



THE CHIEF MAGISTRATE OF THE LOCAL COURT

17 August 2021

Mr Alan Cameron, AO
Chairperson
NSW Law Reform Commission

By email: nsw-lrc@justice.nsw.gov.au

Dear Mr Cameron

Re: Open Justice Review – Draft Proposals

Thank you for your invitation to provide comment on the draft proposals arising from the NSW Law Reform Commission's Open Justice Review. While I do not propose to address each of these proposals, I provide the following comments in relation to those areas which the Local Court considers require particular consideration.

Apologies for the delay in providing these comments. The Court's capacity to consider and respond to these proposals has been impacted by the recent lockdowns in Greater Sydney and the need to focus attention on managing the Court's operations.

General approach to increasing uniformity and consistency

The Court previously submitted the interaction of provisions forming the current framework for access to court proceedings and records has created a complicated matrix which the Court finds difficult to administer. The Court is generally supportive of the Commission's overall approach to addressing these issues by increasing uniformity and consistency across the legislative framework, including:

- The introduction of uniform definitions
- The introduction of a new Act containing general powers to make non-publication, suppression, exclusion and closed court orders, principles guiding decision makers, and consistent procedures for making orders.
- Amendment of existing provisions relating to non-publication, suppression, exclusion and closed court orders within subject-specific legislation in a uniform way to achieve consistency with the above.

- The introduction of a new legislative framework governing access to court records, which can be supplemented by court rules.

Application of proposals to coronial jurisdiction

The Court notes the proposals put forward by the Commission are not intended to apply to the 'Coroners Court'. While the Court appreciates what is intended, references to the 'Coroners Court' in any future proposals or recommendations should be replaced with 'coronial jurisdiction'. It is a common misconception that the Coroners Court is a standalone court, similar to the Children's Court. However, the coronial jurisdiction and the Coroners Court form part of the Local Court and all magistrates, by virtue of their office, are coroners. The Coroners Court at Lidcombe is the headquarters for this jurisdiction; however magistrates across the state determine matters falling within the coronial jurisdiction.

Uniform definitions

The Court is supportive of the proposals set out in Chapter 3 regarding insertion of uniform definitions of key terms in the new Act and existing subject specific legislation (Proposal 3.1 – Proposal 3.7). Adopting this approach will assist in reducing the complexities associated with administering an open justice regime which spans across multiple pieces of legislation. This will likely increase consistency of approach within courts, as well as across jurisdictions.

In relation to Proposal 3.7 (Definition of "journalist" and "news media organisation"), the Court notes these definitions are intended to be flexible enough to cover a range of journalistic practices, but distinct enough to exclude practices that do not constitute journalism. However, several of the factors indicative of whether a person is a journalist refer to publication or dissemination of material in a 'news medium'. The Court submits it would be of further assistance if this term was also defined, given the rise of non-traditional, citizen-run sources of news and information.

Interaction between the new Act and other laws

The Court supports the introduction of a requirement that prior to making an order under the new Act, the court must consider whether statutory requirements, prohibitions or discretionary powers under subject-specific legislation apply (Proposal 4.5).

The Court requests some consideration be given to the scenario where an order is inadvertently made under the new Act, despite a requirement, prohibition or discretionary power in subject-specific legislation.

A suggested approach might be:

- Where an automatic prohibition, restriction or statutory requirement exists in subject-specific legislation, include a provision to the effect these provisions prevail over any order made under the new Act in the event of any inconsistency.
- Where a discretionary power is contained in subject-specific legislation, include a provision to the effect an order made under the new Act is not invalidated where power to make that order exists elsewhere.

Requirement to give reasons on request

The Court notes the Commission's intention to introduce a requirement for the court to give reasons when requested to do so by a party or other person with sufficient interest, including a journalist or news media organisation:

- When making a non-publication, suppression, exclusion or closed court order under the new Act (Proposal 4.8), and
- When exercising discretionary powers to make such orders under subject-specific legislation (Proposal 6.4, Proposal 7.9, Proposal 8.5)

Providing access to these reasons is essential to upholding transparency, promoting accountability, and facilitating access to the material necessary for proper consideration of possible grounds for appeal and review. For these reasons, the Court supports the introduction of these requirements in principle.

The Commission would be aware from previous consultations the Court expressed concerns around the introduction of a requirement to provide 'written reasons'. The Court maintains the view this would be disruptive and resource intensive in this jurisdiction given magistrates generally deliver *ex tempore* reasons. Those reasons are sound recorded and a transcript can be made available upon request, albeit not immediately.

In light of the above, the Court seeks to ensure the proposal remains a general requirement to provide 'reasons', as opposed to 'written reasons', and in the Local Court, can be fulfilled via the production of a transcript of the magistrate's reasons (on request). The Court will be guided by any advice provided by Court Services in relation to the practicalities involved in requesting and producing such a transcript.

Review and appeal of orders made under new Act and subject- specific legislation

The Court notes the various proposals to introduce appeal and review powers in relation to orders made pursuant to an exercise of discretionary power under the new Act and subject-specific legislation. This includes:

- Non-publication, suppression, exclusion and closed court orders made under the new Act (Proposal 4.9 (appeals), Proposal 4.18, Proposal 4.21, and Proposal 4.24 (reviews))
- Non-publication and suppression orders made in accordance with provisions contained in subject-specific legislation (Proposal 6.5 (review) and Proposal 6.6 (appeals))
- Exclusion orders made in accordance with provisions contained in subject-specific legislation (Proposal 7.10 (review only))
- Closed court orders made in accordance with provisions contained in subject-specific legislation (Proposal 8.6 (review only)).

The Court notes the appeal provisions are similar to those currently set out in section 14 of the *Court Suppression and Non-publication Order Act 2010* (the CSNPO Act) and include a right to appeal (with leave) a decision whether to make an order or review an order, as well as any subsequent decision

made on review. However, existing appeal rights have been extended to include exclusion and closed-court orders made under the new Act, as well as non-publication and suppression orders made under subject specific legislation. Additional clarification specifying the relevant appellate court, as well as those persons with standing to appeal, has also been included.

The Court further notes the provisions for review of orders are largely the same as those set out in section 13 of the CSNPO Act, and have similarly been extended to provide for review of all orders made under the new Act and subject specific legislation, including exclusion and closed court orders. The court would have power to review an order on its own motion or on application, and to confirm, vary, revoke or make any other order on review.

While generally supportive of an approach which clarifies appeal and review pathways, the Court anticipates the expansion of review powers beyond that which currently exist in the CSNPO Act may increase the Court's workload. It is difficult for the Court to quantify this impact; however, it would be of assistance if such implications are acknowledged in the Commission's recommendations to Government.

In addition to the above, the Court has concerns in relation to the impact of powers to review and appeal exclusion orders, as well as the requirement to revoke a non-publication or suppression order where review is requested by certain complainants and protected persons. These concerns are discussed in more detail below.

Requirement to revoke suppression and non-publications orders

Proposal 4.18 contains an express requirement that the court *must* revoke a non-publication or suppression order made under the new Act if:

- a) the review is requested by a complainant in proceedings for a prescribed sexual offence or domestic violence offence, or a protected person in apprehended domestic violence order (ADVO) proceedings, and
- b) the court is satisfied:
 - i. the complainant or protected person is over 18 and consents to revocation, or if aged between 16 and 18, does so after receiving legal advice, and
 - ii. it is otherwise appropriate in all the circumstances for the order to be revoked.

On a broad interpretation, this would require revocation of a non-publication or suppression order, even where the order is made to protect information other than the complainant or protected person's identity. This would include orders made to protect the identity of witnesses and criminal informants, as well as material containing criminal intelligence and information relevant to national security. It would also include orders which are made in favour of the defendant, including on grounds of ensuring the proper administration of justice and a fair trial.

While it is noted the court would maintain discretion to determine whether revocation is 'otherwise appropriate in all the circumstances', consideration may need to be given to whether it is intended that complainants and protected persons have broad power to initiate this course of action in

relation to orders protecting information other than their own identity. If this is the Commission's intention, the Court queries why the proposal to introduce powers to review and revoke suppression and non-publication orders made under subject-specific legislation (Proposal 6.5) does not contain similar requirements. In raising this query, the Court is specifically considering non-publication orders made pursuant to section 45(2) of the *Crimes (Domestic and Personal Violence) Act 2007* protecting the identify of any person involved in ADVO proceedings.

Review and appeal of exclusion orders

As indicated above, the Court has some concerns surrounding the extension of review and appeal rights to exclusion orders made under the new Act (Proposal 4.9 (appeals), Proposal 4.21 (reviews)) and subject specific legislation (Proposal 7.10 (review only)).

In the commentary surrounding the introduction of rights to appeal exclusion and closed court orders made under the new Act, the Commission noted this 'may result in delays, as proceedings may need to be stayed whilst the appeal is determined' (at [4.42]). In relation to review of these orders, the Commission formed the view this 'should not result in significant delays to proceedings, given that such reviews can be determined by the court that made the original order' (at [4.82]).

Noting closed court orders would be made rarely in this jurisdiction, the Court respectfully adds the following to the Commission's observations regarding the impact of appeal and review of exclusion orders. The Commission would be aware the high volume of matters dealt with in the Local Court necessitates an approach which is more expeditious than other jurisdictions. Magistrates routinely sit in list courts dealing with in excess of 100 different matters and are skilled at efficiently managing the proceedings before them in a manner which minimises the risk of matters not being reached. That being said, procedural or interlocutory applications place additional stressors on the time available to magistrate's managing these lists and can often lead to matters being stood down or put over to a later date.

Given the above, the Court is concerned introducing review and appeal rights in relation to exclusion orders has the potential to introduce significant disruptions in this jurisdiction while any such application is determined. This may risk directly and indirectly introducing delay, both in the proceedings in which the application is made, and in dealing with other pending matters before the court. In relation to the former, the Court notes introducing delays in criminal proceedings can have implications for bail, prompting applications for release from custody and variation of bail conditions.

The extent of this impact is difficult to quantify, as the Court does not have access to the data necessary to anticipate the volume of review and appeal applications it may receive. The latter aside, the impact of review applications would be influenced by matters which are not currently addressed in any of the proposals relating to powers of review. This includes:

- Whether a written application for review is required, and if so, whether service and notice requirements under the *Local Court Rules* would apply,
- Whether the original decision-maker can determine the review application, or whether another magistrate needs to conduct the review, and

- Whether the proceedings could continue while the review is determined, or whether they would be effectively 'stayed' pending determination of the review.

(It is noted the above queries would also apply to, and should be considered in the context of, review of orders generally).

Collective impact on Court's workload

A number of the Commission's draft proposals have the potential to increase both the volume and complexity of proceedings. Increases such as this directly and indirectly affect delay in this jurisdiction, both in the time taken to determine individual matters, as well as the collective impact on the Court's pending workload.

The Court has identified the following proposals as contributing to this impact:

- Proposals 4.11 – 4.12, and Proposals 9.1 – 9.2 – Collectively, these proposals provide that breaches of all non-publication, suppression, exclusion and closed court orders will be categorised as summary offences capable of being prosecuted in the Local Court. This change introduces several new offences in this jurisdiction. While it is acknowledged prosecution of current breaches is rare, the Court notes the Commission's intention to enhance monitoring and enforcement of orders and reduce current barriers to prosecution. On this basis it would be fair to state that the Local Court may see an increase in this area.
- Proposal 4.6 – Extends the power to make non-publication and suppression orders under the new Act to evidence *and information* given in proceedings, as well as information that comprises evidence which may be given or adduced in proceedings (i.e. material to be served in the brief, but not yet tendered). This represents a new set of circumstances which may give rise to an application, which in turn may contribute to an overall increase in applications.
- Proposals 5.8 – 5.13 – Introduces exceptions to all statutory prohibitions on the disclosure or publication of a person's identity by enabling the court to grant leave for disclosure or publication in certain circumstances. This includes where the proceedings are ongoing, where a child to whom the prohibition relates is under the age of 16 at the time of publication, where a complainant in proceedings for a prescribed sexual offence is under the age of 16 at the time of publication or is deceased. Not only would these changes introduce new application types in this jurisdiction, they would also introduce additional complexity in managing and administering statutory prohibitions.
- Proposal 7.1, 7.3 – 7.5 – These proposals effectively convert provisions in subject- specific legislation which automatically exclude specified persons from proceedings, to a positive onus on the court to make an exclusion order (regardless of the fact the Court does not have discretion whether to make such an order). This introduces additional steps for magistrates in these proceedings which are not currently undertaken – not only will magistrates be required to read the order onto the record, it will also be necessary to mark-up bench papers to reflect the order. It is not unreasonable to anticipate this will have consequent administrative impacts on court registries, as they would need to record this information and produce an order in JusticeLink.

The Court anticipates this change will have a significant impact. This is due to the high volume of matters in this jurisdiction where certain persons or a specified class of people must be excluded (i.e. ADVO proceedings involving children and where the complainant is giving evidence, and proceedings for domestic violence and prescribed sexual offences where the complainant is giving evidence).

Given the above, the Court **opposes** the shift to a positive onus and requests the Commission consider an alternative approach to achieving its aim of uniform expression of statutory exclusion requirements. The Court considers the benefits of the proposed approach are far outweighed by the significant impact on judicial and administrative workloads.

The Court notes a similar shift is proposed in relation to statutory requirements to make closed court orders (Proposal 8.1). While it would be rare for orders of this nature to be made in this jurisdiction, the Court submits for consistency an alternative approach should be considered in this context as well.

- Proposal 7.14 – Converts and extends the power in section 289UA of the *Criminal Procedure Act 1986* (the CP Act) to permit the court to make an exclusion order in *all* ADVO proceedings, as opposed to ADVO proceedings where there is a related domestic violence offence. Broadening the application of the current power in this manner may result in additional applications, which may give rise to an overall increase in applications.

Legislation which should be treated differently

While the Court has not had an opportunity to comprehensively review all legislation empowering magistrates to make orders departing from the principles of open justice, there are two pieces of legislation the Court considers should be exempt from some of the proposals put forward by the Commission.

Court Security Act 2005

In Chapter 7 the Commission sets out various proposals in relation to the existing powers to make exclusion orders contained in subject-specific legislation. While the *Court Security Act 2005* is not specifically referenced in this Chapter, the Court submits it would not be appropriate to apply the proposals therein to this Act.

Section 7 of the *Court Security Act* permits a judicial officer to order that certain persons/ a specified category of persons leave or not be admitted to court premises or a part of court premises. In contrast to other exclusion-type powers which are typically aimed at protecting the well-being of complainants and witnesses, this power exists to permit the judicial officer to secure physical order and safety in court premises. The objects of the Act support this distinction, being to 'provide for the secure and orderly operation of courts, and to confer certain functions on judicial officers and security officers for that purpose'(s 3).

In addition, while an exclusion order means 'an order to exclude a specified person or class of people from the whole or any part of proceedings' (Proposal 7.6 (proposed definition)), orders made pursuant to the *Court Security Act* apply to remove a person (or category of persons) from, or refuse entry to, *court premises*. Court premises are defined broadly to include areas beyond the actual

court room, such as other parts of court premises or places used in relation to the operations of the court (s 4). Given these differences, the Court submits the powers under this Act should remain separate and distinct from 'exclusion orders'.

The Court also does not consider the following procedural proposals to be appropriate in the context of powers exercised under the *Court Security Act*:

- Proposal 7.7 sets out the procedure for making exclusion orders, including on the court's own motion or on application of a party to the proceedings or other person with sufficient interest. There is currently no provision for application to be made under the *Court Security Act*. The power exists solely as one which the judicial officer exercises in undertaking their responsibility to maintain order and security within court premises. Further, orders of this nature are generally not open to argument from the parties and it may not be appropriate for broader categories of person to have standing to appear and be heard (i.e. journalists and media organisations). To do so would delay the making of an order which may be necessary to immediately secure order and security of court premises.
- Proposal 7.10 introduces powers to review exclusion orders. Similarly to the above, the Court would have serious concerns as to the operation of these provisions in circumstances where a magistrate has removed a person because of a threat to the order and security of court premises.

Given the above, the Court submits the proposals set out in Chapter 7 should not apply to the *Court Security Act*.

Drug and Alcohol Treatment Act 2007

The *Drug and Alcohol Treatment Act 2007* (the DAT Act) sets out the legislative basis for an involuntary detention, treatment and stabilisation regime for persons with severe substance dependence, with the stated aim of protecting the health and safety of such persons. Magistrates perform several functions under this Act, including determining applications for orders for assessment, reviewing dependency certificates, and determining applications to extend dependency certificates.

In performing these functions, magistrates are dealing with extremely vulnerable persons and legislative intervention is necessary to protect these persons from serious harm. Such persons are often suffering from drug and alcohol related brain injuries and their decision-making capacity is severely compromised.

The DAT Act contains the following provisions for departures from open justice in these proceedings:

- A statutory non-publication requirement in relation to the name of the person to whom any proceedings under the DAT Act relate, or of any person who is a witness or is mentioned or otherwise involved in the proceedings, except with the consent of the magistrate (s 41).
- Broad reaching discretionary powers in proceedings for the review and extension of dependency certificates, including powers to close the court, order that the proceedings be

conducted wholly or partly in private, prohibit or restrict the publication or broadcasting of any report of the proceedings, as well as evidence or matters contained in documents, and prohibit or restrict the disclosure of evidence or documents to some or all of the parties to the proceedings (s 37).

The Court submits the powers contained in the DAT Act should be distinguished from those in other subject-specific legislation. This is due to the highly-sensitive nature of these proceedings, the vulnerability of the persons involved, and the potential for such persons to have alcohol-related brain injuries and impaired cognitive functioning.

Given the above, the Court requests the Commission give specific consideration to the following:

- The duration of both the statutory non-publication requirement (s 41) and other orders made prohibiting or restricting publication (s 37), including whether it is necessary for orders to continue indefinitely given the stigma attached to proceedings of this nature and the need to ensure any publicity doesn't undermine effective treatment.
- The operation of the consent exception to the statutory non-publication requirement (Proposal 5.8) and the limitations surrounding this requirement. The Court notes the statutory non-publication requirement does not currently contain an exception permitting disclosure where the person the subject of the proceedings consents (s 41(1)), instead vesting the court alone with power to consent.
- If the Commission considers it appropriate to empower the dependent person with the power to consent to publication or disclosure of their identity, the Court suggests it may be appropriate to consider adopting a similar approach to that which has been proposed in relation proceedings in the Mental Health Review Tribunal and NSW Civil and Administrative Tribunal (Proposal 5.13).

Access to records on court file

The Court is generally supportive of the proposed approach to establishing a new legislative framework governing access to court records set out in Chapter 10. However, the Court suggests the following issues be given further consideration to ensure the proposed framework operates effectively in practice.

Different approaches across jurisdictions

The Court understands the new legislative framework may be supplemented by individual court rules, policies or practice notes (Proposal 10.1). The Court appreciates this approach is an attempt at accommodating the differences between the various jurisdictions and the environments within which they operate. However, it is noted this may result in a differing approach to access in matters involving Table offences, depending on whether they are prosecuted summarily in the Local Court or on indictment in a higher jurisdiction. It is also possible there may be differing approaches to access in committal proceedings in the Local Court, compared to when they are committed to a higher jurisdiction for trial or sentence.

Should the proposed framework proceed, this office will endeavour to work with other jurisdictions to create as much consistency in approach as possible. However, given the differing operating environments and the discretion vested in heads of jurisdiction, complete uniformity of approach may not be achievable.

Recognition of registrars as decision-makers

The Court seeks to clarify whether it is the Commission's intention that both judicial officers and registrars are vested with power to determine an access application. The draft proposals contained in Chapter 10 largely refer to a decision by a 'court'. Whereas Proposal 10.7 specifically refers to a 'judicial officer or registrar' when setting out the list of considerations to be taken into account when determining an access application.

Within this jurisdiction, the majority of access applications are determined by registrars (subject to review by a magistrate pursuant to rule 8.8. of the *Local Court Rules 2009*). The Court seeks to ensure this approach can be maintained, as it is critical to ensuring the timely determination of these applications and ensuing access to court records. It is assumed this approach will be maintained under the new framework; however, it would be of assistance if the Commission could confirm this in its final recommendations.

Impact of non-publication order/ statutory prohibition on publication on media access

In its earlier submissions the Court raised issues surrounding the application of the potentially contradictory regimes contained in the CP Act and the *Local Court Rules 2009* (the LCR) when determining media access to court records in prescribed sexual offence proceedings. While section 314 of the CP Act sets out the media's entitlement to inspect certain documents in criminal proceedings, some courts impose a blanket ban on media access to court records in proceedings for prescribed sexual offences. This is as a result of the interaction of the prohibition on publishing material which identifies the complainant in these proceedings (*Crimes Act 1900* s 578A), with the exception to the media's access entitlement set out in section 314(4)(b) of the CP Act. The latter subsection provides the registrar must not make documents available to the media for inspection if a prohibition on publication or disclosure exists under another Act.

Where refused access, section 314(4A) of the CP Act permits the making of an application for media access to court records under LCR 8.10. Such access is permitted with leave of a registrar or magistrate. The Court is aware there are divergent views between registrars and magistrates as to how to reconcile the prohibition in section 578A of the *Crimes Act* with the broad discretionary considerations set out in LCR 8.10(5). The varying approaches to the complicated interaction of these dual regimes leads to inconsistent outcomes across Local Court locations.

The Court requested the above be specifically considered as part of this review and appreciates Proposals 10.4 and Proposals 10.5 go towards addressing the issue raised. These proposals create an entitlement for journalists and researchers to access specified materials, but require a grant of leave to access any other records on the court file which fall outside these categories, including a record that contains information subject to a non-publication order or statutory prohibition on publication. In all applications (whether the applicant is entitled to access certain records or requires a grant of leave), the court is able to impose any conditions considered appropriate (Proposal 10.11). This includes a condition on the use of a record, including a condition restricting disclosure or publication.

The Court is concerned the approach proposed by the Commission is too broad and in practice may place a burden on those determining applications to assess the likely use of each record and whether the imposition of a condition on such use is appropriate. Instead, the Court proposes consideration be given to a specific provision in the new access framework addressing the impact of a non-publication order or statutory prohibition on publication on a journalists' entitlement to access court records. The Court is open to further discussions with CTSD and the Commission to develop such a provision.

Administrative impact of access regime

The Court has concerns surrounding the administrative impact of Proposal 10.10, which enables the court to impose conditions on access. While it is a matter for CTSD, the Court is concerned this proposal adds a discretionary component to all access decisions, including in circumstances where this is not currently required. The Court anticipates this would increase the administrative workload of registries and without proper additional resourcing, may compromise the other services provided by these registries, including support for court users and magistrates.

The Court also notes Proposal 10.10 specifically contemplates the court imposing a condition that the applicant access a copy of a record from which personal identification information has been removed. The Court is concerned about the capacity of court registries to provide this service as currently resourced, and defers to the advice of Court Services as to whether charging a prescribed fee to undertake the removal of this information (Proposal 10.11) will resolve any associated resourcing implications.

Thank you for the opportunity to provide comments as part of this review. Should you require any further information in relation to the above matters, please do not hesitate to contact my Policy Officer, Brooke Delbridge [REDACTED] or [REDACTED]

Sincerely,

[REDACTED]
Judge Graeme Henson AM
Chief Magistrate