

SUBMISSIONS: NSWLRC CONSULTATION PAPER 22 – OPEN JUSTICE

9 March 2021

“Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity.”

Jeremy Bentham

This submission is made by Banki Haddock FIORA (**BHF**), a Sydney-based boutique media and intellectual property law firm, in response to the NSW Law Reform Commission (**NSWLRC**) Consultation Paper 22 – Open Justice, Court and Tribunal Information: Access, Disclosure and Publication (**Consultation Paper**). BHF has one of the largest and busiest specialist media law practices in Australia, advising and acting for large media organisations in relation to all aspects of their businesses, including prepublication advice, defamation litigation, non-publication order applications and accessing Court documents.

This submission should be read in conjunction with our preliminary submission dated 31 May 2019. The questions set out in the Consultation Paper traverse a wide variety of matters and are expressed at a high level of granularity. Responding to every specific sub-paragraph of each question would likely result in some duplication in our responses. Consequently, BHF has structured this submission by referring to broadly to certain basic principles underlying issues addressed in the Consultation Paper.

Executive Summary

BHF is supportive of the NSWLRC’s Open Justice Review. Acting for media clients that report on matters before NSW courts and advising daily on such reports, BHF is concerned that open justice is under threat by the complexity, obscurity and inconsistency surrounding restrictions on access and publication of court proceedings and documents. These factors manifest in unnecessary cost and compliance burdens not only on the Courts, but also on journalists and media organisations, at a time when their business models are under threat. Worse, the existing regime of criminal penalties puts journalists’ liberty at risk should they make a mistake or overlook a restriction.

BHF therefore submits that at least the following high-level principles should guide the NSWLRC in responding to the terms of reference.

1. In light of the fundamental importance of the principle of open justice, access and publication restrictions, both statutory and discretionary, should go no further than is reasonably necessary to protect legitimate countervailing interests.
2. Any automatic restrictions on access and publication that are necessary to protect legitimate countervailing interests should be contained in a single statute.
3. Any such instrument should clearly and consistently state the applicable access and publication rules and their exceptions.
4. Media organisations should be notified of discretionary non-publication and suppression orders and given a real opportunity to challenge their making and scope.

5. Journalists should not be at risk of multiple actions for the one publication.
6. Journalists should not be at risk of imprisonment or having a criminal record for doing their jobs.
7. The media must have access to documents in matters before the Courts to ensure accuracy of reporting on matters of public interest, in the interests of open justice.

BHF's submissions on possible open justice reforms that could reflect the above guiding principles, are set out below.

Submissions

1. Access and publication restrictions should go no further than is reasonably necessary to protect legitimate countervailing interests.

As noted in the Consultation Paper, a primary objective of the administration of justice is to safeguard the public interest in open justice.¹ It is an important aspect of the administration of justice that it is conducted in public where it can be seen "warts and all".²

The rationale of the open justice principle is that Court proceedings should be subjected to public and professional scrutiny. It is a common law corollary of the open-court principle that, absent any restriction ordered by the Court, anybody may publish a fair and accurate report of the proceedings, including the names of the parties and witnesses, and the evidence, testimonial, documentary or physical, that has been given in the proceedings.³ If information relating to matters before the Court is unduly suppressed, proceedings would inevitably become the subject of rumours, misunderstandings, exaggerations and falsehoods.⁴

Media access to, and publication of matters raised in, Court proceedings therefore serve a number of important public interest functions, including:

- accountability of the judiciary;
- accountability of police and prosecutors;
- educating the public as to judicial processes and applicable laws;
- informing the public and exposing those people who have infringed upon those laws, not only to ensure justice is seen to be done as a deterrent for others, but also to inform the public of the adequacy and performance of the criminal justice system.

Had media reporting on school and prison relationships, sexual assault, and bail hearings not been permitted, BHF queries whether essential law reforms with broad public support would have occurred, such as NSW's special care offences⁵, consent⁶, and the 2014 reforms to the *Bail Act 2013* (NSW)⁷.

Restricting publication of details of, or more fundamentally, access to, court proceedings should, in BHF's submission, only be done where the countervailing interest being protected by the restriction

¹ Section 6 *Court Suppression and Non-publication Orders Act 2010* (NSW) (**CSNPO Act**); *Rinehart v Welker* [2011] NSWCA 403; 93 NSWLR 311

² *Dallas Buyers Club, LLC v iiNet Limited (No 1)* [2014] FCA 1232 per Perram J at [8].

³ *Hogan v Hinch* [2011] HCA 4; 243 CLR 506 per French CJ at [22]

⁴ *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* (supra) at 481. See also *Ex parte Queensland Law Society* [1984] 1 Qd R 166 at 171.

⁵ See amendments effected by the *Crimes Amendment (Special Care Offences) Act 2020* (NSW).

⁶ Which became the subject of a NSW Law Reform Commission inquiry: see *NSWLRC Report 148: Consent in relation to sexual offences*, following reporting of the *Lazarus* rape case, *Lazarus v R* [2016] NSWCCA 279.

⁷ *Bail Amendment Act 2014* (NSW).

impacts justice outcomes and outweighs these important open justice principles. As Kirby P (as he then was) noted in *John Fairfax Group Pty Ltd (Receivers and Managers appointed) v Local Court of NSW* (1991) 26 NSWLR 131 (at 140-141):

However well meaning the derogations [from the open justice principle] may be in particular cases, history, and not only ancient history, demonstrates the way in which exceptions can multiply and the principle of the open administration of justice, publicly reported, can be destroyed.

...

(at 143) A significant reason for adhering to a stringent principle, despite sympathy for those who suffer embarrassment, invasions of privacy or even damage by publicity of their proceedings is that such interests must be sacrificed to the greater public interest in adhering to an open system of justice. Otherwise, powerful litigants may come to think that they can extract from courts or prosecuting authorities protection greater than that enjoyed by ordinary parties whose problems come before the courts and may be openly reported.

BHF submits that mere embarrassment or the possibility of notoriety arising from a person's *involvement* in criminal proceedings should never justify a statutory restriction on publication or access without some further serious impact on the administration of justice, given the paramount importance of the open justice principle.

Against that contextual consideration of principle, BHF makes the following specific submissions (noted in blue).

- A. *In relation to automatic identification restrictions, the following uniform exemptions should be available:*
- i. consent of the Court on application by an interested party (which should be defined to expressly include the media);*
 - ii. informed consent of those identified and capable of giving consent; and*
 - iii. deceased persons.*

BHF accepts that legitimate interests can be protected by automatic publication restrictions in criminal matters, such as protecting child offenders and victims from public scrutiny and sexual assault victims from trauma and embarrassment that would deter other complainants from coming forward. However, where such legitimate interests exist, the rules formalising their protection should only go so far as is necessary to achieve those ends.

Self-evidently, any such legitimate interests are not served when the individual in question has died, yet the *Children (Criminal Proceedings) Act 1987 (NSW)* does not permit identification of a deceased child unless a senior available next of kin has consented; an unlikely circumstance. Any legitimate countervailing interest in protecting children from public scrutiny is not served by protecting their identities once they have died. By contrast, section 578A of the *Crimes Act 1900 (NSW)*, in BHF's submission correctly, permits publication of the victim's identity after their death.

- B. *In relation to access restrictions:*
- i. Statutory provisions limiting access to the court by the media (e.g. closing the court where victims of sexual offences or domestic violence offences) should specify whether publication of evidence or submissions given in closed court is permitted.*
 - ii. Evidence or submissions given in closed court should only be prohibited from publication where there is a legitimate interest e.g. protecting a sexual offence victim's identity.*

- iii. *An analogous provision to s291C of the Criminal Procedure Act 1986 (NSW) should be available for access to records of evidence and submissions in closed court in Domestic Violence Offence proceedings.*

A November 2020 amendment to the *Criminal Procedure Act 1986* has highlighted several difficulties and inconsistencies with the current regime of mandatory court closures during victim evidence. Largely mirroring the provisions applicable to prescribed sexual offence proceedings, section 289U of the *Criminal Procedure Act 1986* provides that domestic violence offence proceedings must be held *in camera* when the complainant is giving evidence or when a recording of the complainant's evidence is heard by a court. Analogously to the prescribed sexual offence provisions in Part 5 Division 1, section 289UA allows the court discretion to hear other parts of domestic violence offence proceedings *in camera*.

However, *unlike* the analogous provisions in Part 5 Division 1, in relation to domestic violence offences, there is no provision made for media access to the courtroom or a record of that evidence given in such circumstances akin to *section 291C* of the *Criminal Procedure Act 1986*. Section 291C permits the media to avoid any contempt of court arising from publishing the *in camera* evidence, by granting them access to the material, thereby (implicitly) consenting to the publication of that material.

This evident drafting lacuna has created a serious difficulty for media representatives wishing to report on the very important issue of domestic violence and the effectiveness of the NSW legal system in protecting victims and prosecuting perpetrators. BHF's initial anecdotal observation of the impact of this legislation on reporting is that this difficulty tends to result in under-reporting of the prevalence of domestic violence and the outcomes of those cases, as key details of the offences have been *heard in camera* and are unable to be reported. BHF also understands that some courts have implemented a blanket rule following the enactment of these new rules of blocking media access to the court files in such cases, even where the complainant has not given evidence (e.g. the accused has pleaded guilty). BHF submits that s291C should be amended as soon as possible to permit media access in the same circumstances as those in prescribed sexual offence proceedings.

This issue also highlights the lack of certainty arising from the drafting of legislation empowering the court to close itself to *the public*. As the legislation does not expressly prohibit publication of evidence given *in camera*, journalists and other court users may not be aware that publication of such evidence in the absence of an access right could constitute a contempt of court that may not be defensible by a fair and accurate report of proceedings. They may not be aware that publication is prohibited at all because the legislation refers to a legal term of art, in latin: *in camera*, rather than specifically articulating what can or cannot be published.

There is also uncertainty regarding whether references in open court to the complainant's evidence given *in camera*, such as in defence submissions, sentencing remarks and judgments, can be published.

The failure of these provisions to address the status of publication of evidence given *in camera*, and their location deep in the text of the *Criminal Procedure Act 1986*, make the law that governs reporting of these provisions inaccessible to those who are not experienced lawyers in the field. This is a situation which is not conducive to open justice and discussed further under heading 2 below.

C. At least the following automatic publication restrictions be reconsidered against the aim of open justice and public interest:

- i. *Information relating to registered child sex offenders under section 21E of the Child Protection (Offenders Registration) Act 2000 (NSW); and*

- ii. *the breadth of s15A of the Children (Criminal Proceedings) Act 1987 (NSW), which goes further than any other State or Territory in Australia by preventing the identification of child witnesses and children merely mentioned or otherwise involved in proceedings.*

In relation to item C.i. above, there is significant public interest in the identification of child sex offenders and the drafting of section 21E of the *Child Protection (Offenders Registration) Act 2000* (NSW) is unclear in its application. Unlike other State and Territory counterparts, which make it clear that the persons restrained from disclosing information are persons with access to such information, the NSW legislation prohibits the disclosure of such information by any person, which could include the news media when reporting on proceedings involving registered offenders.

In such a case, there is very little legitimate countervailing public interest in restraining publication of such information, vis a vis the public interest in open justice.

Item C.ii. above highlights where the NSW automatic restrictions go further than any other State or Territory. The public interest in open justice should not be overcome by an overzealous need to protect children who are not victims but are merely mentioned or appear in some criminal proceedings; there is no legitimate countervailing interest that outweighs open justice in such a scenario. As noted under heading A. above, there is no legitimate rationale for protecting the identity of deceased children. BHF submits that section 15A of the *Children (Criminal Proceedings) Act 1987* (NSW) should be wound back to come closer to the rules in effect in the other States and Territories.

D. In relation to suppression and non-publication orders:

- i. *In making a non-publication or suppression order, a Court should only be permitted to depart from the open justice principle in exceptional circumstances, and only if the facts demonstrate that it is necessary.*

Suppression and non-publication orders should only be made under the *Court Suppression and Non-publication Orders Act 2010* (NSW) (**CSNPO Act**) on the basis that such orders are necessary, in accordance with the principle of open justice.⁸ This reflects the common law, where it has been held that a suppression order should only be made where “it is really necessary to secure the proper administration of justice”⁹ or “the administration of justice would (otherwise) be rendered impractical”,¹⁰ and only to the extent as is absolutely necessary.

Where the Court is exercising criminal jurisdiction, to deny the public knowledge of any part of such proceedings is a matter of gravity,¹¹ and caution should be exercised by the Court. Where the open justice principle is engaged, a high level of strictness in applying the test of necessity is appropriate if the jurisdiction or power sought to be implied would, if exercised, result in closing the Court or prohibiting the publication of any information about the proceedings, such as reasons, verdict or orders.¹²

Where legislation permits the making of a non-publication order, the statutory powers permitting such an order must be applied with due consideration to the principle of open justice. The NSW Court of Appeal has stated that the principle of legality favours a construction of legislation such as the *CSNPO Act* which, consistently with the statutory scheme, has the least adverse impact upon the open justice

⁸ Sections 6 and 8 of the CSNPO Act; *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125; 83 NSWLR 52; 263 FCR 211; (2012) 293 ALR 384 at [45] to [51].

⁹ *John Fairfax & Sons Limited v Police Tribunal of New South Wales* (1986) 5 NSWLR 456 at 476-7 per McHugh JA.

¹⁰ *Scott v Scott* [1913] AC 417 per Earl Loreburn at page 446.

¹¹ *R v Tait* (1979) 24 ALR 473 and 487 per Brennan, Deane and Gallop JJ.

¹² *O’Shane v Burwood Local Court (NSW) & Ors* [2007] NSWSC 1300; 178 A Crim R 392 per McClellan CJ at CL at [34].

principle and common law freedom of speech and, where constructional choices are open, minimal intrusion upon that principle.¹³

However, in practice, the principles referred to above are often not properly engaged with or taken into account by lower Courts when making orders pursuant to the *CSNPO Act*. An amendment to section 6 to allow derogation from the open justice principle only in exceptional circumstances, and only where the evidence supports such a derogation, would go some way to addressing this issue.

ii. The Court should be required to give reasons for non-publication and suppression orders.

Given the importance of the principle of open justice and the inevitable chilling effect on freedom of expression of suppression and non-publication orders, reasons should be required to be given by Courts. It is widely accepted that fair and accurate reports of what occurs in courtrooms is an essential attribute of the administration of justice in Australia, and that any limitations imposed by judicial orders on reportage of proceedings conducted in open court remain “wholly exceptional” in this country.¹⁴ A requirement to give reasons would simply reflect the obligation of the Court to take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice pursuant to section 6 of the *CSNPO Act*. Such a requirement would also help ensure that Courts comply with the requirements that such orders operate for no longer than is reasonably necessary to achieve the purpose for which it is made (s 12(2)) and specify the information to which the order applies with sufficient particularity to ensure that the order is limited to achieving the purpose for which they are made (s 9(5)).

iii. The CSNPO Act should be amended to provide that orders are of no force or effect unless they comply with the requirements under the Act and reasonable attempts have been made to notify affected parties of the orders.

In BHF’s experience, given the relative ease with which non-publication and suppression orders can be sought under the *CSNPO Act*, and the inherent cautiousness of Courts in relation to the risk of prejudice to a fair trial, the protection of privacy, and concerns around publicity of Court proceedings, the principle of open justice and freedom of the expression may not always be properly taken into account when such orders are made.

Despite the requirements of section 6 of the *CSNPO Act*, in many instances the principle of open justice might often only be carefully considered by the Court upon a review by media or other affected parties of interim or final orders that have already been made. BHF submits that section 6, while well-intentioned and somewhat unusual in its application, should nevertheless be strengthened and given the desirability of an open and accountable judicial system and the public interest in allowing the media to report on matters before the courts, in the capacity of the general public’s “eyes and ears”.¹⁵

iv. Non-publication and suppression orders should be a defined length, or otherwise automatically expire after a defined period.

In BHF’s experience, it is often the case that non-publication orders are expressed to apply “until further order”. In many cases, no such further order revoking or varying the order is ever made, and the parties to the original matter simply move on. This leads to an outcome that clearly fails to adequately take into account the principles of open justice, freedom of expression and the overriding purpose.

¹³ *Rinehart v Welker* [2011] NSWCA 403; 93 NSWLR 311 (see also *Hogan v Hinch* (at [5], [27]) per French CJ; *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47 (at 55) per Kirby P).

¹⁴ *Re Application by the Chief Commissioner of Police (Victoria)* [2005] HCA 18; (2005) 214 ALR 422 per Kirby J at 448–449.

¹⁵ *Attorney-General v Observer Limited* [1990] 1 AC 109 at 183F per Sir John Donaldson M.R.

In one recent example, in an application seeking the revocation or variation of non-publication orders in a long-running criminal matter that had concluded with the conviction and sentencing of the defendant, it became apparent that suppression and non-publication orders had been made on at least 11 occasions by at least nine judges and magistrates over the course of eight years in those proceedings. The precise terms (including the duration) and application of several of those orders was impossible to ascertain, despite registry staff having conducted extensive enquiries of the records and transcripts of various hearings. One District Court judge involved in the matter conducted a series of searches of the records themselves. Given that the Court was unable on that occasion to articulate the effect of some of the relevant orders, it would obviously be impossible for a journalist to know with certainty what would constitute a contravention of the order, requiring the media to take the only real option available and not report on the matter.

Consequently, the *CSNPO Act* should be amended to provide that an order must be of a defined duration, and will otherwise automatically expire after a period of, for example, ten years.

- v. *Amend the CSNPO Act to expressly provide that costs may be awarded by a Court, however constituted, in any CSNPO Act application, including interim order applications, review applications and appeals.*

As noted in BHF's preliminary submission, there is currently no disincentive to an applicant bringing an application for *CSNPO Act* orders, even in circumstances in which such orders (including take-down orders) would be futile in light of the instantaneous dissemination of information across the globe via social media and the Internet, or are frivolous, vexatious or an abuse of process.

In BHF's experience, it is common for a party involved in a criminal proceeding (often a well-resourced defendant in a criminal proceeding) to make an application for non-publication orders on the eve of trial, in an effort to avoid the embarrassment of publicity surrounding the trial. It is also not uncommon for government or bureaucratic bodies to seek such an order to avoid embarrassment, or to maintain an application, whether by way of review, appeal or protracted legal argument, despite there being no reasonable basis for maintaining that position. Embarrassment should never be reason for interfering with the principle of open justice.

The Supreme Court of New South Wales has held that it would be antithetical to the public interests in open justice and free speech for a party affected by a non-publication order to be required to bear the costs burden of setting aside invalid orders, and that it would be neither just nor reasonable to deprive such a party, which has secured the vacation of orders which had no basis in law and which placed it at jeopardy of prosecution, of its costs of doing so.¹⁶ Too often non-publication orders are made hastily and not in conformity with the requirements set out in the *CSNPO Act*¹⁷, without adequate notice to affected parties, and without giving affected parties an opportunity to be heard.

BHF does not consider that allowing the Court to award costs in *CSNPO Act* applications would discourage the media or activists from challenging orders. In BHF's experience, the costs of appearing and challenging such orders are already borne by media and other affected parties. Consequently, allowing the Court discretion to grant costs orders would not, in BHF's submission, further burden media parties, but would instead act as a deterrent to frivolous, vexatious and embarrassing non-publication order applications.

¹⁶ *Australian Broadcasting Corporation v Local Court of NSW (No.2)* [2014] NSWSC 515 (ABC) per Adamson J at [20]

¹⁷ For example, by failing to state the grounds on which the order was made despite s 8(2), the order fails to specify the information to which the order applies with sufficient particularity to ensure that the order is limited to achieving the purpose for which the order is made despite s 9(5), or may effectively be of indefinite duration by being expressed as applying "until further order" and therefore operates far longer than may reasonably be necessary to achieve the purpose for which it is made despite s 12(2).

BHF also considers that the following issues should also be addressed by the NSWLRC in relation to the CSNPO Act:

- vi. *Remove the ground for making an order in section 8(1)(c), which has been too liberally applied to provide a broad and non-specific basis for the making of non-publication and suppression orders.*
- vii. *Limit the application of 8(3) of the CSNPO Act to defendants in sexual offence proceedings.*
- viii. *Create an exemption from the effect of a CSNPO Act order to allow the subject of a CSNPO Act order to consent to the publication of their identity, subject to exceptions which might include where disclosure prejudices an ongoing investigation, or identifies another person protected by a statutory reporting restriction of non-publication order.*
- ix. *Require the NSW Department of Justice to keep and maintain statistics as to the number and duration of CSNPO Act orders made.*

2. Necessary automatic restrictions on access and publication should be contained in a single statute.

- A. *Access rights and publication restrictions are currently located in obscure sections of legislative instruments that a lay person, and even a lawyer not practising in the field or from another jurisdiction, could not easily locate.*
- B. *There should be one legislative instrument for all automatic access rights and publication restrictions relating to NSW courts.*
- C. *The Court Information Act 2010 (NSW) could be amended to incorporate automatic publication restrictions, or a new piece of legislation could be drafted for this function.*

The concerns discussed under heading 1 above are suggestive of another impediment to open justice arising from the current legislative regime. A publisher or journalist wishing to know whether there is a statutory restriction on reporting a particular proceeding could not easily find obscure provisions located deep in myriad statutes. For example, section 578A of the *Crimes Act 1900* (NSW) in particular stands out as an unlikely place for a court user to look for such a restriction.

This leads to journalists and media companies relying heavily on law firms like BHF for advice in relation to whether they can publish articles about proceedings, and if so, what they can publish. We estimate that a significant amount of our prepublication work for media clients relates to matters before the courts. This necessarily equates to a heavy financial cost imposed by the current legislative regime on media companies at a time when public interest journalism is widely recognised as under financial pressure.

For these reasons BHF submits that all media access rights and automatic publication restrictions regarding proceedings should be repealed from their current locations and a new legislative instrument be enacted where media access and reporting restrictions appear together. This review represents a unique opportunity to do so.

3. Any such instrument should clearly and consistently state the applicable access and publication rules and their exceptions.

Perhaps due to their location in a variety of statutory instruments, publication restrictions are not consistently or clearly described and the exceptions vary in scope and definition. These should be clearly codified and harmonised in their scope, with respect to the restrictions and any exceptions.

In particular, BHF notes the difficulties presented to journalists in the complexity of the current regime in being able to determine for themselves:

- Whether an offence is indictable or summary and therefore proceeding before a jury (thereby raising a *sub judice* contempt issue);
- Whether certain material is restricted from publication due to it having been heard in camera;
- Whether a non-publication or suppression order applies; and
- Whether an offence is a prescribed sexual offence (thereby raising a s 578A issue).

In relation to non-publication and suppression orders, court media liaison officers typically provide these upon request. While BHF considers that a searchable database of extant non-publication or suppression orders would be a better option for media outlets and less burdensome on the court's resources, generally the court media liaison officers are responsive even outside business hours such that this system appears to be functioning relatively well.

BHF submits that the other critical information listed above, and any other applicable automatic restrictions, could be noted on the court file and provided to media outlets along with details of charges, non-publication/suppression orders and agreed facts, upon request.

4. Media organisations should be notified of discretionary non-publication and suppression orders and given an opportunity to challenge their making and scope.

The aims of open justice would be facilitated if the Courts proactively notified media outlets of applications having been made in such cases so that they have as much notice as possible to be able to appear and challenge their making and scope. A simple method of notifying media outlets would be to send an email to the Courts' electronic mailing lists for non-publication orders advising of the upcoming application and providing a contact for any interested media outlet to request the application and supporting materials for the purposes of assessing whether to appear and resist the application.

Although BHF recognises the utility in allowing a Court to make an interim order to avoid a situation where a failure to do so would render a final order futile, section 10 of the *CSNPO Act* should be amended to provide that as soon as practicable after the making of an interim order, the applicant must personally serve the order, or at the very least must make reasonable attempts to notify affected parties, and provide affidavit evidence verifying those efforts at the final hearing, failing which the interim order must be vacated.

As recommended in BHF's preliminary submission, given the severity of the criminal sanctions involved, even for an unintentional contravention, a registry must be established, setting out the terms, duration and affected parties of *CSNPO Act* orders. BHF notes that some Australian jurisdictions already maintain such registries. The costs of establishing such a register would not be prohibitive, given that the terms of such orders are already lodged in the NSW Court system's database, JusticeLink, and could easily be transferred across to a stand-alone database. Alternatively, a fee could be charged to the applicant upon the entering of a non-publication order, with a discretion to waive the fee in cases of hardship or where the interests of the administration of justice require it. We note that all orders made in proceedings before the Federal Court of Australia are published in a timely fashion to the general

public. BHF submits, in those circumstances, that the benefits of establishing such a register would far outweigh any cost or administrative burden it would impose.

5. Journalists should not be at risk of multiple actions for the one publication.

The recent Victorian example of prosecution of numerous Australian media outlets, journalists and editors in relation to breaches of suppression orders and contempt in relation to the criminal charges against Cardinal George Pell are a live example of the layered effect of reporting restrictions on media reporting.

In that case, those media outlets, journalists and editors were charged with contempt for breach of a Victorian suppression order and *sub judice* contempt in relation to the same factual matrix after they reported on Cardinal Pell's conviction (subsequently quashed by the High Court of Australia) in December 2018 (**Pell Contempt Case**).

This case raises numerous concerns about open justice, but key amongst those is the possibility of numerous charges in relation to the one set of facts, where (in relation to common law contempt), the penalty is in the discretion of the Court, notwithstanding a statutory breach of suppression order offence being available under section 23 of the Victorian *Open Courts Act 2013* (Vic).

While in NSW s16(4) of the *CSNPO Act* arguably would not permit the doubling up of contempt and non-publication orders, automatic restrictions do not contain similar provisions. For example, if a reporter inadvertently reports identifying material about a child sex abuse victim in breach of a non-publication order in NSW, multiple possible charges and penalties arise:

- Contempt of court (penalty of imprisonment and/or penalty at Court's discretion) or breach of non-publication order (12 months' imprisonment or 1000 penalty units for an individual);
- Breach of s15A of the *Children (Criminal Proceedings) Act 1987* (12 months' imprisonment and/or 50 penalty units for an individual); and
- Breach of s578A of *Crimes Act NSW 1900* (6 months' imprisonment and/or 50 penalty units for an individual).

While BHF is not aware of multiple charges of this kind having been laid against a media defendant in NSW, the Pell Contempt Case makes clear that the potential exists for it to occur and it is a deterrent to reporting on such matters. BHF submits that the issue of doubling up should be dealt with as per section 16(4) of the *CSNPO Act*. If the automatic publication restrictions were located in one instrument and harmonised as submitted by BHF, this instrument would be an appropriate location for such a provision.

6. Media companies and their staff should not be at risk of imprisonment or having a criminal record for doing their jobs.

BHF asks the NSWLRC to consider whether it is appropriate, given the important public interest role the media and journalists (and editors, legal personnel and others) play in facilitating access to justice, that they face the prospect of criminal charges simply for undertaking paid work in this important field of endeavour. The recent (albeit Victorian) example of the Pell Contempt Case involved 36 defendants, including numerous individual journalists and editors, each of whom faced the prospect of imprisonment for reporting on the very important topic of the (then) conviction of a very prominent Australian. The chilling effect of the prospect of such action must be significant.

BHF submits that criminal sanctions for breach of publication restrictions, including contempt, should only be available in the most extreme and contumelious cases, particularly where professional journalists in the news media are involved.

7. The media must have access to documents in matters before the Courts to ensure accuracy of reporting on matters of public interest, in the interests of open justice.

A. Amend s 314 of the *Criminal Procedure Act 1986 (NSW)* to remove the prohibition in s 314(4), having regard to the effect of statutory reporting restrictions and non-publication orders.

Under section 314 of the *Criminal Procedure Act 1986 (NSW)*, media representatives are only permitted to “inspect” the documents listed in s 314(2). Not having a right to make copies of the documents creates a risk that information will be incorrectly transcribed or recorded. Imposing an artificial restriction on the right of a media representative to copy documents serves no practical purpose, risks inaccurate reporting of Court proceedings and therefore potentially undermines the principle of open justice. The methods by which the Courts make documents available should also take account of the recent advances in digital technology, including with respect to security and access control measures that are increasingly available.

With respect to the time limit imposed by s 314(1), pursuant to which a media representative can inspect the relevant Court file only up to two days after the proceedings have been finally disposed of. While there might be a reasonable basis in principle for limiting the media’s right of access to Court documents to matters currently before the Courts, the media performs an important role as the eyes and ears of the general public,¹⁸ whose entitlement to report on Court proceedings is a corollary of the right of access to the Court by members of the public.¹⁹ Further, the right of the media to publish a fair and accurate report of Court proceedings has been “seen as an adjunct to the right to attend” the Court.²⁰ As such, there is some basis for restricting access to documents relating to matters actually before the Courts. However, there are situations where it may clearly be necessary, and in the interests of facilitating open justice, for a media representative to access documents more than two days after the “final disposal”, in order to prepare a fair and accurate report of Court proceedings, for example where a defendant is sentenced some weeks or months after their co-defendant.

BHF welcomes the NSWLRC’s consideration of media access to Court documents, including the impact of the “blanket ban”²¹ on media access to Court documents in prescribed sexual offence and domestic violence matters, and criminal matters involving children, currently imposed by the NSW Local and District Court registries. The automatic refusal of applications by media representatives appears to be a result of what has been held to be an erroneous interpretation on the part of Registrars and registry staff as to the interaction between statutory reporting prohibitions and section 314(3)(b) of the *Criminal Procedure Act 1986*.

The blanket ban has had a significant chilling effect on the reporting of criminal matters and has led to the media incurring significant costs and delay by being forced to file applications for review by a magistrate or Judicial Registrar, placing undue strain both on the limited resources of the judicial system and undermining the principle of open justice.

¹⁸ *Attorney-General v Observer Limited* [1990] 1 AC 109 at 183F per Sir John Donaldson M.R.

¹⁹ *John Fairfax Publications Pty Ltd & Anor v District Court of New South Wales & Ors* (2004) 61 NSWLR 344 at [20].

²⁰ *The Herald & Weekly Times Ltd v. Medical Practitioners Board of Victoria* [1999] 1 V.R. 267 at 278-279.

²¹ Paragraph 10.26 of the Consultation Paper.

Although this blanket ban has been consistently held by Local and District Courts to be founded on an erroneous interpretation of the relevant statutory reporting restrictions,²² Court registries nevertheless persist in imposing the ban, notwithstanding the express entitlement to access such documents pursuant to section 314(1) of the *Criminal Procedure Act 1986*. This has tipped the balance too far in favour of the privacy and confidentiality of individuals.

The issue appears to have arisen because registry staff have formed the view that section 314(4)(b), insofar as it interacts with the statutory publication restrictions (such as s 578A of the *Crimes Act 1900* and section 15A of the *Children (Criminal Proceedings) Act*), prohibits the inspection of any document that contain information that cannot be published as a result of those restrictions. This is an error. Section 314(4) provides:

(4) The registrar must not make documents available for inspection if:

(a) the proceedings are subject to an order prohibiting their publication or a suppression order, or

*(b) the **documents** are prohibited from being published or disclosed by or under any other Act or law. [emphasis added]*

Reporting restrictions such as section 578A of the *Crimes Act* do not expressly or implicitly prohibit all **documents** held on a Court file for relevant classes of criminal proceedings from being “published or disclosed” in the relevant sense described at section 314(4)(b) of the *Criminal Procedure Act 1986*.

Rather, (to use section 578A of the *Crimes Act* as an example), the prohibition upon the publication of “matter” in section 578A(2) is directed to the publication of material such as news reports or the provision of information to a mass audience. The term “matter” in this regard is not directed to the Court file itself or the making of the Court file available for inspection for the purpose of preparing a report of proceedings. A document, the publication of which is not prohibited, may nevertheless contain material that could identify a victim of a prescribed sexual offence. In those circumstances, the statutory prohibition remains in effect in relation to the relevant information, but does not prohibit the document being made available to a media representative pursuant to s 314 of the *Criminal Procedure Act 1986*. The same applies to other reporting restrictions such as section 15A of the *Children (Criminal Proceedings) Act*.

It is clearly conceivable that there would be information contained in such documents that would *not* be subject to any statutory publication restrictions, but which would nevertheless be relevant to the preparation of a fair and accurate report of Court proceedings.

Further, the statutory reporting restrictions contain criminal penalties for their contravention. Although BHF submits that journalists should not be exposed to criminal penalties simply for doing their job, media representatives are nevertheless acutely aware, in our experience, of their obligations with respect to the reporting restrictions. Given that there might be hundreds of media reports of criminal proceedings each week, in a fast moving and high pressure environment, the rarity of prosecutions for deliberate or inadvertent contraventions of the statutory publication restrictions is a testament to the diligence of the media in seeking to comply with those restrictions. It also suggests that the blanket ban is unnecessary and disproportionately undermines the principle of open justice.

²² For example, *R v Brotherton* 2018/00160467, *R v Lewis* 2017/00215209 and *R v Thomas* 2018/00231791 in the District Court, and *R v Frost* 2017/00334302 and *R v Glaser* 2019/00065010, *R v Murchie* 2018/00358207, *R v Tarlington* 2019/00073383, *R v EF* 2019/00239257, *R v Murray* 2020/00030778, *R v Khorami* 2020/225974 in the Local Court.

An interpretation of s 314(b) that effectively prohibits inspection (as distinct from publication) by the media of any document that might contain material covered by a statutory reporting restriction is not necessary, having regard to the terms of the statutory restrictions, and would therefore unduly intrude upon the open-court principle (*Hogan v Hinch* (2011) 243 CLR 506 at [27], *Rinehart v Welker* (2011) 93 NSWLR 311 at [26]). Imposing an additional layer of censorship over statutory restrictions that carry criminal sanctions undermines the purpose of those provisions and leads to a perverse outcome whereby registry staff have usurped the role of the Courts in enforcing those laws. In *R v AB (No 1)*, the Court of Criminal Appeal, in refusing a non-publication order application where section 15A of the *Children (Criminal Proceedings) Act* would otherwise apply to protect the identity of the child witness, held that the appropriate remedy for any contravention of the prohibition in s 15A(1) is for proceedings to be brought under s 15A(7) against a person who has published contrary to that prohibition. The Court observed that:

*the Act should be allowed to operate according to its terms and with the sanctions which Parliament has prescribed and the Court should not make orders which carry with them the prospect of contempt proceedings of a character parallel to any proceedings for a contravention of s 15A.*²³

The same principle should apply to section 314(4) of the *Criminal Procedure Act 1986*. The High Court of Australia has held that any statute which affects the open court principle, even on a discretionary basis, should generally be construed, where constructional choices are open, so as to minimise its intrusion upon that principle, as well as to minimise its intrusion upon common law freedom of speech.²⁴ Unless the right of the media to access documents that might contain information covered by a reporting restriction is clarified, the ability of the media to report on legitimate matters of public interest will be significantly undermined.

Consequently, BHF submits that s 314 should be amended to expressly exempt from the application of the restriction in s 314(4)(b) any document whose contents would otherwise be subject to a statutory reporting restriction.

BHF also submits that it is not in keeping with the principles expounded by the High Court and the Court of Criminal Appeal²⁵ to prohibit the media from accessing Court documents that are subject to a non-publication or suppression order.²⁶ Media representatives are regularly in possession of suppressed information, and refrain from publishing it. There are serious penalties imposed under the *CSNPO Act* and other relevant Acts for contravention. It is simply unnecessary to impose an additional layer of restriction on access to such documents.

A. Case Conference Materials.

The *Criminal Procedure Act 1986* (NSW) was amended in 2018, to introduce a confidential regime relating to case conferences, set out in a newly introduced Part 2, Division 5 of Chapter 3 of that Act. That regime now requires the parties to conduct a case conference after the charge certificate is filed, for the purpose of determining whether there are any offences to which the accused is willing to plead guilty. Following the case conference, a “case conference certificate” is filed, which sets out a number of matters which are listed in s 75 of the *Criminal Procedure Act*. Those certificates are confidential, and must not be published, pursuant to sections 79 and 80 of the *Criminal Procedure Act*.

²³ *R v AB (No 1)* [2018] NSWCCA 113 per Meagher JA (Rothman and Garling JJ agreeing) at [38].

²⁴ *Hogan v Hinch* [2011] HCA 4; 243 CLR 506 per French CJ at [27]

²⁵ *Hogan v Hinch*, *R v AB (No 1)* above.

²⁶ Section 314(4)(a) of the *Criminal Procedure Act*

This regime, introduced with minimal consultation with stakeholders, is inconsistent with the media's right to access Court documents pursuant to section 314 of the *Criminal Procedure Act*. For example, the media is entitled to inspect agreed statements of facts in the event of a guilty plea by a defendant, pursuant to s 314(2). However, under the new case conference regime, if an offer made to or by the accused person to plead guilty to an offence has been accepted, the details of the agreed facts on the basis of which the accused person is pleading guilty and details of the facts (if any) in dispute must be included in the case conference certificate. Consequently, even if an agreed statement of facts has been separately tendered in sentencing (in the event of a guilty plea), section 314(4)(b) could be taken to prohibit the Registrar from allowing the statement to be inspected. Although there may be a sound rationale for keeping confidential the concessions made by an accused for the purpose of a case conference, there is no reasonable basis on which the facts tendered in open Court, upon which a defendant is sentenced, should be withheld from the media, and by extension, the public.

BHF therefore submits that, in addition to the repeal of s 314(4), Part 2, Division 5 of Chapter 3 of the *Criminal Procedure Act* should be amended to provide that once a document is tendered in open Court, any confidentiality that may have attached to that document by its inclusion in a case conference certificate has no further force or effect.

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