uniform way

7.19 We propose that subject-specific legislation containing powers to make exclusion orders should be amended in a uniform way. The aim is to achieve some consistency between these statutes and provisions relating to exclusion orders in the new Act. As these matters are largely procedural in nature, we see no reason for them to differ across statutes. This also aligns with the principle that any legislation that departs from the principle of open justice should be uniform and consistent (see chapter 1).

7.20 Like the new Act, subject-specific legislation containing powers to make exclusion orders should:

- Use the term “exclusion order” and clarify that an “exclusion order” means an order to exclude a specified person or class of people from the whole or any part of proceedings, and does not, of itself, restrict or prohibit the disclosure (by publication or otherwise) of information in that part of proceedings (**Proposal 7.6**).
- Outline the procedures for making these orders (**Proposal 7.7**), which specify who may apply for them and who may be heard in an application. Many existing statutes do not clearly state when and how exclusion orders can be applied for. Amending these in a uniform way would provide clear guidance to interested parties.
- Require the court to specify the period for which an order applies (**Proposal 7.8**). This would provide further clarity about the scope and effect of an order, which may improve understanding and compliance. It would also ensure that orders operate for only as long as is necessary.

- Require the court to give reasons for making an order, when requested by certain people who are entitled to make such a request (**Proposal 7.9**). This may help to ensure orders are only made when required and could facilitate appropriate review applications.
- Allow exclusion orders to be reviewed (**Proposal 7.10**). An express review power would enable courts to examine whether an order should have been made in a particular case or should continue to operate. This should help to ensure orders are only made or only operate where appropriate in the circumstances of the case.
- Provide that costs are generally not awardable in proceedings for the application or review of an exclusion order, except where a person’s involvement in the application is frivolous or vexatious (**Proposal 7.11**). This is intended to ensure the risk of a costs order does not discourage people from seeking reviews of orders.

7.21 We also propose including a requirement for courts to consider the public interest in open justice before making an exclusion order (**Proposal 7.12**). This would ensure courts consider whether making an exclusion order is necessary and appropriate.

7.22 We do not propose the grounds for making exclusion orders should be made uniform across statutes. These grounds should be tailored to the circumstances in which the power operates.

Proposal 7.6: Meaning and effect of an exclusion order

Subject-specific legislation that provides that a specified person or class of people may be excluded from the whole or any part of proceedings should be amended to provide that:

- a court may make an “exclusion order” in those proceedings or part thereof, and
- an “exclusion order”:
 - means an order to exclude a specified person or class of people from the whole or any part of proceedings, and
 - does not, of itself, restrict or prohibit the disclosure (by publication or otherwise) of information in that part of proceedings.

Proposal 7.7: Procedure for making exclusion orders

Subject-specific legislation containing powers to make exclusion orders should be amended to provide that:

- A court may make an order on its own initiative or on the application of:
 - a party to the proceedings concerned, or
 - any other person that the court considers has a sufficient interest in the making of the order.
- 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 7.7(1)(a)–(b):
 - the applicant for the order
 - 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 proceedings.
 - (4) An order can be made subject to such exceptions or conditions as the court sees fit.

Proposal 7.8: Duration of exclusion orders

Subject-specific legislation containing powers to make exclusion orders should be amended to provide that:

- (1) An exclusion order must specify the period for which the order operates.
- (2) 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.
- (3) The period for which an order operates is to be determined by reference to:
 - (a) a fixed or ascertainable period, or
 - (b) the occurrence of a specified future event.

Proposal 7.9: Requirement to give reasons on request

Subject-specific legislation containing powers to make exclusion 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 in whether an order should have been made or should continue to operate.

Proposal 7.10: Reviews of exclusion orders

Subject-specific legislation containing powers to make exclusion orders should be amended to provide that:

- (1) The court that made an 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

- (f) a journalist or legal representative of a news media organisation, and
 - (g) 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.

Proposal 7.11: Costs in proceedings for exclusion orders

Subject-specific legislation containing powers to make exclusion orders should be amended to provide that a court must not make a costs order against a person in proceedings for the application or review of an order unless the court is satisfied that the person's involvement in the application is frivolous or vexatious.

Proposal 7.12: Safeguarding the public interest in open justice

Subject-specific legislation containing powers to make exclusion 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.

Exclusion orders in criminal proceedings against a child

- 7.23 **Proposal 7.13** applies to an existing power to exclude a person from criminal proceedings to which a child is a party during the examination of a witness. Currently, a court is only required to consider the interests of the child defendant before exercising this power.¹²
- 7.24 We propose that the court be required to also consider the interests of the witness, if the witness is a child. This may assist courts to consider whether exclusion orders are necessary in some cases, for example, to assist a child witness in giving evidence. This also aligns with the principle that departures from open justice are appropriate to protect vulnerable people (see chapter 1).

Proposal 7.13: Exclusion orders in criminal proceedings against a child

Section 10(2) of the *Children (Criminal Proceedings) Act 1987* (NSW) should be amended to provide that the court, in deciding whether to exclude a person (other than the child defendant, a family victim or other person who is directly interested in the proceedings) from the proceedings during the examination of any witness, must consider:

- (a) the interests of the child defendant, and
- (b) if the witness is a child, the interests of that child witness.

12. *Children (Criminal Proceedings) Act 1987* (NSW) s 10(2).

Powers to make exclusion orders instead of closed court orders in certain proceedings

- 7.25 **Proposals 7.14–7.16** are to reclassify certain powers currently classified as powers to make closed court orders as powers to make exclusion orders. These are powers to make closed court orders in:
- domestic violence offence proceedings and apprehended domestic violence order proceedings¹³
 - proceedings for a prescribed sexual offence,¹⁴ and
 - proceedings in which a victim reads out a victim impact statement.¹⁵
- 7.26 The purpose of all of these powers is to reduce distress or trauma to participants in the proceedings, rather than to protect the secrecy or confidentiality of evidence or other information in the proceedings, for example. This purpose can be achieved by making an order to exclude members of the public from the proceedings.
- 7.27 It is not necessary to make a closed court order, which also prohibits disclosure (including by publication) of information in the closed proceedings. Where appropriate, the identity of the participant is separately protected by suppression orders or requirements.
- 7.28 There is currently a power to close domestic violence offence or apprehended domestic violence order (“ADVO”) proceedings other than when the complainant gives evidence or a recording of their evidence is heard. However, the latter only applies if the defendant in the proceedings is a person charged with a domestic violence offence and the protected person is the alleged victim of the offence.¹⁶
- 7.29 In **Proposal 7.14**, as well as proposing that this power be converted to a power to make an exclusion order, we also propose that it be extended to *all* ADVO proceedings. This would be a departure from the existing law.¹⁷ It is meant to ensure there are equal protections for all complainants in all domestic violence offence and ADVO proceedings. This proposal corresponds with and supplements **Proposal 7.4** above.

Proposal 7.14: Exclusion orders in domestic violence related proceedings

(1) Section 289UA of the *Criminal Procedure Act 1986* (NSW) (in relation to domestic violence offence proceedings) should be amended, and a new section in the *Crimes (Domestic and Personal Violence Act) 2007* (NSW) (in relation to apprehended domestic violence order proceedings, whether or not they are connected to domestic violence offence proceedings) should be added, to:

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13. *Criminal Procedure Act 1986* (NSW) s 289UA(1).
 14. *Criminal Procedure Act 1986* (NSW) s 291A(1).
 15. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30K(1).
 16. *Criminal Procedure Act 1986* (NSW) s 289T(1)(b), s 289UA(1).
 17. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 58(1)(b).

- (a) allow the court to make an exclusion order in any part of proceedings, in addition to those parts in which the complainant is giving evidence or the court is hearing a recording of the complainant's evidence (where the court is already required to make an exclusion order)
 - (b) allow such an order to be made on the court's own motion or at the request of a party to the proceedings, and
 - (c) require the court, in determining whether to make such an order, to consider:
 - (i) the need of the complainant to have any person excluded from those proceedings
 - (ii) the need of any party to have any person present in those proceedings
 - (iii) the interests of justice, and
 - (iv) any other matter that the court considers relevant.
- (2) This power to make an exclusion order should not affect:
- (a) the requirement to make an exclusion order under s 289U of the *Criminal Procedure Act 1986* (NSW)
 - (b) the complainant's entitlement under s 306ZQ of the *Criminal Procedure Act 1986* (NSW) to have a support person present when giving evidence, or
 - (c) a vulnerable person's entitlement under s 306ZK of the *Criminal Procedure Act 1986* (NSW) to have a support person present when giving evidence.

Proposal 7.15: Exclusion orders in sexual offence proceedings

- (1) Section 291A of the *Criminal Procedure Act 1986* (NSW) should be amended to:
- (a) allow the court to make an exclusion order in any part of proceedings, in addition to those parts in which the complainant is giving evidence or the court is hearing a recording of the complainant's evidence (where the court is required to make an exclusion order)
 - (b) allow such an order to be made on the court's own motion or at the request of a party to the proceedings, and
 - (c) require the court, in determining whether to make such an order, to consider:
 - (i) the need of the complainant to have any person excluded from the proceedings
 - (ii) the need of any party to have any person present in the proceedings
 - (iii) the interests of justice, and
 - (iv) any other matter that the court considers relevant.
- (2) This power to make an exclusion order should not affect:
- (a) the requirement to make an exclusion order under s 291 of the *Criminal Procedure Act 1986* (NSW) when the complainant gives evidence
 - (b) the complainant's entitlement under s 294C of the *Criminal Procedure Act 1986* (NSW) to have a support person present when giving evidence, or
 - (c) a vulnerable person's entitlement under s 306ZK of the *Criminal Procedure Act 1986* (NSW) to have a support person present when giving evidence.

Proposal 7.16: Exclusion orders where a victim reads a victim impact statement

Section 30K of the *Crimes (Sentencing Procedure) Act 1999* (NSW) should be amended to provide that:

- (1) The court may make an exclusion order in any part of proceedings in which a victim reads out a victim impact statement.
- (2) In determining whether to make such an order, the court must consider whether the order is necessary to avoid causing undue distress or embarrassment to the victim.
- (3) This power to make an exclusion order does not affect protective provisions that apply to a victim in proceedings for a prescribed sexual offence.

8. Requirements and other powers to make closed court orders

- 8.1 In this chapter, we outline our proposals relating to other requirements and powers to make closed court orders. By this, we mean requirements and powers to make orders to close a court that are contained in subject-specific legislation and apply in specific contexts. These are separate to the powers to make closed court orders that we propose be included in a new Act (see chapter 4).
- 8.2 As we discuss in chapter 1, closed court orders are orders to exclude all people from the whole or any part of the proceedings, except those whose presence is required for the purposes of the proceedings. They also have the effect of suppression (prohibiting disclosure, including by publication), of information given in the closed proceedings.
- 8.3 In this chapter we differentiate between two situations where closed court orders arise:
- Situations where a court *must* make a closed court order: in these cases, it is mandatory for a court to make a closed court order. There are limited circumstances where the court has discretion to order otherwise. We also refer to these as “requirements to make a closed court order”.¹
 - Situations where a court *may* make a closed court order: in these cases, a court has discretion to make a closed court order but is not required to do so. We also refer to these as “powers to make a closed court order”.²
- 8.4 The proposals in this chapter only apply to closed court orders in court proceedings. They do not apply to closed court orders in tribunal proceedings. We seek your views on whether this is appropriate. We discuss the differential approach to courts and tribunals in chapter 2.

Where a court must make a closed court order

- 8.5 **Proposal 8.1** applies to existing subject-specific legislation that provides that the whole or any part of proceedings must be closed.
- 8.6 **Proposal 8.1** is for legislation to be amended to:

1. See, eg, *Crimes (Appeal and Review) Act 2001* (NSW) s 108(5); *Supreme Court Act 1970* (NSW) s 101A(7); *Witness Protection Act 1995* (NSW) s 26(1)(a).

2. See, eg, *Witness Protection Act 1995* (NSW) s 26(2); *Evidence Act 1995* (NSW) s 126E(a).

- provide that a court *must* make a closed court order in these cases, and
 - define a “closed court order” as an order that excludes all people from the whole or any part of proceedings, except those whose presence is required for the purposes of proceedings, and has the effect of prohibiting information in that part of proceedings from being disclosed (by publication or otherwise).
- 8.7 Currently, some legislation uses expressions such as “in camera”, “in private” or “in the absence of the public”. Our proposal for the legislation to instead provide that a court must make a “closed court order” in these cases is not intended to change the practical effect of these provisions. For example, a court would not be given discretion *not* to make a closed court order if it does not have such discretion currently.
- 8.8 Instead, our proposal is meant to ensure that legislation is expressed in a consistent way. This aligns with our aim to achieve uniformity in terminology and definitions to ensure consistency across different statutes (see chapter 1).
- 8.9 **Proposal 8.1** would not apply to existing requirements that use closed court language that we propose be treated clearly as requirements to make an exclusion order instead (**Proposals 7.3–7.5**).

Proposal 8.1: Where a court must make a closed court order

Legislation that provides that the whole or any part of the proceedings must be closed should be amended to provide that:

- (a) a court must make a “closed court order” in those proceedings or part thereof, and
- (b) a “closed court order” means an order that:
 - (i) excludes all people from the whole or any part of proceedings, except those whose presence is required for the purposes of proceedings, and
 - (ii) has the effect of prohibiting information in that part of the proceedings from being disclosed (by publication or otherwise).

Where a court may make a closed court order

- 8.10 **Proposals 8.2–8.9** apply to discretionary powers to make a closed court order, which are contained in subject-specific legislation and apply in specific contexts.
- 8.11 We propose that these should be amended in a uniform way to achieve consistency between these statutes and the closed court provisions in the new Act. As these matters are largely procedural in nature, we see no reason for them to differ across the statutes. This also aligns with the principle that any legislation that departs from the principle of open justice should be uniform and consistent (see chapter 1).
- 8.12 As in the new Act proposed in chapter 4, subject-specific legislation containing powers to make closed court orders should:
- Use the term “closed court order” and define this term (**Proposal 8.2**). It is clearer and simpler for all powers to make closed court orders to use the same language.

- Outline the procedures for making these orders (**Proposal 8.3**), which specify who may apply for them and who may be heard in an application (including journalists). Many existing statutes do not clearly state when and how closed court orders can be applied for. Amending these in a uniform way would provide clear guidance to interested parties.
- Require closed court orders to 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. The legislation should also provide that unless the court orders otherwise, a closed court order has the effect of prohibiting all information in that part of the proceedings from being disclosed (by publication or otherwise) anywhere inside, or outside, the Commonwealth (**Proposal 8.4**). This would provide further clarity about the scope and effect of an order, which may improve understanding and compliance.
- Require the court to give reasons for making an order, when requested by certain people who are entitled to make such a request (**Proposal 8.5**). This may help to ensure orders are only made when required and could facilitate appropriate review applications.
- Outline the procedures for reviews of orders (**Proposals 8.6**). An express review power would allow a court to re-examine whether an order should have been made in a particular case or should continue to operate. This could help to ensure orders are only made or only operate where appropriate in the circumstances of the case.
- Provide that costs are generally not awardable in proceedings for the application or review of a closed court order, except where a person's involvement in the application is frivolous or vexatious (**Proposal 8.7**). This is intended to ensure the risk of a costs order does not discourage people from seeking a review of an order.
- Include a requirement for courts to post a notice of a closed court order (**Proposal 8.8**), to ensure awareness of it and reduce the likelihood of a breach.

8.13 We also propose including a requirement for courts to consider the public interest in open justice before making a closed court order (**Proposal 8.9**). This would ensure courts consider whether making a closed court order is necessary and appropriate in the circumstances. It may also encourage courts to consider whether a less restrictive approach would be more appropriate.

8.14 We do not propose the grounds for making closed court orders should be made uniform across the statutes. We consider it appropriate for different grounds to apply, depending on the circumstances in which the power operates. This aligns with our aim to retain provisions in existing statutes that recognise special circumstances (see chapter 1).

Proposal 8.2: Meaning and effect of a closed court order

Subject-specific legislation that provides that a court may hold proceedings in “closed court”, “in camera”, “in private” or “in the absence of the public”, should be amended to provide that:

- (a) a court may make a “closed court order” in those proceedings or part thereof, and
- (b) a “closed court order” means an order that:
 - (i) excludes all people from the whole or any part of proceedings, except those whose presence is required for the purposes of proceedings, and
 - (ii) has the effect of prohibiting information in that part of proceedings from being disclosed (by publication or otherwise).

Proposal 8.3: Procedure for making closed court orders

Subject-specific legislation containing powers to make closed court 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 8.3(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 proceedings.
- (4) An order can be made subject to such exceptions or conditions as the court sees fit.

Proposal 8.4: Where and when a closed court order applies

Subject-specific legislation containing powers to make closed court orders should be amended to 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, 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.

Proposal 8.5: Requirement to give reasons on request

Subject-specific legislation containing powers to make closed court 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 in whether an order should have been made or should continue to operate.

Proposal 8.6: Reviews of closed court orders

Subject-specific legislation containing powers to make closed court orders should be amended to provide that:

- (1) The court that made an 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 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.

Proposal 8.7: Costs in proceedings for closed court orders

Subject-specific legislation containing powers to make closed court orders should be amended to provide that a court not make a costs order against a person in proceedings for the application or review of an order unless the court is satisfied that the person's involvement in the application is frivolous or vexatious.

Proposal 8.8: Requirement to post notice of a closed court order

Subject-specific legislation containing powers to make closed court orders should be amended to provide that the court must post notice of a closed court order, whether the proceedings are held in a courtroom or virtually.

Proposal 8.9: Safeguarding the public interest in open justice

Subject-specific legislation containing powers to make closed court 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.

9. Monitoring and enforcing departures from open justice

- 9.1 In this chapter, we outline our proposals to improve the monitoring and enforcement of contraventions of statutory prohibitions on publication or disclosure and non-publication, suppression, exclusion and closed court orders (“prohibitions and orders”). We include proposals to improve the offences for breaching these prohibitions and orders and the prosecution of such offences.
- 9.2 These proposals apply to prohibitions and orders applicable to, or arising from, both court and tribunal proceedings. Courts and tribunals experience similar challenges in monitoring and enforcing breaches, including:
- statutory offences are not clearly and consistently framed
 - investigation of breaches can be difficult and time-consuming
 - public awareness of prohibitions and orders is low, and
 - there is no central agency to investigate and enforce breaches.
- 9.3 It is therefore appropriate that proposals which seek to address these challenges apply to prohibitions and orders arising from both court and tribunal proceedings.
- 9.4 The proposals in this chapter only apply to offences in subject-specific legislation. They are intended to be consistent with the offence that we propose be included in the new Act (see **Proposals 4.11–4.12**).

Clarifying and standardising offences

- 9.5 A breach of a prohibition or an order should be punishable as an offence. However, currently, not all departures from open justice contained within subject-specific legislation include an associated offence if the order or prohibition is breached.
- 9.6 Of those that do, the offences are set out in a range of different ways. For example, some offences do not state key elements, such as the mental element. **Proposals 9.1–9.3** are intended to introduce a more comprehensive and uniform offence regime. This aligns with our guiding principle that any legislation that departs from the principle of open justice should be uniform and consistent, as far as practicable (see chapter 1).
- 9.7 **Proposal 9.1** is for all offences to have a maximum penalty not exceeding two years’ imprisonment and/or a fine of 100 penalty units (for an individual), or a fine of 500 penalty units (for a corporation). Currently, maximum penalties for offences range

considerably, with some for up to five or seven years' imprisonment.¹ Setting a maximum penalty of two years' imprisonment is meant to ensure that punishments are proportionate to the nature of these offences.

9.8 **Proposal 9.2** is for all offences for breaching a non-publication, suppression, exclusion and closed court order to be punishable as a statutory offence or contempt, but not both. The *Court Suppression and Non-publication Orders Act 2010* (NSW) ("*CSNPO Act*") has a provision to this effect.²

9.9 Our proposal is meant to provide the courts and the prosecution with discretion in determining how to deal with conduct that constitutes the offence. For example, it may be appropriate for breaches closely connected with the proceedings to be dealt with directly by the judicial officer as a contempt of court, and for more remote breaches to be prosecuted as an offence. **Proposal 9.2** aligns with our guiding principle that the power and discretion of judicial officers to control court proceedings and to determine open justice issues, in accordance with the circumstances of each case, should be preserved to the maximum extent possible (see chapter 1).

9.10 **Proposal 9.3** is for all offences for breaching prohibitions and orders made under subject-specific legislation to provide that a person commits an offence if the person:

- engages in conduct that breaches the prohibition or order, and
- knows of the existence of the prohibition or order.

9.11 This ensures that offences are described consistently. It also ensures that only deliberate ("knowing") conduct is captured by the offences. Accidental breaches would not constitute an offence.

9.12 **Proposal 9.3(3)** also provides that directors of corporations may be personally liable for offences in some circumstances. This is intended to further deter breaches.

9.13 We do not propose that the offences include uniform exceptions. We consider it appropriate for different exceptions to apply, depending on the circumstances in which the offence operates. This aligns with our aim to retain unique provisions in existing subject-specific legislation that recognise special circumstances (see chapter 1).

1. *Terrorism (Police Powers) Act 2002* (NSW) s 26P(4); *Terrorism (High Risk Offenders) Act 2017* (NSW) s 59F(3).

2. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 16(2)–(4).

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.

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.

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.

Addressing barriers to prosecuting offences

- 9.14 Prosecutions of offences involving breaches of statutory prohibitions on publication or disclosure, or non-publication, suppression, exclusion or closed court orders, are

rare.³ **Proposals 9.4–9.6** seek to address barriers to enforcement, which can prevent reporting, investigation and prosecution of breaches.

- 9.15 **Proposal 9.4** is for the time limit for bringing prosecutions for breaches of prohibitions and orders to be within two years of the date of the alleged offence. A two year time limit is consistent with the current time limit under the *CSNPO Act*.⁴
- 9.16 In NSW, proceedings for summary offences generally must be commenced within six months of the offence occurring.⁵ However, breaches of prohibitions and orders may take longer to investigate. This is particularly the case for breaches that occur online, as it can be difficult to determine the identity and location of the person responsible. Extending the time period to two years may therefore assist in the effective investigation and prosecution of such offences. This aligns with our aim to create effective regimes for compliance and enforcement (see chapter 1).
- 9.17 **Proposal 9.5** is to create a register of non-publication, suppression and closed court orders. The register would be searchable by authorised parties, including journalists and legal representatives of news media organisations, researchers and publishers. This would strengthen the current system of notification of orders and help to ensure that orders are known, particularly by those reporting on proceedings that may be affected by such orders. **Proposal 9.5** would also streamline the current notification system, while expanding it to include proactive monitoring.
- 9.18 **Proposal 9.6** is to establish a Court Information Commissioner who would perform a range of functions related to the enforcement and prosecution of offences. Currently, these roles are performed by a range of agencies.⁶ Centralising these functions is meant to improve efficiency and co-ordination and ensure there is general oversight of prohibitions and orders in NSW. The role of a Court Information Commissioner could be performed by a new or existing body (or bodies), such as the Prothonotary of the Supreme Court.

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 two years of the date of the alleged offence.

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3. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Consultation Paper 22 (2020) [5.39]–[5.43].
 4. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 17(3).
 5. *Criminal Procedure Act 1986* (NSW) s 179(1). Offences with a maximum penalty of two years' imprisonment or less are generally summary offences: *Criminal Procedure Act 1986* (NSW) s 6(1)(c).
 6. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Consultation Paper 22 (2020) [5.48]–[5.52], [5.65].

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.

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.

10. Access to records on the court file

- 10.1 Access to records on the court file is an important part of open justice. In particular, it assists the media to give fair and accurate accounts of cases and to report the information on which decisions are based. This has the benefit of expanding both the public's knowledge of key cases and their overall understanding of the justice system.
- 10.2 There are several different regimes governing access to records on the court file in NSW, which submissions criticise as complex, confusing and inconsistent. Whether a person can access records can depend on factors such as the type of court proceeding or records being sought. The application procedures and methods by which access may be provided also vary.¹
- 10.3 In this chapter, we outline our proposals for a new legislative framework governing access to records on the court file.

Streamlining the access regimes

- 10.4 The current access regimes in NSW, which consist of a mix of statutory provisions, court rules and practice notes, are overly complex and create unnecessary barriers to access.
- 10.5 **Proposal 10.1(1)** is for a new legislative framework governing access to records on the court file to apply to most NSW courts, including the Children's Court. The access framework should not apply to tribunals or the Coroners Court (see chapter 2).
- 10.6 Our proposal for a new access framework is meant to improve and simplify access to records on the court file by:
- clarifying what records are and are not available to particular applicants, and
 - providing a uniform and consistent approach across the different courts and types of proceedings.
- 10.7 Existing provisions governing access in criminal proceedings, civil proceedings and application proceedings in the Local Court should be repealed.² The access framework should be included in the new Act proposed in chapter 4 (**Proposal 10.1(2)(a)**) (for example, in a division within the new Act).

1. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Consultation Paper 22 (2020) [6.14]–[6.16].

2. *Criminal Procedure Act 1986* (NSW) s 314; *District Court Rules 1973* (NSW) pt 52 r 3; *Local Court Rules 2009* (NSW) r 8.10.

- 10.8 While our proposal for a new access framework seeks to improve consistency, it also accommodates differences between the courts. **Proposal 10.1(2)(b)** contemplates each court making their own rules (in court rules, practice notes or policies) that supplement the legislative framework. These rules should take account of the individual factors, such as the different types of cases dealt with by the court.

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.

Features of the new access framework

- 10.9 The access framework should simplify and enhance access to records on the court file, while also protecting the privacy of personal information contained in these records. Some parts of the access framework should differ depending on the category of applicant. These are:
- the types of records on the court file that are accessible as of right and those that are accessible with leave of the court (see **Proposals 10.3–10.6**)
 - the information that must be included in access requests (see **Proposal 10.8**)
 - the methods by which access can be provided (see **Proposal 10.9**), and
 - whether any prescribed access fees can be waived or reduced (see **Proposal 10.12**).
- 10.10 The access framework should include specific access entitlements for journalists to reflect the media’s important role in facilitating open justice by reporting on the courts (see chapter 1). Existing legislation in NSW also gives media representatives the right to inspect certain documents in criminal proceedings.³
- 10.11 The access framework should also include specific access entitlements for researchers because research is an important part of open justice. Research can investigate areas of the law and the operation of the courts, highlight shortcomings and lead to improvements.⁴
- 10.12 The access framework should apply stricter rules to members of the public. The main reason for this is that a significant proportion of records on the court file contain personal identification information. Allowing such information to be readily available to

3. *Criminal Procedure Act 1986* (NSW) s 314.

4. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Consultation Paper 22 (2020) [11.3].

the public could lead to identity theft or people being targeted for commercial purposes. Unlike members of the public, journalists and researchers are subject to professional conduct and ethics requirements, which should reduce the risk of their publishing, disclosing or misusing personal identification information contained in court records.

- 10.13 Other parts of the access framework should apply to all types of applicants. These include:
- the considerations for deciding whether to grant leave to an applicant to access a record on the court file (see **Proposal 10.7**)
 - the conditions that courts can impose on access to and use of court records (**Proposal 10.10**), and
 - the offence of disclosing or publishing personal identification information contained in court records, unless certain exceptions apply (**Proposal 10.13**).

Definitions of key terms

- 10.14 The new access framework should include definitions of key terms that are integral to the operation of the regime, including “record” (**Proposal 10.2**). It should also include the definitions of “non-publication order”, “suppression order”, “closed court order”, “complainant”, “victim”, “protected person”, “prescribed sexual offence” “domestic violence offence”, “contact information”, “journalist”, and “news media organisation”, which are proposed in chapter 3.
- 10.15 In addition, the access framework should include the definitions of “court” and “proceeding” proposed in chapter 4 (see **Proposal 4.1**). This is to ensure consistency and avoid confusion.
- 10.16 The definition of the “court file” should include records that are filed or tendered in proceedings, admitted into evidence and any judgment, directions or orders (**Proposal 10.2(1)**). It should not include a judicial officer’s notes, working papers or deliberations, as allowing access to these records could interfere with judicial independence or damage the perceived impartiality of the judicial process. It also should not include documents produced on subpoena that have not been admitted in evidence, as such documents have not been formally used in proceedings, are often third party documents (not those of parties to the proceedings), and may be confidential or privileged.
- 10.17 The definition of “personal identification information” should include information such as tax file numbers, passport numbers and particulars of titles of land holdings (**Proposal 10.2(2)**). It should also include “contact information”, which is defined to include addresses, phone numbers, email addresses and social media profiles (see **Proposal 3.6**). These are the types of information that could be used to impersonate someone or target them for commercial purposes.
- 10.18 A “researcher” should be defined as a person who makes a request for access to a record on the court file for the purposes of research (**Proposal 10.2(4)**). The

definition should include a non-exhaustive list of the factors that indicate a request is “for the purpose of research” to provide guidance for decision-makers.

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 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” 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.

Records available to different types of applicants

- 10.19 The new access framework should specify the types of records on the court file that are available to different categories of applicant (**Proposal 10.3–10.6**). Parties to proceedings should be entitled to access any record on the court file for the proceedings, subject to any conditions imposed, any applicable fees and certain exceptions (**Proposal 10.3**). This is because parties are generally considered to have a right to access their court records.
- 10.20 The access framework should not include a specific definition of “party to proceedings”. This is because the framework would apply to a broad range of court proceedings, and the types of parties involved in such proceedings may vary.
- 10.21 It is not intended that “party”, for the purposes of the access framework, should have the same meaning as that proposed in chapter 3. That definition includes people who are not traditionally considered “parties”, such as complainants and victims (**Proposal 3.3(a)**). Given the access framework would confer broad access entitlements on parties, we think the “party” in this context should be interpreted narrowly, to mean “party” in the traditional sense (for example, the plaintiff or defendant in a civil proceeding).
- 10.22 Journalists should be entitled to access certain records on the court file that provide key information about the case, without the need to seek leave of the court (**Proposal 10.4(1)(a)**). This is not because of a right to know what takes place in court proceedings, but rather because of the media’s special role in informing the public about the courts by reporting on cases (see chapter 1). Many of the records listed in the proposal are similar to those available to the media under existing legislation.⁵
- 10.23 Notably, journalists should be entitled to access a pleading filed in a civil proceeding, even before the proceeding has concluded (**Proposal 10.4(1)(a)(iv)**). This is different to the current Supreme Court and District Court practice notes, which contain a presumption in favour of access to pleadings in proceedings that have concluded.⁶ Our proposal reflects the fact that journalists often report on cases while they are on foot. Where, for example, a pleading contains scandalous or vexatious material that has not yet been struck out, the court could make an order to restrict access (see **Proposal 10.4(4)(e)**).
- 10.24 There may be concerns that enhancing media access to certain records on the court file could increase the risk of information being disclosed or published contrary to suppression or non-publication orders or statutory prohibitions on publication or disclosure. We consider that our proposals for uniform definitions in chapter 3 could improve compliance with these restrictions and reduce the risk of breaches. Courts

5. *Criminal Procedure Act 1986* (NSW) s 314(2).

6. Supreme Court of NSW, *Practice Note SC Gen 2: Access to Court Files* (2019) [7]; District Court of NSW, *Practice Note DC (Civil) No 11: Access to Court Files by Non-Parties* (2005) [2].

should also be able to make additional orders denying access to court records in a particular case (see **Proposal 10.4(4)(e)**).

- 10.25 Journalists should be able to access records, with leave of the court, that they are not otherwise entitled to access (for example, records that have not been admitted into evidence) (**Proposal 10.4(1)(b)**). The release of records that have not been formally used in proceedings should attract a higher degree of control and scrutiny by the court, which can assess whether release is appropriate in the particular circumstances of the case.
- 10.26 Researchers should be entitled to access a transcript of proceedings in open court, any record admitted into evidence, and a record of the judge's summing up, oral directions to a jury and any orders and judgments (including remarks on sentence), without the need for leave (**Proposal 10.5(1)(a)**). This reflects the fact that such records are a key source of data for research. As with journalists, other records on the court file should only be accessible to researchers with leave of the court (**Proposal 10.5(1)(b)**).
- 10.27 Members of the public should not be entitled to access any records on the court file. Rather, they should only be able to access a record with leave of the court (**Proposal 10.6(1)**). This would enable courts to exercise a higher degree of control over release of court records to the public.
- 10.28 Access by any applicant to a record on the court file should also be subject to any conditions imposed by the court and any prescribed fees (**Proposal 10.3(2)**, **Proposal 10.4(3)**, **Proposal 10.5(2)** and **Proposal 10.6(2)**). We discuss conditions and fees further below.
- 10.29 The access framework should also specify the types of records on the court file that cannot be accessed by any applicant, such as records subject to a claim of privilege (**Proposal 10.3(3)**, **Proposal 10.4(4)**, **Proposal 10.5(3)** and **Proposal 10.6(3)**). This is to set clear parameters for decision-makers in determining access requests.
- 10.30 Some access regimes in NSW do not allow access where a statutory prohibition on publication or disclosure or a non-publication or suppression order applies.⁷ The access framework should draw a distinction between restrictions on publication and restrictions on disclosure, such that:
- An applicant would be able to access a record on the court file containing information subject to a statutory prohibition on publication or a non-publication order with leave of the court (**Proposal 10.4(1)(b)**, **Proposal 10.5(1)(b)** and **Proposal 10.6(1)**). This is because the purpose of a non-publication restriction is to prevent the publication of information to the wider community, rather than to prevent the release or disclosure of information to a particular individual.

7. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Consultation Paper 22 (2020) [6.85]–[6.87].

- An applicant would not be able to access a record containing information subject to a statutory prohibition on disclosure or a suppression order where it is not reasonably practicable for the court to provide only that part of the record that does not contain the suppressed information (**Proposal 10.4(4)(b)**, **Proposal 10.5(3)(b)** and **Proposal 10.6(3)(b)**). This is because releasing or disclosing the suppressed information to an applicant would be an offence.

Proposal 10.3: Records available to parties

The access framework should provide:

- (1) Subject to Proposal 10.3(2)–(3), a party to a proceeding is entitled to access any record on the court file for that proceeding.
- (2) Access to any record on the court file by a party 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
 - (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 party to access a copy of the record from which personal identification information has been deleted or removed
 - (d) s 30G of the *Crimes (Sentencing Procedure) Act 1999* (NSW), where the record is a victim impact statement and the party is an offender within the meaning of s 3 of that Act, and
 - (e) s 30N of the *Crimes (Sentencing Procedure) Act 1999* (NSW), where the record is a victim impact statement received by the court under s 30L of that Act and the party is an accused person in mental health and cognitive impairment forensic proceedings.
- (3) A party to a proceeding is not permitted in any case to access a record on the court file for that proceeding that:
 - (a) is subject to a claim of privilege that has not yet been decided
 - (b) a court has decided contains a matter that is privileged, or
 - (c) is the subject of a court order to be kept confidential or otherwise restricted from access.

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.

Proposal 10.5: Records available to researchers

The access framework should provide:

- (1) Subject to Proposal 10.5(2)–(3), a researcher:
 - (a) is entitled to access the following records on the court file:
 - (i) a transcript of proceedings in open court
 - (ii) any record admitted into evidence, and
 - (iii) 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 containing information subject to a non-publication order or statutory prohibition on publication.
- (2) Access to any record on the court file by a researcher 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 researcher to access a copy of the record from which personal identification information has been deleted or removed.
- (3) A researcher 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 statutory prohibition on disclosure, and it is not reasonably practicable for the court to provide that part of the record that does not contain the 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 by a court
- (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 a court has ordered to be kept confidential or otherwise restricted from access.

Proposal 10.6: Records available to members of the public

The access framework should provide:

- (1) Subject to Proposal 10.6(2)–(3), a member of the public may access a record on the court file only with leave of the court, including a record containing information subject to a non-publication order or statutory prohibition on publication.
- (2) Access to any record on the court file by a member of the public 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 member of the public to access a copy of the record from which personal identification information has been deleted or removed.
- (3) A member of the public 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 statutory prohibition on disclosure, and it is not reasonably practicable for the court to provide that part of the record that does not contain the 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 by a court
 - (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 a court has ordered to be kept confidential or otherwise restricted from access.

Considerations in deciding whether to grant leave for access

- 10.31 The new access framework should specify the matters courts must consider when deciding whether to grant leave to an applicant to access certain records on the court file (**Proposal 10.7**). This proposal is meant to promote consistency, assist applicants in framing access requests, and assist decision-makers in determining requests.
- 10.32 The framework should require courts to balance the various considerations involved in granting leave for access, including the public interest in open justice and the impact on individual safety or privacy (**Proposals 10.7(a)** and **10.7(c)**). An important consideration is any conditions that can be imposed by the court (**Proposal 10.7(g)**),

which could mitigate the impact on an individual's privacy or safety, for example. We discuss conditions further below.

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.

Procedures for and methods of access

- 10.33 The proposed access framework should specify the procedures for accessing records on the court file (**Proposal 10.8**). This proposal is meant to clarify and simplify application processes, and ensure requests include the information necessary for decision-makers to determine them.
- 10.34 Where the request is by a researcher, additional information should be provided to enable courts to determine whether the request is for the purposes of research (**Proposal 10.8(2)**).
- 10.35 The proposed access framework should allow courts to notify parties in proceedings of access requests, and give them an opportunity to be heard, but not *require* courts to do so in every case (**Proposal 10.8(3)**). Such a requirement could increase the formality of applications and the time involved in considering them.
- 10.36 The proposed framework should also specify the methods by which access to records on the court file can be provided (**Proposal 10.9**). Parties, journalists and researchers should be entitled to receive a copy of a record (**Proposals 10.9(2)–(3)**) because:
- parties are directly involved in the proceedings, meaning there are fewer privacy concerns
 - journalists may need copies to assist with preparing accurate reports of court proceedings, and
 - researchers may need copies to refer back to, over the course of a long-term project.

- 10.37 Members of the public should have to obtain additional permission if they want a copy of a record on the court file (**Proposal 10.9(1)(b)**). This would ensure the court can exercise control over whether a member of the public receives a copy and withhold such permission where it has specific concerns.

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.

Proposal 10.9: Methods of providing access

The access framework should provide:

- (1) If the applicant requesting access to a record on a court file is a member of the public, they may:
 - (a) inspect, view or listen to the record, and
 - (b) with additional permission of the court, obtain a copy of it.
- (2) If the applicant requesting access to a record on the court file for a proceeding is a party to the proceeding, a journalist or a researcher, they may inspect, view, listen to, or obtain a copy of it.
- (3) "Obtain a copy" of a record includes making a digital copy of, or photocopying, scanning or photographing a record.

Conditions on access to and use of court records

- 10.38 The proposed access framework should outline the conditions courts can impose on access to, and use of, records on the court file (**Proposal 10.10(1)**). Such conditions may, for example, be necessary to protect certain information contained within records.
- 10.39 A court should be able to impose a condition requiring the applicant to access a copy of the record from which personal identification information has been redacted (**Proposal 10.10(1)(d)**). In some cases, courts have redacted personal or sensitive

information from a document, or allowed parties to redact such information, before making it available to a non-party.⁸

- 10.40 We envisage that such a condition need not be imposed in every case, but only where the court considers it to be appropriate in the circumstances. In some criminal proceedings, the amount of personal identification information contained in records on the court file may be limited, such that a redaction condition may be unnecessary. As we discuss in chapter 3, legislation limits the disclosure of certain people's addresses and telephone numbers in criminal offence proceedings.⁹
- 10.41 A court should also be able to impose conditions on use of the record, including in relation to disclosure and publication of it, to protect it from being misused (**Proposal 10.10(1)(c)**). Breach of a condition imposed by the court should be subject to criminal penalties to deter such conduct (**Proposals 10.10(2)–(3)**).
- 10.42 Breaches should be punishable as an offence or as contempt of court, but not both (**Proposals 10.10(4)–(6)**).

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.

8. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Consultation Paper 22 (2020) [6.111].

9. *Criminal Procedure Act 1986* (NSW) s 149B, s 247S, s 280–280A.

Access fees

- 10.43 The new access framework should allow regulations to prescribe fees for the provision of access to records on the court file (**Proposal 10.11(1)(a)**). This would allow courts to recover the cost of providing access where, for example, records must be retrieved from archives.
- 10.44 The proposed framework should also allow regulations to prescribe fees for the deletion or removal of personal identification information from records, where this is required by a condition imposed by the court (**Proposal 10.11(1)(b)**). In submissions and consultations, we heard courts do not currently have the resources to carry out this task.¹⁰
- 10.45 Any prescribed fees should not exceed what is reasonably necessary to cover the cost of providing access to records on the court file or redacting information from them (**Proposal 10.11(2)**). This proposal is meant to ensure fees are kept to a minimum, so as not to deter applicants who have a genuine interest in accessing records.
- 10.46 The access framework should also outline the circumstances in which fees can be waived or reduced (**Proposal 10.12**). Notably, a complainant in sexual offence or domestic violence proceedings, a victim in criminal proceedings, or a protected person in apprehended violence order proceedings should be exempt from paying fees (**Proposal 10.12(1)(b)**). A requirement to pay fees could further disempower them and act as an additional barrier to their full engagement in the criminal justice system.

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.

10. Office of the Director of Public Prosecutions, *Submission C17*, 18–19; Chief Magistrate, Local Court of NSW, *Submission C125*, 3; Chief Justice, Supreme Court of NSW, *Submission C126*, 2–3; Chief Justice, Supreme Court of NSW, *Consultation C14*.

Proposal 10.12: Exemptions and reductions for access fees

The access regime should provide:

- (1) The following applicants are exempt from paying any prescribed fee for the provision of access to a record on the court file, or the deletion or removal of personal identification from a record on the court file:
 - (a) an accused person in a criminal proceeding, and
 - (b) a complainant or victim in a criminal proceeding or protected person.
- (2) If the applicant is a member of the public, the court may waive or reduce any prescribed fee to access a record on the court file for a proceeding if the applicant would experience financial hardship as a result of paying the fee.
- (3) If the applicant is a researcher, the court:
 - (a) may waive or reduce any prescribed fee to access a record on the court file for any reason it considers appropriate, and
 - (b) in determining whether to do so, may have regard to:
 - (i) the administrative burden of providing access to the record
 - (ii) the level of funding available to the researcher as part of the research project
 - (iii) the number or volume of records requested by the researcher, or
 - (iv) any other matter that the court considers relevant.

Offences

- 10.47 The access framework should make it an offence for an applicant who is given access to a record on the court file to publish any personal identification information it contains, unless the court or the person to whom the information relates consents to publication (subject to some limitations) (**Proposal 10.13**). This proposal is meant to reduce the need for courts, in every case, to impose a condition requiring an applicant to access a copy of a court record from which personal identification information has been deleted or removed. It should also provide some protection where an applicant is inadvertently given access to a court record containing personal identification information that was meant to be redacted.
- 10.48 We are seeking views about whether there should be a special offence of unauthorised disclosure of records on the court file by court officers. There are many offences in NSW prohibiting the disclosure of information obtained by a person in the course of administering, or performing duties under, an Act.¹¹ For example, it is an offence for a person to disclose information obtained in exercising a function under the *Civil and Administrative Tribunal Act 2013* (NSW),¹² which would apply to NSW Civil and Administrative Tribunal officers.
- 10.49 At this stage, we are unpersuaded that a similar offence is needed to deter court officers from disclosing records on the court file without authorisation, but would nonetheless welcome submissions on the matter. If such an offence is considered

11. See, eg, *Guardianship Act 1987* (NSW) s 101; *Mental Health Act 2007* (NSW) s 189.

12. *Civil and Administrative Tribunal Act 2013* (NSW) s 70.

necessary, it should only capture intentional disclosures, with knowledge that the disclosure is unauthorised (see **Proposal 10.14(1)**).

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.
- (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.

Proposal 10.14: Offence of unauthorised disclosure of a court record by a court officer

If an offence of unauthorised disclosure of a court record by a court officer is required, the access framework should provide:

- (1) A court officer who intentionally discloses a court record knowing that the disclosure is not authorised by law is guilty of an offence.
- (2) If a court record is disclosed pursuant to a decision under the access framework, and the court officer believes in good faith when making the decision that the access framework permits or requires the court record to be disclosed, the court officer and any other person concerned in disclosing the court record is not guilty of an offence merely because of the disclosing of the court record.
- (3) A “court officer” includes any person employed in the Public Service to exercise functions in a court registry or other court office.

11. Technological issues and open justice

- 11.1 Technology brings opportunities for open justice, but also significant challenges. Digital innovation can transform engagement with the justice system and offers opportunities to improve access to courts and tribunals.
- 11.2 On the other hand, the ease of information sharing brings challenges in controlling what the public knows and sees of court and tribunal proceedings. For example, unauthorised participants could access restricted virtual proceedings or view the proceedings without being seen.
- 11.3 In this chapter, we outline proposals relating to virtual access to proceedings and the use of social media to transmit information about proceedings. The proposals apply to both courts and tribunals, as these issues affect both types of forums.

Virtual access to courts and tribunals

- 11.4 Virtual access to court and tribunal proceedings has been a feature of the NSW justice system for some time. By “virtual access to proceedings”, we are referring to:
- virtual access to proceedings by all participants (in other words, the proceedings are conducted entirely virtually), and
 - virtual access by some participants (for example, certain witnesses) to proceedings that are conducted in person.
- 11.5 The COVID-19 pandemic has led to increased virtual access to proceedings. Virtual access to proceedings can help facilitate open justice.¹ In submissions and consultations, we heard it makes it easier for journalists to attend and observe proceedings, for the purpose of reporting on them.² Other benefits include improved public access to proceedings, particularly in regional or remote locations.
- 11.6 We also heard about some drawbacks to virtual access to proceedings, including:
- Difficulties with non-parties accessing proceedings. While access links are usually provided to parties, non-parties may need to request links from the court. Whether a link is provided may depend the type of matter.³

1. Roundtable 5, *Consultation CIC09*.

2. Sydney Morning Herald, *Preliminary Consultation PCIC07*; 9News, *Preliminary Consultation PCIC09*; Australia’s Right to Know Media Coalition, *Submission CI27 (Response to chapters 5–10)*, 34.

3. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Consultation Paper 22 (2020) [12.10], [12.19].

- Some courts or tribunals may not have adequate technology and resources to facilitate virtual access to proceedings.⁴
 - Courts and tribunals may be unable to control the conduct of observers who access proceedings virtually. Potential risks include unauthorised recording of proceedings and additional people watching the proceedings “off screen”.⁵
- 11.7 **Proposal 11.1(1)** seeks to promote the provision of virtual access to proceedings in NSW where appropriate, which should enhance open justice. This aligns with our guiding principle that open justice is fundamental to the integrity of the justice system (see chapter 1). Virtual access to proceedings could be facilitated by measures such as sending out links to registered users.
- 11.8 **Proposal 11.1(2)–(4)** seeks to address potential risks associated with virtual access to proceedings. Enabling courts and tribunals to control registration for virtual access (**Proposal 11.1(2)**) is meant to ensure judicial officers can exercise oversight as to who is present in the proceedings. It also aligns with our guiding principle that judicial officers should be able to control court proceedings (see chapter 1).
- 11.9 **Proposal 11.1(3)** is to amend the prohibition on using a recording device to record sound or images (or both) in court premises to also prohibit recording of proceedings by a person who accesses them virtually.⁶ The prohibition applies to proceedings in various courts and tribunals.⁷
- 11.10 Amending this prohibition to apply where a person accesses proceedings virtually reflects our aim of developing modern legislation that is responsive to societal and technological changes (see chapter 1). It is also consistent with the current practice of notifying people who attend proceedings virtually that they must not record the proceedings.⁸
- 11.11 **Proposal 11.1(4)** is to require people who access court proceedings virtually to acknowledge the prohibition on recording proceedings and declare that no unauthorised person is attending the proceedings as a condition of access. Requiring people to expressly acknowledge these restrictions is meant to increase the likelihood of compliance with them.

4. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Consultation Paper 22 (2020) [12.13].

5. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Consultation Paper 22 (2020) [12.16].

6. *Court Security Act 2005* (NSW) s 9(1).

7. *Court Security Act 2005* (NSW) s 4 definition of “court”.

8. Office of the Sheriff, *Consultation CIC20*.

Proposal 11.1: Virtual access to proceedings

- (1) A clear process should be established for journalists and the public to access court and tribunal proceedings virtually.
- (2) Courts and tribunals should be able to control registration for virtual access to proceedings.
- (3) Section 9 of the *Court Security Act 2005* (NSW) should be amended to expressly prohibit the recording of court or tribunal proceedings by a person who accesses them virtually.
- (4) People who access court or tribunal proceedings virtually should, as a condition of access, be required to acknowledge the prohibition on recording the proceedings and declare that no unauthorised party is attending with them.

Regulating transmission of information about court proceedings by journalists

- 11.12 In NSW, legislation prohibits the unauthorised use of any device (including a smartphone or tablet) to transmit sounds or images, or information forming part of court proceedings, from a room or other place where the court is sitting. The prohibition applies whether the transmission occurs simultaneously with the proceedings or at a later time. It expressly covers sending information to another person or posting on social media.⁹
- 11.13 Transmissions by a journalist, for the purposes of a media report on the proceedings, are exempted from this prohibition under regulations.¹⁰ This means a journalist can transmit (including via social media) any information about proceedings from the courtroom in which they are being heard, at the time they are being heard. A journalist can also transmit the same information from another location on court premises. Some other jurisdictions place stricter limits on the use of social media in court.¹¹
- 11.14 **Proposal 11.2(a)** is for regulations to be amended to limit the exception, so that a journalist cannot transmit information that forms part of the proceedings until 30 minutes has passed since that part of the proceedings (for example, a witness' evidence, a bail hearing or an interlocutory application) has concluded. We received support for such a proposal in consultations.¹² Where there has been an application for a suppression or non-publication order in relation to that information, journalists should not be able to transmit information until the court has made its decision (**Proposal 11.2(b)**).

9. *Court Security Act 2005* (NSW) s 9A(1).

10. *Court Security Act 2005* (NSW) s 9A(2)(f); *Court Security Regulation 2016* (NSW) reg 6(a).

11. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Consultation Paper 22 (2020) [12.74].

12. Roundtable 5, *Consultation CIC09*.

- 11.15 **Proposal 11.2** is intended to address the fact that evidence or any other information given in proceedings may later be subject to an order prohibiting or restricting its publication. Imposing a delay before information about proceedings can be shared on social media may reduce the risk that information is shared before objections and applications for suppression and non-publication orders have been dealt with.

Proposal 11.2: Regulating transmission of information from the courtroom by journalists

Regulation 6(a) of the *Court Security Regulation 2016* (NSW) should be amended to provide that transmission of sounds, images or information by a journalist for the purposes of a media report on the proceedings concerned is only exempt from the restriction in s 9A of the *Court Security Act 2005* (NSW) if:

- (a) 30 minutes has elapsed since that part of the proceedings has concluded, or
- (b) if an application for a suppression or non-publication order concerning that information has been made, the court has given its decision not to make a suppression or non-publication order in relation to that information.

