ODPP
New South Wales

Director's Chambers

Our Reference
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Your Reference

4 August 2021

Alex Sprouster
Policy Manager
Law Reform and Sentencing Council Secretariat
Department of Communities and Justice

Sent via email: nsw-lrc@justice.nsw.gov.au

Dear Mr Sprouster

Response to Draft Proposals for review of *Open Justice: Court and tribunal information: access, disclosure, publication*

Thank you for your correspondence seeking feedback in relation to the Draft Proposals regarding the Open Justice review.

The ODPP is generally supportive of the draft proposals that provide welcome clarification and reform in this area. We raise the following feedback for your consideration.

a) In relation to Chapter 2 and the application of the draft proposals to courts and tribunals, it is noted that the new Act is intended to apply to the Drug Court. The Drug Court has a standing non-publication order in relation to most of the business of the court that remains in place to promote the rehabilitative aims of that Court. Consideration should be given as to whether the new Act should extend to include the Drug Court.

b) The ODPP supports the general principle of applying uniform definitions of the key terms throughout the new Act and within the provisions of existing subject specific legislation. The ODPP also supports the proposed definitions contained in the proposals in Chapter 3 and throughout the remaining chapters.

c) In relation to Proposal 3.5, the ODPP is of the view that a non-exhaustive list of examples of what information may lead to the identification of a person would assist in the practical application of statutory prohibitions on publication or disclosure of a protected person's name. Although there may be some concern that this proposal may suppress otherwise relevant information, we emphasise our view from our previous submissions in February 2021; that where the statutory prohibition relates to the complainant or a victim, the risk that this may lead to the suppression of otherwise relevant information.

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d) In relation to Proposal 4.6, the ODPP endorses the explicit inclusion of a requirement to use a pseudonym as a manner in which a court may prohibit or restrict the publication or disclosure of information tending to identify a person. The ODPP raises for consideration whether the subject-specific legislation should be amended to similarly provide for the use of pseudonyms, to avoid any unnecessary additional orders relating to pseudonyms being made under the new Act where subject-specific prohibitions on publication would otherwise apply.

e) In relation to Proposal 4.7, Proposal 6.1, Proposal 7.7 and Proposal 8.3, the ODPP raises the possibility that multiple applications to appear and be heard may arise from various interested parties. In criminal matters, it is anticipated that this will most frequently be from multiple journalists or representatives of news media organisations. Given the new Act appears to widen the ambit of parties who may fall under the definition of a party as a journalist, the Act should consider whether limitations should be placed on applications made by multiple parties on the same or similar basis. In dealing with such applications, the Court should maintain the ability to summarily refuse an application that is raised on a basis that has previously been the subject of a ruling, unless new circumstances justify the making of a further application. This would eliminate unnecessary delay. It is noted that this would not abrogate from the requirement to provide reasons under Proposal 4.8, Proposal 6.4, Proposal 7.9, Proposal 8.5. In circumstances where a similar application has previously been dealt with, the Court should be entitled to rely upon its prior reasoning without the need to provide further reasons. This would ensure an applicant is not denied any appeal rights.

f) In relation to Proposal 4.9 and Proposal 6.6, there is concern that orders that are appealed to a higher Court may cause a criminal matter to be stayed so the parties can appear at the appeal hearing. This comes at a significant cost to the prosecution, defence, victims, witnesses and the Court. Accordingly, any legislation should consider strict timelines to ensure such appeals proceed expediently.

g) In relation to Proposal 4.10, Proposal 6.7, Proposal 7.11, and Proposal 8.7, the ODPP is generally supportive of the principle that costs orders should not be made except where the person's involvement in the application is frivolous or vexatious. The ODPP suggests that consideration also be given to costs being available where a media organisation opposed or appealed the making of a non-publication or suppression order in circumstances where there were found to be no reasonable prospects of succeeding in that application.

h) In relation to Proposal 4.17 and Proposal 6.3, the ODPP supports the principle of providing a duration for non-publication or suppression orders so they do not continue indefinitely or for longer than required. However Proposal 4.17 and Proposal 6.3 should be crafted to contain an exception such that a non-publication or suppression order that is made to protect a complainant of a prescribed sexual offence or a domestic violence offence or a protected person in an apprehended violence order proceeding, continues indefinitely, or until an application is made for review of that order pursuant to Proposal 4.18.

This is consistent with the ongoing protection currently afforded to that class of individuals by subject-specific statutory prohibitions. The ODPP recommends that this ongoing protection should remain in place, without the legislation referring to stated durations.

i) In relation to Proposal 5.5(b), publication after death in some circumstances would cause unwarranted hardship for the family of the deceased.

j) In relation to Proposal 5.8 and 5.9, consideration should be given as to the means by which a Court is satisfied that informed consent has been provided or communicated to the Court. This information should be easily accessible so that the person subject to those orders, who wishes to consent to the publication of their identification, can easily understand the steps that are required to be taken. The ODPP otherwise supports Proposal 5.9, given the capacity for a publication about a matter where proceedings are ongoing to not only re-traumatise a victim but also because of its capacity to prejudice an accused person's ability to receive a fair trial.

k) In relation to Proposal 7.3-7.5, the ODPP involvement in these proposals arises where orders are made that relate to domestic violence and prescribed sexual offences. The ODPP is supportive of Proposal 7.3-7.5. We are also of the view that those provisions, and the making of exclusion orders should be mandatory in its application to domestic violence and prescribed sexual offences, which reflects the current practice in such matters. The ODPP supports the principle in 7.4 to extend protection to all ADVO proceedings.

l) The ODPP is supportive of the breach provisions in Chapter 4 and 9 however raises the following two points for consideration:

Maximum penalties for breaching an order (see Proposal 4.11 and 9.1)

The ODPP generally supports the suggested maximum penalties, however notes that there may be some offences under subject-specific legislation which arguably fall within this description but warrant higher penalties. For example, an offence under s 32 of the *Witness Protection Act* 1995 of disclosing the identity of a participant of a witness protection programme carries a maximum penalty of 10 years imprisonment. Accordingly, it would be useful to see a list of the statutory offences intended to be subject to these maximum penalties to ensure no such offences are inadvertently included.

Mental element for breach of an order (see Proposal 4.11 and 9.3)

In relation to Proposal 4.11 (1)(b) and Proposal 9.3 (2)(b) the DPP suggests that an offence of breaching a non-publication or similar order made by a court should require either knowledge or recklessness as to the existence of the order.

However, the DPP does not agree that knowledge of or recklessness as to the existence of a statutory prohibition on publication, such as that contained in s 15A of the Children (Criminal Proceedings) Act, should be an element of an offence of breaching that prohibition.

That position would be contrary to the principle that ignorance of the law is no excuse. Instead, such offences should attract strict liability, to which the 'defence' of 'honest and reasonable mistake of fact' would apply.

m) In relation to Proposal 10.2 the ODPP agrees with the proposal and places emphasis on the importance for the definition of personal identification information to be non-exhaustive, to allow flexibility in interpretation and durability to cover new forms of information that may identify someone.

n) The ODPP does not support the breadth of Proposal 10.4(1)(a)(viii), being an entitlement for a journalist to access any record admitted into evidence (which, by virtue of proposal 10.9(2), would include obtaining a copy of that record). This is far wider than what is presently permitted to be accessed under s314(2) Criminal Procedure Act 1986 (which, in terms of exhibits, is limited to witnesses' statements tendered as evidence), and per the practice in the Supreme Court there must be an application from a journalist to access exhibits.

Whilst the ODPP's previous submissions supported greater media access to material, this was specifically in relation to proceedings which had concluded. With respect to ongoing proceedings, the previous submissions emphasized the lack of consistency between jurisdictions.

The ODPP raises the following concerns about legislating an entitlement to access any record admitted into evidence:

- Reportage on the material accessed has the capacity, during ongoing proceedings, to undermine an accused person's ability to receive a fair trial;

- Reportage on the material accessed has the capacity to lead to misunderstandings or misreporting in the absence of the context in which it was admitted;

- It does not distinguish between a record admitted into evidence on a voir dire (and thus potentially ruled inadmissible at trial) and a record admitted into evidence in the trial proper

Although the court can place conditions on access under Proposals 10.3(2) and 10.4(3), this is not something that will necessarily be apparent as being necessary to the court or the parties at the time of tender, during the conduct of a busy criminal trial. The ODPP is of the view that the parties should be given the opportunity to be heard about whether conditions should be made about access at the time that the request for access is made by a journalist.

o) The ODPP would also urge caution with allowing access to documents that are subject to non-publication orders and statutory prohibitions, and that consideration should be given to clearly making access to such documents (even if otherwise falling into the definition of documents to which access is otherwise permitted) subject to the leave of the court under Proposal 10.4(1)(b)). Notwithstanding that the new proposed definitions may provide greater clarity as to what publication will amount to the breach of an order

or prohibition, the ODPP harbours significant concerns for the well-being of complainants and other affected persons in the event of non-compliance. The ODPP presently makes frequent requests to media entities for the removal of material that offends such orders and prohibitions.

p) The ODPP raises for consideration the fact that, at the conclusion of proceedings, exhibits are typically returned to the parties, with the vast majority of exhibits in criminal matters having been tendered by the prosecution. It is not apparent how orders for access or rights of access would operate for material no longer in the physical possession of the court. It would place a significant burden on the ODPP in the event that access orders or rights continued past the time of the court's possession of such records. The ODPP urges that the new Act should make clear that any orders or rights of access are limited to material in the possession of the court at that time.

q) Relatedly, and as referred to in previous submissions, it is common in ongoing proceedings for Supreme Court judges to permit access to exhibits, but to order that this should be through the ODPP. Presently, the ODPP endeavours to assist with such orders, but urges that the new Act should make clear that the responsibility for facilitating access rests with the court, and not any of the parties.

r) In relation to Proposals 10.4(3)(c), 10.5(2)(c) and 10.6(2)(c), the ODPP is aware that the task of deletion or removal of personal identification will vary from case to case. We note in some cases there will be voluminous material that will need to be reviewed, by someone who is unlikely to have any knowledge as to the likely content of the material. There is a high risk that information will be missed. For this reason, we consider that Proposal 10.10 is very important complement to the proposals concerning access by members of the public. The ODPP would be concerned, however, that the task of such deletion or removal may be passed on to the ODPP, placing an additional burden on ODPP resources. The new Act should make clear that the responsibility for deletion or removal remains with the court.

s) In relation to Proposal 10.14 we agree that if there is to be an offence of this nature it should only cover intentional conduct. We query whether intentional conduct of this nature would not already be covered by other offences, for instance corrupt disclosure of personal information by a public official under section 62 Privacy and Personal Information Protection Act 1999.

t) In relation to Proposal 11.1 we agree that there should be a clear process for journalists and the public to access court and tribunal proceedings virtually. That process should enable the courts to control the registration for virtual access. We support the amendment of the Court Security Act 2005 to expressly prohibit the recording of court or tribunal proceedings. It is important that as a condition of access the viewer is required to acknowledge the prohibition on recording the proceedings, and to declare that no unauthorised party is attending with them.

u) In relation to Proposal 11.2 we agree that there should be a time lapse between the conclusion of the part of the evidence and the transmission of information from the

courtroom by the media. Care will need to be taken in the framing of the provision and how the process is administered by the courts. For instance, does conclusion of that part of the evidence mean the end of that person's evidence, or an adjournment of the court, or the conclusion of cross examination? An adjournment may be necessary in some cases for parties to get instructions about a part of the evidence if something unexpected occurs.

For any further information concerning these comments, please contact Johanna Pheils, Deputy Solicitor for the Public Prosecutions (Legal), Solicitor's Executive, Office of the Director of Public Prosecutions on [redacted] or [redacted]

Yours faithfully

[redacted]

Peter McGrath SC
Acting Director of Public Prosecutions