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Law Reform Commission
Department of Communities and Justice

Open justice review-Court and tribunal information: access, disclosure and publication

NSWCCL thanks the Law Reform Commission for the opportunity to respond to the recent Consultation paper reviewing the operation of suppression and non-publication orders and access to information in NSW courts and tribunals.

NSWCCL contributed to the initial consultation process in May 2019 and continues to support the recommendations made in that submission, many of which have been included in the discussion paper. We note that matters, such as the non-proclamation of the *Court Information Act 2010,* have not changed in the intervening period.

It is not proposed to repeat the substantive points that we made in the initial consultation process but we provide a copy of that preliminary submission for your reference.

Yours Faithfully

[redacted]

Michelle Falstein
Secretary
NSW Council for Civil Liberties

New South Wales
Council for Civil Liberties

NSWCCL SUBMISSION

NSW LAW REFORM COMMISSION

OPEN JUSTICE REVIEW PRELIMINARY SUBMISSION

COURT AND TRIBUNAL INFORMATION: ACCESS, DISCLOSURE AND PUBLICATION

28 May 2019

About NSW Council for Civil Liberties

NSWCCL is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. We also listen to individual complaints and, through volunteer efforts; attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

CCL is a Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

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Open Justice Review
Court and tribunal information: access, disclosure and publication

I. Introduction

The New South Wales Council of Civil Liberties (NSWCCL) welcomes the opportunity to make submissions to this New South Wales Law Reform Commission review. The review deals with the operation of NSW court suppression and non-publication orders[1] and access to information in NSW courts and tribunals. This submission addresses parts b), d), e) and j) of the terms of reference

In general, NSWCCL supports the current balance between open justice and the right to a fair trial afforded by suppression and non-publication orders in the Court Suppression and Non-publication Orders Act 2010 (NSW) (*Act*).

NSW has implemented the model provisions developed by the Standing Committee of Attorneys General. The Act provides a reasonable balance between the public interest in the making of orders and the public interest in open justice, not reflected in its Commonwealth or Victorian counterparts.[2] However, NSWCCL does consider there is need for reform to improve both the civil liberties of those affected and the promotion of open justice, which are discussed below.

II. The balance between the right to a fair trial and the public interest in open justice

The NSWCCL considers the current arrangements may not strike the right balance between the proper administration of justice, the right to a fair trial and the public interest in open justice.

A right to a fair trial is a recognised human right in Article 14 of the International Covenant on Civil and Political Rights (*ICCPR*), to which Australia is a party, though is not incorporated into Australian legislation.[3] At its core, and at Common law, is that a jury should make a decision solely based on the information before it and that jurors must remain objective in the face of prejudicial publicity. Prejudicial publicity can also affect the testimony of witnesses and the progression of the matter for litigants. Not surprisingly, tensions have emerged between open justice and the principle of a fair trial.[4]

Recommendation 1.

NSWCCL recommends that Article 14 of the ICCPR should be incorporated into the Act.

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[1] S.3 Act. Non publication orders, prohibit or restrict the publication of information or further publication of information if disclosed during open hearing and suppression orders, more broadly prohibit or restrict the disclosure of information.

[2] S.8 Act; Cth (Schedule 2 Access to Justice (Federal Jurisdiction) Amendment Act 2012) or Vic Act (s18 Open Courts Act 2013).

[3] International Covenant on Civil and Political Rights (New York, 16 December 1966). Entry into force generally (except Article 41): 23 March 1976. Entry into force for Australia (except Article 41): 13 November 1980 <https://www.austlii.edu.au/au/other/dfat/treaties/1980/23.html>

[4] Burd, R (2012) Is there a case for Suppression Orders in an Online World *Media and Arts Law Review* 17 at p.110

While much extraneous material is subject to the Common law of sub judice contempt, the courts have shown little confidence that this will prevent prejudicial publicity.[5] The resulting response has led to concerns over the excessive use of suppression and non-publication orders, particularly in Victoria. Those concerns are primarily due to overlapping pieces of legislation permitting automatic suppression and orders being issued when not justified.[6]

There is no doubt that unjustified or ineffective suppression orders curtail open justice and isolate the community from the legal system and matters of public interest.

In NSW however, the grounds to make a suppression order or non-publication order, are that the order is necessary to prevent prejudice to the proper administration of justice, that the order is otherwise necessary in the public interest and that the public interest outweighs the public interest in open justice. [7] The necessity test applies to both scope and duration of the order[8] and it is accepted that general precautionary orders cannot be made.[9]

Suppression orders should be a last resort and properly applied. **NSWCCL considers that, generally in its current form, the Act achieves this.**

Regardless, to ensure a clear statutory entitlement to access to court information and achieve a greater balance in favour of open justice, the Court Information Act 2010 (NSW) *(CIA)* should be enabled. The CIA, despite garnering overwhelming support, has never been proclaimed, and is now in need of review in light of more recent legislation and in line with the findings in this review.[10]

Recommendation 2.

NSWCCL recommends that the Court Information Act 2010 (NSW) is reviewed, updated and proclaimed.

Media outlets play a crucial role in facilitating open justice however media groups complain that with fewer journalists and greater workload pressures, there are less resources available to challenge suppression orders.[11] At the very least, the speed and efficiency of notification of orders, to media outlets, should be improved and public National and State registers of such orders kept.[12]

Recommendation 3.

NSWCCL recommends that the NSW Government improve the efficiency of notification of suppression and non-disclosure orders to media outlets and starts a public register of such orders.

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[5] Bosland, J (2018) Restraining 'Extraneous' Prejudicial Publicity: Victoria and New South Wales Compared *UNSW Law Journal* 41(4) at p.1266

[6] Burd, R. (2012) Is there a case for Suppression Orders in an Online World *Media and Arts Law Review* 17 at p.115.

[7] S.8(1) Act

[8] S.12 Act

[9] Basten JA in *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* (2012) 83 NSWLR 52; Bosland op. cit. at p.1276

[10] Mullins, L. (2014) Open justice versus Suppression Orders: A Battle of Attrition *Communications Law Bulletin* 33.3 at p.8

[11] Suppression Orders *Criminalising Journalism: The MEAA Report into the State of Press Freedom in Australia in 2018* at p.13 <https://www.meaa.org/download/criminalising-journalism-the-meaa-report-into-the-state-of-press-freedom-in-australia-in-2018/>

[12] ibid p.15; S.9(2)(d) of the Act- news media organisation entitled to appear at appeal.

More broadly, the NSWCCL supports the involvement of a Public Interest Monitor (PIM), and recommends that the Federal NSW Government follow the examples of the Queensland and Victorian Governments in this respect. In those states the PIM has a number of roles. In NSW that role would also extend to acting as a contradictor, if requested by a judge, to help frame the scope of suppression or non-publication orders. Interested parties could also refer their concerns to the PIM who would intervene to review or appeal the order.

Recommendation 4.

NSWCCL recommends that the NSW Government appoint a well-resourced Public Interest Monitor, one of whose roles would be, to act as contradictor when suppression or non-publication orders are being determined and who can independently consider the terms of those orders, intervene in the public interest and report annually to the Attorney General.

III. Identification of children, child offenders reaching adulthood and deceased children

NSWCCL has concerns relating to 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.

NSW legislation gives specific power to suppress the identity of victims in prescribed sexual offences and the identity of children involved in legal proceedings.[13] Such power is underpinned by the UN Convention on the Rights of the Child and the ICCPR, that the best interests of the child are paramount, specifically consideration of their age and desirability of rehabilitation. Child victims are protected to allow them to recover from trauma and embarrassment and so that they do not feel reluctant to come forward to authorities. NSWCCL considers this to be uncontroversial.[14]

Recommendation 5

NSWCCL recommends that the current legal status relating to the anonymity of child victims and offenders is maintained.

Nonetheless, there has been a recent call to name child offenders and remove publication restrictions once a child offender reaches adulthood.[15] NSWCCL considers that there is stronger evidence that naming child offenders is detrimental rather than the reverse.[16] Children need to be able to leave their past behind and make a new start at a time when they might be starting school or entering employment; a problem particularly exacerbated by the enduring nature of the internet. It is claimed that anonymity increases the likelihood that child offenders will mature into law-abiding adults and not be stereotyped as criminals.[17]

[13] S.11 Children (Criminal Proceedings) Act (1987) (NSW); Crimes Act 1900 (NSW) s562NB (1)).
[14] Rodrick, S (2010) Open justice, the media and identifying children involved in criminal proceedings *Media and Arts Law Review* 15 at p. 412
[15] ibid p.410
[16] ibid p.413
[17] ibid p. 420

The community also benefits from the anonymity of child offenders since the approach maximises the chances of rehabilitation and therefore poses less threat.[18] In terms of community safety, the NSW courts can already authorise naming of a child offender in the case of a serious indictable offence, taking into consideration a number of factors.[19] The objectives of open justice are still achieved since everything else about the case can be reported.

Recommendation 6

NSWCCL recommends that the current legal status relating to the publication restrictions on child offenders reaching adulthood be maintained.

Any legislative prohibition on naming should also extend to the period prior to the commencement of criminal proceedings. Identifying a child publicly during police investigation, when there is most media interest, is counterproductive to the child's interests.

Recommendation 7.

NSWCCL recommends the extension of the legislative prohibition on naming children to the period prior to commencement of legal proceedings, when police are investigating.

In NSW, prohibition on identifying child victims extends to deceased victims. The prohibition on naming deceased children is unwarranted as no privacy issues are at stake and there is no question of protecting the child's prospects of recovery or rehabilitation into society. The prohibition can also operate to protect the privacy of the offender where the child's killer is a parent or relative.[20]

Recommendation 8.

NSWCCL recommends the removal of restrictions, where appropriate, on the identity of deceased children.

IV. Suppression and non-publication orders in the digital age

NSWCCL is sceptical as to the extent, suppression and non-publication orders can remain effective in the digital environment.

The judicial assumption that jurors will discharge their duty with integrity is possibly naive but jurors who access prejudicial information during a trial will not necessarily be tainted by it.[21] More stringent directions from the bench can be effective. Regardless, there will be a reduction in the acceptable standards of fairness in the digital environment though the court should still continue to try and remove prejudicial material.

Where suppression and non-publication orders have become futile, however, they should not be maintained, for example, republication into the world at large brings into question the enforceability of orders.[22] Though revoking a suppression order, on that basis, may provide an incentive for further breaches, a deliberate breach does not necessarily mean that the order

[18] ibid p.423

[19] ibid p.440. Children (Criminal Proceedings) Act 1987 (NSW) s15C(1)

[20] ibid p. 440

[21] Burd op.cit. p.118

[22] Fitzgerald, B & Foong, C. (2013) Suppression orders after *Fairfax v Ibrahim*: Implications for internet communications *Australian Bar Review* 37 at p.186

should be lifted. The public interest might still be served by maintaining that order.[23] For these reasons, the NSWCCL supports the use of suppression and non-publication orders for country specific blocking of content or notice and takedown procedures, provided that the test of necessity is strictly applied.[24]

Effective compliance also requires effective monitoring. A collaborative approach, between the parties and service providers, needs to be taken to ensure prejudicial information is taken down, reducing the scope of influential information available to jurors.[25]

Recommendation 9

NSWCCL recommends the establishment of a collaborative compliance regime to assist in the effectiveness of suppression and non-publication orders, in which the parties and service providers join in reducing the scope of prejudicial information available to jurors.

V. Need for Charter of Human rights

The NSW Council for Civil Liberties considers the long overdue enactment of a Human Rights Charter at both National and NSW state level, to be of the highest priority. Such a charter of rights would put, on a formal footing, the balancing of non-publication and suppression orders with the competing demands of open justice, and make the decision-making process more transparent. Protecting open justice in this way also constrains the enactment of legislation that is incompatible with it. [26]

Recommendation 10

NSWCCL recommends that the NSW Government gives priority to legislating for a NSW Charter of Human Rights which incorporates the provisions of the ICCPR.

This submission was prepared by Michelle Falstein, Convenor of NSWCCL Privacy Action Group, on behalf of the New South Wales Council for Civil Liberties. We hope it is of assistance to the NSW Law Reform Commission

Yours sincerely,

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[23] Bosland, J (2016) Wikileaks and the not-so-super injunction *Media and Arts Law Review* 21 at p.58
[24] Fitzgerald & Foong op.cit p.191; as has been used in the regulation of copyright infringement.
[25] Burd op.cit. p.119
[26] Rodrick, S. (2007) Open Justice and Suppressing Evidence of Police Methods: The Position in Canada and Australia (Part One) 31(1*) Melbourne University Law Review* 171