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Open Justice Consultation Paper - RE: Justice Action's Response

Dear Commissioners:

We welcome and thank you for your invitation to Justice Action to provide feedback to the NSW Law Reform Commission's (NSWLRC) Open Justice Review and comment on your December 2020 Consultation Paper, '*Court and tribunal information: access, disclosure and publication*'.

Justice Action is a not-for-profit, non-governmental independent organisation that focuses its efforts upon the abuses of authority in criminal justice and mental health systems both within NSW, Australia-wide and internationally. Our interest as an organisation lies in providing a voice, support and advocacy for the most marginalised peoples in our community.

Justice Action has worked in the sole interests of prisoners and mental health detainees, independent of judicial systems or governmental oversight, dating back to Australia as a penal colony. Our organisation have worked on and continues to work on and bring to the public eye a variety of institutionalised issues concerning the experiences of offenders, such as violations of the Optional Protocol on the Convention Against Torture, prisoner education and the implementation of tablets and access to technology in cells.

As a result of our organisation's focus, our submission to the NSWLRC centres around our considerations and concerns pursuant to the 3 b) term of reference; specifically upon the rights afforded to incarcerated people in regard to fair trial procedure.

Preliminary Overview of the Submission:

We firmly believe that the Consultation Paper on Open Justice as a whole insufficiently considers the experiences of offenders and their rights to privacy and respect. In order for the effective implementation of law and policy on upholding open justice in Australian court proceedings, it is crucial to consult all stakeholders who are involved in the process.

It is imperative that this consultation includes those who are accused or charged with committing criminal offences. Unfortunately, to date these people have been starkly excluded from the consultation paper at hand; we propose that this exclusion has occurred in three parts.

- (1) People in cells who are awaiting trial, as well as those already incarcerated, were not included in the conversation nor consulted on the topic of open justice.
- (2) (a) Once placed in a cell, these people do not have sufficient access to their own information for self research, whilst the media does, and can disseminate this information at will.

(b) Upon publication of news, opinion pieces or general information about ongoing cases by the media, which contains the risk of questionable factuality and reliability, the person implicated is not afforded their entitlement to the right of reply.
- (3) Following the publication of media relating to a case, the procedure to initiate suppression or non-disclosure can be unclear and overwhelming, as well as irresponsible in the face of the time sensitive nature of media-prolific cases.

Justice Action proposes that there should be continuous engagement with those who are within institutions, through the Inmate Development Committees mandated by law. We would be happy to facilitate such consultation to ensure that these experiences and opinions are being adequately considered in consultation, and recommend four IDCs in which consultation can occur in the future for the Law Reform Commission; *these being Silverwater Correctional Complex, Silverwater Women's Prison, South Coast Correctional Centre and the Dillwynia Women's Correctional Centre.*

A key focus that has been excluded from the paper lies in considering the impact of open justice policies on offenders, and in continuing to neglect marginal members in the community, the judicial system will fail to uphold universal rights to privacy and dignity whilst prisoners remain subjected to media attention and difficult reinclusion into the community.

The exclusion of incarcerated persons and those on trial:

The principle of '*open justice*' as defined in the report is that the public should be kept aware of court proceedings and procedure in order to keep judicial systems accountable - a principle that has foundations in elements of justice and fair trials.

In the discussion of justice and fair trials, Justice Action believes that the Law Reform Commission has placed an undue emphasis upon rights afforded to the public and to the media, whilst neglecting to include incarcerated peoples and those currently on trial in the conversation.

Despite reference to "*a fair report of proceedings*" in 10.10 and statutory provisions referenced upon the right to solely 'inspect', as well as the media's legal entitlement to documentation, the Publication has not given sufficient attention nor focus towards the very people that are affected by malicious media practice within the 'open courts'; those who are on trial.

The distressing lack of consultation with people currently on trial, and those in cells awaiting trials that are not afforded a right of reply to sensationalist media, is alarming especially considering the power of print, online and television media to tarnish the public character of an individual overnight, as well as influencing potential jurors when a high profile case goes to trial.

There are countless trials in Australia's judicial history that prove beyond doubt that high profile cases can be manipulated by the media in print to the point of slander; and conversely, when this manipulation occurs, the powerless people on trial are not offered a right of reply nor a viable method to clear their name and assert their own innocence or interpretation of the facts.

Civil and Political Rights - Public Image and Media Representation

The power of the media to influence public opinion on civil and criminal cases, and the pursuing effect this media coverage can have on jurors, brings into question the efficacy of the law to abide by the *International Covenant on Civil and Political Rights*, under Article 14.¹

14.1 : *“In the determination of any criminal charge against him, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals... or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”*

Special attention should be given to the wording of competency and impartiality which come under question in sensationalist media coverage events, such as public trials concerning stereotypical ‘headline-worthy’ details of sexual violence, depravity or homicide.

It is vital that the law continues to exist to uphold the values of competency and impartiality in judicial proceedings of any kind, and the Publication has not sufficiently addressed the implications involved to incarcerated persons if the media is provided a relatively liberal rein upon the scope of information it is allowed to publish publicly. Justice Action believes strongly that, in any instance of discussion surrounding open justice within Australia, especially in this Publication that explores the disclosure, dissemination and suppression of personal information, it is crucial that marginalised people and their contributions are considered in the forefront of future decisions.

In this affirmation, it is important to consider whether current laws and legislation are effective not only for the dissemination of information to the general public - an entitlement to the public to stay aware of its surroundings and judicial environment - but also effective in upholding respect and affording rights to those that are affected by the dissemination itself. Whilst the Publication has extensively considered the power that the law affords to the media and the public, we still remain concerned that a neglectful approach has been taken in considering the rights to suppression and reply on the part of those in Australia’s prisons, mental health facilities and holding cells.

¹ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

Infringements to the ‘Right to a Fair Trial’

The consultation paper, at 1.34, acknowledges the potential for an accused person’s right to a fair trial being jeopardised due to biased and excessive media coverage of their case and/or crime. Whilst ‘open justice’ is essential to upholding democratic values and ensuring transparency, ultimately, the processes and decisions of the Court must be respected and upheld by both the media and general community.

Media coverage which displays partiality endangers an accused person’s right to a fair trial, especially, in high profile cases by influencing potential jurors. As recognised by the consultation paper, at 1.34, in some cases it becomes impossible to establish an impartial jury due to public dissent caused by victim-centred media reports. For an accused person, a highly publicised trial has far-reaching consequences which continue beyond their acquittal or release. Following their release, incarcerated individuals face numerous barriers to their reintegration into society.²

Social stigma surrounding incarceration and criminal records prevents many incarcerated individuals from gaining stable employment, further isolating them and increasing their chances of reoffending, fuelling a gruelling cycle.³ Additionally, the lack of education within prisons and similar institutions in NSW bars incarcerated persons from gaining skills and improving employability. Allegations and unsolicited publicity of trials further hinders an incarcerated person’s chances of gaining employment, adversely affecting the government’s objectives in reducing recidivism.

Concerning an Individual’s Right of Reply

Furthermore, partial media coverage hinders justice as it does not afford incarcerated persons the ‘*right of reply*’. In this scenario, incarcerated persons are defenceless against allegations and potentially unvetted claims about their alleged crimes and more broadly about their character and place in society prior to their remand.

International law has set the convention that, according to Article 1 of the 2004 Council of Europe recommendation, the right of reply is ‘*offering a possibility to react to any information in the media presenting inaccurate facts which affect personal rights.*’⁴

² Amy Antonio, Helen Farley, ‘Offline inmates denied education and skills that reduce re-offending’, *The Conversation*, (Academic article, 24 April 2015)

<<https://theconversation.com/offline-inmates-denied-education-and-skills-that-reduce-re-offending/>>.

³ Ibid.

⁴ *Recommendation Rec(2004)16[1]* (Adopted by the Committee of Ministers on 15 December 2004 at the 909th meeting of the Ministers' Deputies)

The Brazilian Constitution has guaranteed the right of reply within a civil context even further, which if implemented in Australia, would unequivocally apply to those in incarceration facing baseless claims from a profit-driven sector that is often infamous for its dissemination of questionable content.

It is unacceptable that incarcerated persons, due to a lack of technology, digital literacy and connection with the ‘outside world’ are unable to research and prepare their own case, whilst the general community is empowered with this information; and additionally, that they cannot defend themselves in the light of character comments from one-sided perspectives. This among many other reasons is why, Justice Action believes in the need for ‘*Computers in Cells*’- which were only recently introduced in NSW prisons to facilitate virtual prison visits during the peak of the COVID crisis. As outlined in prior reports, prisoner’s access to communications allows them to gain educational qualifications and digital literacy, empowering them to research their own case whilst also becoming aware of the public sentiment surrounding their character and crime.

The Consultation Paper (at 12.44-12.47) recognises the difficulties of enforcing suppression and non-publication orders in the contemporary digital environment, especially, in relation to social media and international publications. Especially, until measures are arranged to improve enforceability, it is vital for the endorsement of the Rule of Law that incarcerated persons have access to crucial information and updates regarding their case. Introducing ‘*Computers in Cells*’ would overcome this issue and allow for a more efficient and controlled administration of justice.

Suppression of Dissemination of Personal Information

Media access to any information regarding proceedings may have an adverse effect on the reputation of the parties involved, regardless of the credibility of the claims. The *Court Suppression and Non-publication Orders Act 2010 (CSNO)* outlines the guidelines that courts adhere to when implementing suppression orders to restrict the availability of information regarding proceedings to the public.

It is explicitly stated in s 8(1)(d) of the *CSNO* that a suppression order is necessary to ‘*avoid causing undue distress or embarrassment to a party to or witness in criminal proceedings involving an offence of a sexual nature...*’⁵, indicating the intention of the legislation to protect the reputation of those awaiting trial by restricting damaging publications.

⁵ *Court Suppression and Non-publication Orders Act (No 106) 2010* (NSW).

While such legislation exists, the steps needed for a concerned party to file for such an order is not made clear enough. This is especially concerning given the impact that media coverage can have on accused parties and the lengthy process needed to approve the order. With an estimated 10% of accused persons receiving an acquittal in 2017, the number of persons whose reputation may be tarnished by damaging media publications is not insignificant⁶.

While the application process can be done through the legal representatives of the accused parties, the case is different for parties who have chosen the path of self-representation and do not have access to the internet given that they are kept in cells awaiting trial. We at Justice Action believe that the circumstances of such disadvantaged people should not be disregarded and there should be mechanisms put in place to provide an avenue of action for such parties.

Justice Action's Proposition - Simplified Suppression Process

We propose that a channel for application be established such that this category of people are able to directly apply for a suppression order given the time-sensitive nature of maintaining privacy from media coverage. Currently, the most intuitive instructions given to parties can be found in the Local Court Bench Book, which includes a sample order that clearly shows the necessary information needed to be included in the order⁷.

However, the issue is once again the inability to access this information from within a cell where the accused party is restricted access to the internet. Moreover, the contents of the Bench Book can appear overwhelming to a self-representing party who is not trained in the legal field. It would benefit the accused party greatly to have the relevant information available to them even when they are in detention.

We believe that a guidebook should be provided to these self-representing parties with the steps to apply for a suppression order clearly laid out in simple language. The right for the accused party to request that the matter be kept private should be enforced regardless of whether they are represented professionally, and we feel that the clarity of the application process can be improved.

⁶ NSW Bureau of Crime Statistics and Research, Parliament of NSW, *NSW Criminal Courts Statistics 2017* (Final Report, December 2017).

⁷ *Local Court Bench Book* (Update 139).

Mental Health Review Tribunal Hearings

Open Justice in practice is denied in the Mental Health Review Tribunal hearings held inside Health or Corrective Services facilities. S 151(3) of the *Mental Health Act 2007* explicitly says that hearings are to be open to the public however access is controlled and denied by those who have an interest in secrecy⁸.

These people are particularly subject to forced medication and other very invasive intervention, without trusted legal or external support. These are the exact conditions under which public scrutiny is essential but denied.

Additionally, the lack of internet access for the accused party in cells strongly restricts their ability to prepare a comprehensive defence in the time leading up to their trial. We believe that access to computers and the internet should be given to self-representing parties in order to give them ample resources to defend their case in the trial.

Thank you for the opportunity to provide our submissions in response to the Publication.

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⁸ *Mental Health Act 2007* (NSW).