Children's Court of New South Wales

9 March 2021

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Dear Commissioner

Thank you for providing the Children's Court of New South Wales with the opportunity to comment on the Consultation Paper, 'Open justice: Court and tribunal information: access, disclosure and publication' ("the Consultation Paper").

Firstly, the Children's Court would like to acknowledge the work of the Commission in compiling this very thorough Consultation Paper. I do not propose to respond to each question posed, but I have attempted to respond to the topics of most relevance to the work of the Children's Court.

Non-disclosure and suppression: statutory prohibitions

Question 3.1: Statutory prohibitions on publishing or disclosing certain information

The Children's Court acknowledges that statutory prohibitions on the publication or disclosure of certain information impinge upon the principles of open justice. However, as the Consultation Paper discusses, there are classes of people who are inherently vulnerable, such as children and young persons, witnesses, victims, sexual assault complainants, domestic and family violence complainants, those who are HIV positive and for people with mental health or cognitive issues. As such, the Children's Court views automatic statutory prohibitions on publishing or disclosing certain information as an important mechanism to facilitate substantive equality and equitable access to our justice system for those who are vulnerable, at risk of violence, stigma, discrimination and harassment.

In particular, the Children's Court agrees with the submissions made by Legal

Aid NSW at paragraph 3.14 of the Consultation Paper, who express their support for automatic prohibitions which relate to children. Legal Aid NSW make the observation that the protections are '"widely acknowledged" as necessary to prevent harm to, and stigmatising of, children, and, in some cases, to avoid negatively impacting on their rehabilitation and reintegration.' It should also be noted that because of their vulnerability, children are unlikely to know or to seek to exercise their right to make an application for a non-publication or suppression order.

Question 3.2: Current statutory prohibitions on publishing or disclosing information

(1) Are the current statutory prohibitions on publishing or disclosing certain information appropriate? Why or why not?

(2) What changes, if any, should be made to the current statutory prohibitions?

For the reasons articulated above, the Children's Court is of the view that automatic prohibitions on publications or disclosure of information enshrined in a number of pieces of legislation including *Children and Young Persons (Care and Protection) Act 1998* (the '*Care Act*') the *Children (Criminal Proceedings) Act 1987* (the '*CCP Act*'), the *Young Offenders Act 1991* are appropriate.

Question 3.3: Additional statutory prohibitions that may be needed

The Children's Court would be supportive of a legislative amendment which reworks s 15A of the *CCP Act* and s105 of the *Care Act* to make it clearer that these prohibitions relate to any information that is likely to lead to the identification of a young person. The Children's Court supports including a non-exhaustive list as to matters that may lead to the identification of the accused young person to prevent the jigsaw identification of young people and children involved in both criminal and care proceedings.

Question 3.5: Duration of the statutory prohibition

The Children's Court acknowledges the complexities which exist in this area, and would be happy to participate in further consultations in relation to s 15D of the *CCP Act* to further examine when children and young people have the agency to disclose. The Children's Court notes that in its view, ensuring that children and young people who are over 16 years of age but under 18 years of age have access to legal advice before they are able to disclose as per s 15D(3) is beneficial. Young people can easily be influenced by adults in making decisions of this nature but may not fully appreciate the long-term implications of such decisions. However, the Children's Court queries the

practicalities around how such legal advice can be obtained.

Non-Disclosure and Suppression Orders

Question 4.1: Actions targeted by an order

From the perspective of the Children's Court, the definitions of 'suppression order' and 'non-publication order' in the *Court Suppression and Non-Publication Orders Act 2010* (the '*CSNPO Act*') are appropriate as they assist the court in ensuring the safety and privacy of court users are maintained in circumstances where these considerations outweigh competing interests in access to court information. In the Court's view the *CSNPO Act* provides sufficient flexibility to cater for the variety of circumstances that arise in the Children's Court jurisdiction.

Question 4.10: Requirement to give reasons

The Children's Court does not support a requirement to give full written reasons following the determination of an application for a suppression or non-publication order under the *CSNPO Act* as this would unduly impact on the efficient administration of the Court and potentially delay the implementation of the order. While the written order for suppression or non-publication may only specify the ground upon which the order was made, further oral reasons would be given by the judicial officer and recorded in court consistent with the general duty of judicial officers to give reasons for decisions. Access to the oral reasons could be sought in appropriate circumstances.

Question 4.14: Interaction between the Court Suppression and Non-Publication Orders Act 2010 and other statutes

The Children's Court can see some benefit in consolidating the statutory non-publication provisions that apply to children in the *CSNPO Act* as this would provide greater clarity and potentially prevent overlapping orders. In particular, the Children's Court is aware that the application of the statutory non-publication provisions relating to children involved in criminal proceedings, including witnesses, under the *CCP Act* in other court jurisdictions are not always well understood. The consolidation of such provisions could also avoid confusion between potentially conflicting provisions, for example, in relation to the right of a 14 or 15 year complainant in prescribed sexual assault proceedings to consent to the publication of their identity under s 578A(4)(b) of the *Crimes Act 1900* and the provisions regarding consent to publication under s15D of the *CCP Act*.

Monitoring and enforcing prohibitions on publication and disclosure

The Children's Court is of the view that the current legislative framework which relates to the enforcement of prohibitions on publication and disclosure are problematic in the Children's Court's jurisdiction. The Children's Court has often observed the publication of information that is likely to lead to the identification of a child involved in criminal or care proceedings through the media as a result of identifying information such as the child's school, home address, body shape or voice.[1]

As the person affected by the breach is a child, they do not have the capacity or resources to assert or protect their rights. In light of this, the Children's Court is of the view that reform in this area is essential, and that there needs to be a clearer process for a state agency to bring a complaint for breaches of these orders where they relate to children. Given it is the role of courts to determine breaches, the Children's Court is of the view that courts should not be responsible for monitoring compliance with either statutory or court ordered non-publication orders or suppression orders.

The Children's Court would be supportive of the creation of a suppression order and non-publication order register as discussed in part 13 of the Consultation Paper for orders made under the *CSNPO Act*. However, as all Children's Court proceedings are covered by statutory non-publication provisions such a register would not be useful for matters that are only covered by the automatic non-publications provisions.

A statutory framework for access to court information

The Children's Court agrees with the proposition that access to court information is an essential part of open justice. Transparency is a key factor in building and maintaining trust in the justice system and in the context of the work carried out by the Children's Court this was recently highlighted in the findings set out in the Family is Culture Report.[2] The Children's Court also agrees that the current statutory framework is cumbersome and is not only confusing for the public but can also be difficult to navigate for those working within the justice system.

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[1] For example, see *AM v Department of Community Sevices (DOCS); ex parte Nationwide News Pty Ltd* [2008] NSWDC 16.

[2] Professor Megan Davis, Family is Culture – Independent review of Aboriginal children and young people in OOHC (Review Report, October 2019), see for example, p. 68 <https://www.familyisculture.nsw.gov.au/?a=726329>.

Question 6.1: Consolidation of the court information access regimes in NSW

(1) Should the regimes governing access to court information be consolidated? Why or why not?

The Children's Court is in principle supportive of having a consolidated court information access regime in NSW. However, the Children's Court also appreciates that shifting to a consolidated model would be a complex undertaking and would need to account for differences across jurisdictions. The Children's Court notes that any changes to the current access regimes would need to be done in consultation with specialist courts to ensure that legislation is fit for purpose. Adequate funding would also need to be secured to ensure that the regime functioned effectively and as intended.

(2) If so, how should the regimes be consolidated?

The Children's Court does not object to a single consolidated access regime such as was sought to be achieved through the uncommenced *Court Information Act 2010* (NSW) (the '*Court Information Act'*). However, the Children's Court also sees merit in establishing a partial consolidated model that distinguishes between criminal and civil proceedings. However, whichever approach is adopted the Children's Court submits that any statutory framework needs to have proper regard to the best interests of any children that are involved in the proceedings. [3]

The Children's Court agrees that a partial consolidated model is likely to provide greater scope to tailor the framework to cater for different types of proceedings and potentially provide a clearer pathway to determine access applications. Nevertheless, the Children's Court accepts that this would still be a challenging task. For example, the Children's Court notes that some court files contain a mixture of information relating both criminal and civil proceedings. The categorisation of proceedings may also need to be stipulated. This is particularly relevant in the context of criminal proceedings that also involve related bail proceedings, apprehended violence proceedings and applications relating to forensic procedures.

The Children's Court also sees a utility in the approach put forward by the Consultation Paper at paragraph 6.22, which states that:

'To deal with the different nature and functions of different forums, the regime could allow certain rules to be tailored to particular forums. For example, statutory provisions outlining general principles could be supported by regulations or rules adapted to the nature and functions of that forum or jurisdiction.'

[3] UN General Assembly, Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), Article 3.1.

The Children's Court also notes that in its view, a transition to a consolidated regime would be best supported by the implementation of a Digital Case File system. Additionally, the Children's Court is of the view that such a shift would potentially require a properly resourced team to assist the Court to give effect to any determination in relation to access to information, noting that there are serious risks associated with the provision of information held by the Children's Court given the sensitive nature of the proceedings.

Question 6.2: Discretion to permit or deny access to information

The Children's Court is supportive in principle of classifying information into classes of information in an analogous way to the way in which the uncommenced *Court Information Act* differentiates between 'open access information' and 'restricted access information'. However, it is noted that the *Court Information Act* in its current form does not deal specifically with information relating to children. Under the uncommenced *Court Information Act,* Children's Court proceedings would fall within the category of 'open access information' but in the Court's view information held by the Children's Court, or any proceedings involving children, should fall into the category of 'restricted access information'.

The Children's Court is of the firm view that courts should maintain a discretion to make determinations about whether or not it is appropriate to permit or deny access to information which falls into the 'restricted access information' category in light of the factual matrix and particular circumstances of a given case. The Children's Court notes that it would like to be involved in any further consultations in this area to determine what information would fall into which class in its specialised jurisdiction.

(2) In what circumstances, if any, should information be available as of right?

The Children's Court is supportive in principle of an access regime where access to information is granted based upon the circumstances of the applicant who is requesting the information. For example, the Children's Court is of the view that parties, non-parties, victims, researchers and the media should all have different access rights as a result of their differing legitimate interests in court information.

Whilst ordinarily parties generally are considered to have a right to access to court information, in some rare circumstances, there may also be cause for the Children's Court to restrict a party's access to information in care proceedings where the release of the information to a party, usually a parent, may potentially cause further harm to a child.[4]

[4] See also s256A of the *Children and Young Persons (Care and Protection) Act 1998*.

The Children's Court agrees that media access to court information as of right is appropriate in some circumstances to ensure fair reporting of the proceedings. However, careful consideration as to what types of information should be available as of right, as well as the administrative burdens placed on registry staff to provide such information in a timely manner need to be considered.

Therefore, any consolidated regime that provides for access as of right should be flexible enough to cater for these types of issues.

Question 6.3: Considerations in determining access requests

The Children's Court does not object to the considerations listed in s9(2) of the *Court Information Act*. Additionally, the Children's Court agrees with the submissions made by Legal Aid NSW as referred to in paragraph 6.56 of the Consultation Paper, that 'the principle of open justice should be balanced with the safety, welfare, wellbeing, privacy and other interests of children involved in legal proceedings.' In the Court's view this should also extend to consideration of the impact of disclosure of the information on a child's future prospects.

Question 6.4: Types of court information available for access

The Children's Court agrees with the recommendation made by Attorney General's Department's as noted in paragraph 6.74 of the Consultation Paper, that access to information held by the Children's Court should generally be categorised as 'restricted access information' with access being provided at the discretion of the Court.

Question 6.6: Who can access court information?

The Children's Court agrees that an access scheme which distinguishes between parties, non-parties and the media is appropriate. The Children's Court agrees with the submission put forward by Rape and Domestic Services Australia in paragraph 6.100 of the Consultation Paper that 'the types of people who can access information in sexual, domestic or family violence proceedings should be limited, due to the sensitive nature of such proceedings.'

Question 6.7: Privacy protections for personal information

The Children's Court agrees that privacy protections are a relevant consideration when dealing with the release of court information for the reasons outlined in paragraph 6.105 of the Consultation Paper and that the

restrictions on the provision of personal identification information as referred to in the *Court Information Act* are appropriate.

The Court notes that there is some argument that personal identification information be could be redacted before filing. In the Court's view this is not only impracticable but would also frustrate a court's business. In the case of the Children's Court, a young person's date of birth is critical information that founds the jurisdiction of the Court. Address details are similarly critical for the purpose of service of court documents and for assessing bail considerations in the criminal jurisdiction.

The Children's Court agrees that the redaction of personal identification information is problematic both in terms of the time required as well as the need to have staff with the relevant expertise to undertake such a task.

Question 6.11: A national access regime

The Children's Court can see some advantage in having a national access regime to allow government law enforcement or child protection agencies to access court orders made in another state, including orders made in Children's Courts. However, the Children's Court is of the view that a general national access regime would be too complex and would likely to be unworkable given the varying statutory frameworks that apply to both criminal and civil proceedings across different states jurisdictions.

Question 6.12: Public availability of judgments and decisions

The Children's Court appreciates that the public availability of judgments and decisions is an integral part of open justice. However, the Court is of the view that imposing a 'quota' of judgments to be published as suggested by some of the submissions would not significantly contribute to open justice principles.

The Children's Court notes that as a summary jurisdiction, placing a quota on judgments to be published would be unfeasible within current resourcing. The Children's Court notes that Children's Magistrates often give ex-tempore judgments so that the parties to the proceedings can be provided with a timely resolution of cases and this is an important consideration given the nature of the cases dealt with by the Children's Court. The imposition of a quota would likely result in the delay in finalisation of many cases.

The Children's Court notes that it publishes key decisions through CaseLaw and periodically issues a bulletin on the Court's website referred to as Children's Law News, to highlight not only Children's Court decisions but decisions in other jurisdictions that are of relevance to the Children's Court jurisdiction. Cases are chosen by an editorial committee made up of judicial officers and legal practitioners working in the jurisdiction. The editorial committee can also request a judicial officer to publish an unpublished decision where the committee is of the view that there is an educative value in

publication of the decision. The Children's Court is of the view that this process ensures that the Court operates in a transparent way and that it meets its obligations in line with the principles of open justice.

Protections for children and young people

Question 7.1: Criminal Proceedings – prohibition on the publication and disclosure of identifying information

(1) Should there continue to be a general prohibition on publishing or broadcasting the identities of children involved in criminal proceedings in NSW? Why or why not?

As the Consultation Paper articulates, children and young people are considered to be inherently vulnerable, and as a result of this vulnerability, are afforded special protections by the law such as the general prohibition on publishing their identities enshrined in s 15 A of the *CCP Act.*

The Children's Court notes that this vulnerability is in some instances, compounded and increased by virtue of the life circumstances of the children and young people who appear before it. Consequently, the Children's Court is of the view that these protections are necessary and important, and that they are in alignment with Australia's international law obligations as set out by the Convention on the Rights of the Child to which Australia is a signatory[5] as well as the special consideration afforded children under the *Criminal Records Act 1991* (NSW).

As the New South Wales Court of Criminal Appeal opined in the case of *Paul Campbell v R* [2018] NSWCCA 87 'the criminal law in Australia treats children differently to adults who commit criminal offences'[6] and the Court stated that 'at its core, [the] regime focuses on the desirability of fostering the rehabilitation of children'[7]. These principles along with our increased understanding of adolescent brain science lie at the heart of the philosophies which underpin the work of the Children's Court and inform the Court's approach to youth justice.

The Children's Court would like to highlight that the philosophies under which the Court currently operates in its youth crime jurisdiction is based on what I have described as the four pillars of an enlightened youth justice approach.

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[5] UN General Assembly, Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), see for example, Article 3.1, 9.1, 28-29, 37, 40.

[6] *Paul Campbell v R* [2018] NSWCCA 87, at [20].

[7] Ibid, at [23].

These four pillars are: prevention, early intervention, diversion, and rehabilitation. [8]

Support for this approach was also highlighted in the *Royal Commission into the Protection and Detention of Children in the Northern Territory* in 2017 where the Commission noted that 'Media reporting identifying young offenders can affect their prospects of rehabilitation, their sense of identity and their connection to the community.'[9]

In light of this, the Children's Court is strongly supportive of the policy objectives behind the publication prohibitions contained in the *CCP Act*; namely, reducing stigma for young people and who are involved in proceedings in the criminal justice system and facilitating their rehabilitation and re-integration back into the community. The Children's Court notes that it also views these protections as beneficial as they also act to protect the child siblings, peers and other family members who may otherwise be stigmatised within their community as a result of their association with a young person who has engaged in criminal behaviour.

Furthermore, the Children's Court notes that it is specifically mandated to give priority to the rehabilitation of children, such that considerations of retribution, deterrence and punishment are secondary considerations.[10] Consequently, the Children's Court is of the view that removing such protections would be counterintuitive to this mandate and to the therapeutic approach taken by the Court in its criminal jurisdiction. As such, the Children's Court believes that there should continue to be a general prohibition on publishing or broadcasting the identities of children and young people involved in criminal proceedings in NSW.

(2) What changes, if any, should be made to the existing prohibition and the exceptions to it?

The Children's Court has observed that the scope of this prohibition has sometimes been misunderstood in two key ways.

Firstly, the Children's Court notes that it has been made aware of some cases where there has been a failure to appreciate that this prohibition applies to all criminal matters involving children and young people in all courts – not just in criminal proceedings involving children which are being heard by the Children's Court.

[8] Judge Peter Johnstone, 'Emerging Developments in Juvenile Justice' (Conference Paper, 5th Annual Juvenile Justice Summit, Rydges Melbourne, 25 March 2014).

[9] Commonwealth, Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory, Report (2017), 28.

[10] *Children (Criminal Proceedings Act 1987* (NSW), s 6.

Secondly, the Children's Court notes that in its view, and as outlined at paragraph 7.16 in the Consultation Paper, the fact that the prohibition extends to any identifying information, including the name of the child's school, home town, images taken where the child's face has been pixelated but other distinctive features such as hairstyles remain or the names of their friends is not always well understood. The Children's Court has taken cognisance of instances where the 'jigsaw identification' of children and young people is possible or has occurred, whereby the identities of the children and young people have been pieced together through the triangulation of details which have been published in different sources.

In light of these misunderstandings, the Children's Court would be supportive of a legislative amendment to the *CCP Act* which makes it clearer that the prohibition applies to any information likely to lead to the identification of the young person and includes a non-exhaustive list as to matters which could potentially lead to the identification of the accused young person.

In relation to the exceptions to the prohibition, the Children's Court is of the view that amendments should not be made with regards to lifting the publication prohibition upon the death of the child or young person, as doing so could potentially lead to the friends and family of the child or young person experiencing unwanted and harmful consequences such as stigmatisation. As discussed in the Consultation Paper, the Children's Court is of the view that the law should recognise that the identities of siblings and friends of the child who has died might still require protection and therefore the current provisions whereby a senior next of kin must give consent provide an appropriate opportunity to balance these interests.

The Children's Court also rejects the arguments and proposals put forward in paragraphs 7.33 and 7.34 of the Consultation Paper that would allow for identification of a child once they turn 18 or 21. The Court is of the view these proposals misunderstand rehabilitative purpose of the prohibition against naming children. Such an approach would also undermine the objectives of the framework established under the *Criminal Records Act 1991* (NSW).

The Children's Court is supportive of the proposal set out in paragraph 7.35 for the reasons outlined in paragraph 7.36, and agrees that the prohibition should be extended to cover the period before charges are laid and include young people who are reasonably likely to become involved in criminal proceedings.

Question 7.1: Criminal Proceedings – closed court orders

(1) Should criminal proceedings involving children continue to be held in closed court as a rule? Why or why not?

As outlined above, children and young people fall into a particular class of

person who are recognised as being inherently vulnerable under Australian and International Law. In light of this, and the fact that the Court is of the view that children should be treated differently to adults due to an increased understandings around adolescent brain development, the Children's Court believes that criminal proceedings involving children should continue to be held in closed court.

Whilst the Children's Court recognises that holding proceedings in a closed court significantly impinges upon the principles of open justice, the Court is of the view that criminal proceedings involving children and young people should be held in a closed court to enable their full participation, which in turn, protects and facilitates their right to be heard, another fundamental principle of justice.

In the Court's view, holding criminal proceedings involving children and young people in an open court would significantly impact upon their ability to participate effectively due to the overwhelming nature of the open court experience. Moreover, the Children's Court notes that some of the children and young people who appear before it in the criminal jurisdiction are some of the most vulnerable members of our community.

The Court would like to highlight that the risk factors for youth offending are well established in research and involve: family 'dysfunction', such as family violence, parental unemployment and parental criminal history; child abuse and neglect [11], including removal and placement in out-of-home care; physical, intellectual or learning disabilities; and mental health issues. As such, the Court is of the view that conducting criminal proceedings involving children and young people in open court could be a very confronting and potentially traumatising or re-traumatising experience for them. In light of these considerations, the Children's Court firmly believes that criminal proceedings involving children and young people should continue to be held in closed court.

(2) Are the current exceptions to the rule appropriate? If not, what changes should be made?

The Children's Court appreciates the complexities around young people and traffic offences. However, the Children's Court notes that in its view, all persons under the age of 18 who are brought before the court, including for traffic matters, should be dealt with in the Children's Court in a closed court environment. This would also ensure that specialist Children's Magistrates who are experienced in communicating with young people would preside over the matter, and that the lawyers and police prosecutors would also be experienced in dealing with issues involving young people.

[11] 'Cross-Over Kids - Childhood and Adolescent Abuse and Neglect and Juvenile Offending', Judge Marien, 2012.

As such, the Children's Court is of the view that the current exceptions are not appropriate, and believes that matters relating to traffic offences involving persons under 18 should be held in a closed court in the event that the matter were to be heard in a court other than the Children's Court.

Question 7.3: Criminal diversion processes

(1) Is the prohibition on publishing or broadcasting the identities of young offenders who take part in criminal diversion processes appropriate? Why or why not?

Diversion and rehabilitation are examples of therapeutic interventions that seek to address the complex constellation of risk factors related to offending by children and young people and are a critical to the Children's Court's approach to youth justice. As such, and for the reasons articulated above, the Children's Court is of the firm view that there should be a prohibition on publishing or broadcasting the identities of young offenders who take part in criminal diversion processes.

From the Children's Court's perspective, lifting this prohibition would be counterintuitive to the restorative justice principles which inform some of the Court's diversionary measures such as Youth Justice Conferencing.

(2) What changes, if any, should be made to the existing prohibition?

The Children's Court does not propose any amendments to the existing prohibitions on publishing or broadcasting the identities of young offenders who take part in criminal diversion processes.

Question 7.4: Proceedings for apprehended domestic violence orders

(1) Is the prohibition on publishing the identities of children involved in apprehended domestic violence order proceedings appropriate? Why or why not?

For the reasons outlined above, the Children's Court strongly supports the prohibition on publishing the identities of children involved in apprehended domestic violence order proceedings.

(2) What changes, if any, should be made to the existing prohibition?

The Children's Court does not propose any amendments to the existing prohibitions on publishing the identities of children involved in apprehended domestic violence order proceedings.

Question 7.5: Care and protection proceedings – prohibition on the publication and disclosure of identifying information

(1) Is the prohibition on publishing or broadcasting the identities of children involved in care and protection proceedings appropriate? Why or why not?

The Children's Court would like to highlight that some of the cases the come before it in its care and protection jurisdiction are some of the most complex, confronting and emotive matters which the Court deals with. For example, matters which come before the Court in the care and protection jurisdiction include non-accidental injury cases, allegations of sexual abuse, domestic violence, incest, substance or alcohol misuse and neglect.

Due to the nature of these proceedings, the incredible vulnerability of the children and young people involved, and the potential for children and young people to be stigmatised, the Children's Court is of the firm view that the prohibition on publishing or broadcasting the identities of children involved in care and protection proceedings is appropriate.

(2) What changes, if any, should be made to the existing prohibition and exceptions?

The Children's Court does not propose any amendments to the existing prohibitions on publishing the identities or identifying information of children involved in care proceedings other than to make it clearer that the prohibition applies to any information that is likely to lead to the identification of the child or young person in subsection (1) of s 104 rather than providing this explanation in subsection (4).

Question 7.6: Care and protection proceedings – closed court orders

(1) Are the existing provisions relating to the exclusion of people (including the child or young person themselves) from court and non-court proceedings under the *Children and Young Persons (Care and Protection) Act 1998* (NSW) appropriate? Why, or why not?

The Children's Court is of the view that the existing provisions relating to the exclusion of people including those which relate to the child or young person who is the subject of the proceedings from court and non-court proceedings under the *Care Act* are appropriate and that these matters should be conducted in a closed court setting.

The Children's Court recognises that children and young people are entitled to attend care and protection proceedings and have a right to 'the fullest opportunity practicable to be heard, and to participate, in the proceedings' as set out in s 95 (3) of the *Care Act*.

The Children's Court would like to clarify that the Court does not discourage children and young people from attending care and protection court proceedings or Dispute Resolution Conferences (DRCs) and the discretion under s 104 of the *Care Act* to exclude a child or young person has rarely, if ever been utilised. Rather, the Court will make adjustments to the process to manage the attendance of a child or young person who wishes to attend, taking into consideration their maturity and interest in particular aspects of the proceedings. For example, the court may list a matter after 3 pm to allow for the child or young person attend after school if they would like to be present. However, the Court notes that in practice, care proceedings have evolved in such a way that means that children and young people don't routinely attend court as the court experience is often considered to be disruptive to their everyday lives.

The Children's Court is of the view that the discretion contained in s 104 of the *Care Act* is appropriate due to the nature of the evidence given in care and protection matters which can be highly traumatising. For example, this discretion may potentially be exercised in relation to part of the proceedings in circumstances where the subject child would have heard directly from the parents that the parents did not want the child to be returned to their care due to the child's high needs and behavioural issues. This discretion might also be exercised in circumstances where graphic or confronting evidence is given, including evidence relation to domestic violence or sexual assault which would be highly traumatising or re-traumatising for the subject child or young person to be exposed to.

In light of the potential for evidence given to cause psychological harm to the child or young person involved in the proceedings, the Children's Court is of the firm view that this discretion should be maintained. From the Children's Court's perspective, this discretion is essential as it ensures that the Children's Court can provide a trauma informed response.

(2) What changes, if any, should be made to these provisions?

The Children's Court does not suggest making amendments to these provisions.

Question 7.9: Other proceedings

What further protections, if any, should there be against the publication and disclosure of, or public access to, types of legal proceedings involving children other than those to which protections already apply?

The Children's Court is supportive of expanding the protections which apply to children and young people to include civil proceedings and would welcome the adoption of protections which are similar to those which are enshrined in s 72(1) of the *Court Procedures Act 2004* (ACT).

Victims and Witnesses: privacy protections and access to information

Question 8.2: Current protections for specific types of victims and witnesses

(1) Are the privacy protections for specific types of victims and witnesses in NSW appropriate? Why or why not?

For the reasons set out above, the Children's Court is of the firm view that the privacy protections contained in s 15A of the *CCP Act,* s 105 of the *Care Act* and s 45(1) of the C*rimes (Domestic and Personal Violence) Act 2007* (NSW) are appropriate and necessary.

However, the Children's Court is supportive of strengthening the privacy protections for specific types of victims and witnesses such as children and young people.

As articulated in the Consultation Paper at paragraph 8.33, s 10 of the *CCP Act* allows the court to direct anyone (apart from child defendants, family victims or other interested parties) to leave the court during the examination of a child (or adult) witness if the court determines that this is in the best interests of the child defendant. While Court is of the view that judicial officers dealing with Children's Court proceedings would be open to any request made by a child victim to exclude any other persons from the court room while they were giving evidence the Children's Court agrees that s 10 could be strengthened to make it clear that the Court should, in addition, have regard to the interests of any child victim.

The Children's Court would like to clarify that judicial discretion provided for by s 10 of the *CCP Act* is not confined to matters which are heard in the Children's Court. As per s 4 of the *CCP Act*, s 10 of the *CCP Act* is applicable in any court which is dealing with a criminal matter involving a child or young person. However, the Court notes that there are exceptions to this provided for by s 10, such as in the case of traffic matters which are being heard by the Local Court.

As discussed in paragraph 8.39 of the Consultation Paper, courts do not have an express legislative power to close the court when a child witness is giving evidence in criminal proceedings relating to an adult defendant. While child witnesses may have the right to give evidence by closed circuit television the Children's Court would support a legislative amendment which provides courts with an express power to close a court when a child witness is giving evidence against an adult accused.

Media access to court information and court proceedings

Question 10.2 Media access to court proceedings

(1) Is the current regime governing media access to proceedings appropriate and workable? Why or why not?

(2) What changes, if any should be made to the current regime?

The Children's Court is of the view that the legislative provisions that operate under s 10 of the *CCP Act* and s 104C of the *Care Act* to allow media representatives to remain in the courtroom unless directed by the court are appropriate. The Court recognises that this is an important safeguard to help instil public confidence in the Court given that members of public are generally excluded from attending Children's Court proceedings.

It might be noted that during the COVID-19 pandemic the Children's Court did not exclude the attendance at court of any party or media representative but reduced the need for parties to attend court by presumptively excusing a party's attendance if legally represented and encouraged legal practitioners to appear by video conference. If the Children's Court was to allow access to virtual courtrooms by media representatives further enhancements to the technology available to the Children's Court would need to be made to ensure that judicial officers had the ability to exercise oversight as to who was present in the courtroom.

Question 10.2 Media access to court information

(1) Are the current arrangements for the media to access court information in relation to both civil and criminal proceedings appropriate? Why or why not?

(2) Should the media have special privileges to access court information in relation to civil and/or criminal proceedings? Why or why not?

(3) What changes should be made to the current arrangements?

The Children's Court is of the view that access to court information should be compatible with the right to access court proceedings to ensure that media representatives can prepare an accurate report of proceedings. However, the application of s 314 of the *Criminal Procedure Act 1986* (NSW) (*'Criminal Procedure Act')* is a source of considerable confusion for both media representatives and registrars given that the statutory non-publication provisions in the *CCP Act* and the *Care Act* relate to the non-publication of information but the *Criminal Procedure Act* relates to documents that are

prohibited from being published or disclosed by any other Act or law.[12]

In the Court's view a consolidated Act, similar to the uncommenced *Court Information Act*, would assist in resolving these type of issues. However, the Children's Court would seek to be involved in further discussions as to what type of Children's Court information should be available to the media as of right unless there is a suppression order in place and what additional court information could be sought on application and at the discretion of the Court.

The impact on registry resources in providing media access to court information should not be understated and any statutory regime needs to take account of these issues. A more consistent approach to providing media access to court information is likely to be achieved if there was a greater awareness by the media of the extent of the statutory non-publication provisions that protect the identification of children involved in court proceedings and accompanied by a stronger framework for monitoring breaches of the non-publication provisions applicable in the Children's Court.

Researcher access to information

The Children's Court's strategic directions are informed by research, and, the Court acknowledges the invaluable contributions made by researchers to our understandings around children, young people and the law. The Children's Court regularly provides researchers with access to court information.

Whilst the Children's Court can appreciate that introducing a centralised framework for access to information for would have some advantages, the Children's Court is of the view that the Court as opposed to a research committee should retain discretion in relation to researcher access to court information. Practical considerations as to what information is likely to be held by the Court, how that information can be identified and how registry staff can support research access to information are often the critical considerations in determining a research application. These issues require practical knowledge of court practice and these issues are unlikely to be able to be resolved by a research committee.

Digital technology and open justice

The Covid-19 pandemic has posed unprecedented challenges for all court jurisdictions, including the Children's Court over the past year. The Children's Court has moved swiftly to adapt to our 'new normal' and has made significant changes to operations in order to meet the increase in demand which was

[12] See s314(4) of the *Criminal Procedure Act 1986.*

placed on court services and the judicial resources of the Court as a consequence of the pandemic.

While public access to the Children's Court during the COVID-19 pandemic has not been an issue given Children's Court proceedings are generally closed to the public, the Children's Court sees potential for the ongoing use of this technology as a way of improving access to justice for those involved in the proceedings, such as victims and family members who are unable to attend court in person. However, the Court also recognises the risks identified in the Consultation Paper and agrees that more work needs to be done in this area, including technological improvements before the current processes can be expanded.

Conclusion

The Children's Court would again like to acknowledge the work of the Commission in compiling this very thorough Consultation Paper and for conducting this timely review into open justice. The Children's Court is of the view that this significant review raised a lot of important issues relevant to the work of the Children's Court and to our justice system more generally.

The Children's Court would appreciate the opportunity to participate in any further consultation processes which relate to this review. The Children's Court looks forward to working collaboratively with the NSW Law Reform Commission, and would like to assist with this review through sharing our insights with regards to our role as a specialist court with experience in dealing with issues affecting children, young people and the legal system.

Should you have any further questions in relation to these matters, please contact me or the Children's Court's Executive Officer, Rosemary Davidson, on [redacted] or by email at [redacted]

Yours sincerely,

[redacted]

Judge Peter Johnstone
President of the Children's Court of NSW