ODPP
New South Wales

Preliminary Submission to the Law Reform Commission – Open Justice Review

Office of the Director of Public Prosecutions

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Introduction

The Office of the Director of Public Prosecutions (ODPP) is an independent prosecuting agency responsible for the prosecution of serious criminal offences in NSW Courts. The Law Reform Commission's (LRC) current terms of reference on "Open Justice" are of great interest to the ODPP, because as the prosecutor in criminal proceedings the ODPP has a significant role to play in the "administration" of non- publication and suppression orders and other information published about criminal proceedings. By "administration" we are referring to:

- Bringing or opposing applications made under the *Court Suppression and Non-Publication Orders Act* 2010,
- Prosecuting statutory non-publication offences and breaches of orders.
- Ensuring potentially prejudicial pretrial publications are removed from the internet
- Ensuring statutory non-publication orders and prohibitions on publication are observed and understood by victims and witnesses
- Managing the substantial amount of "information", in the form of evidence, that is placed before the criminal courts.

Since 2003 when the LRC issued its last report on this subject, Contempt by Publication[1], the media landscape has changed quite dramatically. The internet has supplanted traditional forms of publication and delivers not only current news but is a readily accessible archive of past publications. Further, Twitter, one of the largest online news and social networking services, was not launched until 2006. Facebook only launched in 2004 and was not available to the public until 2006. The advent of freely available online forums, that do not recognise jurisdictional boundaries, in which members of the public can post material which can quickly gain a wider audience has exposed weaknesses in the assumptions underlying suppression and non-publication orders (suppression orders). For instance;

- The source of material can no longer be assumed to be a journalist, editor or a publisher in the traditional sense, who has the benefit of a legal department or experienced senior staff to vet the story prior to publication.
- The boundaries and effectiveness of suppression orders are being tested and openly questioned.
- Increasingly onerous obligations are being placed on the ODPP to ensure earlier publication of information about the case does not jeopardise a fair trial.

In this submission, we take the view that open justice is about achieving the correct balance between the interests of the media and Courts; namely the balance between the need for the courts to be accountable to the public and the need where necessary for confidentiality to be preserved. While strongly supporting open justice, we would like to see changes that ensures that open justice operates within a clearly expressed and readily accessible legislative framework.

[1] Report 100 June 2003

a) Comparable legal and practical arrangements elsewhere in Australia and overseas.

The briefest survey of developments in other jurisdictions reveals that the question of open justice and the balance between new media and the effectiveness of traditional approaches by the courts is being evaluated not only in NSW.

United Kingdom

In the United Kingdom, there has been a recent review about social media. In March 2019 the Home Office published a paper "Response to call for Evidence on the Impact of Social Media on the Administration of Justice". This inquiry was prompted by the discharge of a jury due to comments posted on social media. The mainstream newspapers had reported on the case in a fair and accurate way but links to those articles were shared on social media platforms and numerous adverse comments were made including threats to the accused (two teenage girls) and attacks on the judicial process. Following this review, the following recommendations and actions are worth noting:

- There should be public legal education about the roles of jurors
- Reform concerning a prohibition on the pre-charge naming of children to be considered
- Clear guidelines on contempt are to be published
- New arrangements to be made with Facebook, Google and Twitter dealing with contempt
- A White Paper on "Anonymity and Reporting Restrictions – Online harms" is to be developed.

Victoria

In so far as Australian jurisdictions are concerned Victoria appears to utilise suppression orders more frequently than in other jurisdictions. Richard Ackland says:

> "*according to a tally kept by Gina McWilliams, senior legal counsel at News Corporate Australia, Victoria issued 444 suppression orders in 2017 followed by New South Wales with 181 and South Australia with 179. So far in 2018 the rate is not subsided – to 29 May 2018 there were 150 Victoria, 57 in New South Wales 52 in South Australia and the Northern Territory catching up with 22.*"[2]

The Victoria Law Reform Commission is due to publish an issues paper and is undertaking research, following the "*Open Courts Act* (Vic) Review" that was completed in September 2017. In that review The Hon Frank Vincent AO QC noted:

"*the making of some suppression orders has been based essentially upon a number of traditionally accepted and largely unquestioned positions of dubious validity inherited through the common law concept of binding precedent. As they provide the foundation upon which the restriction of dissemination of much of the information currently encompassed rests, more research into their validity is required"* p5 par 7.

This review's recommendations included

- That courts and tribunal's must give written reasons for making a suppression order.
- Suppression orders that are to be treated as interim for five days so that interested parties can make submissions.

[2] "Legal Frictions" Walkley Magazine in July 2018

- Relevant convictions for youth offenders can be reported if the person continues to engage in serious offending as an adult.
- Adult victims of sexual assault or family violence should be permitted to disclose their identity after an offender has been convicted, including cases where the victim has been abused as a child.
- Harmonisation of the law and practice relating to suppression orders should be referred to the Council of Attorney Generals further consideration, including the establishment of more satisfactory arrangements for the interstate and Territory recognition and enforcement of orders.

New Zealand

New Zealand last reviewed open justice in 2009[3], the report includes a comparable jurisdictional review. The Commission rejected privacy as a reason for suppression, making the distinction that "privacy" is not the correct term to use, it is more a case that private interests are balanced against public interests. They recommended that interim suppression orders be available when matters first come before the courts, creating a special process to allow parties the opportunity to mount an argument for suppression of names or evidence.

The report acknowledged that futility is a ground for denying suppression orders, agreeing with a submission by the New Zealand Herald:

> *"often people before the courts are so well-known in their local communities that the only effect of a suppression is to deny publication of common knowledge… The Internet creates a kind of global village effect in which local knowledge like this can be easily spread and readily discovered. The implications were made clear in this country when the billionaire's name (Lewis) appeared on American websites long for suppression was lifted in New Zealand.*
>
> *Since then we have seen Internet breaches of suppression orders in the celebrity drug case, the police rape trials and the so-called Terra tapes. This trend is sure to increase in cases where public interest is intense enough, meaning the only practical effect of such orders will be to prevent the media publishing what everyone knows*."

Developments from other jurisdictions that we consider particularly worthy of further investigation in NSW, are:

- Harmonisation of Australian laws governing the use of suppression and non-publication orders and the law of sub judice contempt. This would be the most effective way of promoting knowledge and understanding of the law and its effect, which should lead to greater compliance by potential publishers.
- The use of the term "postponement order" where publication is suspended awaiting the conclusion of the criminal trial. In our submission this term is more neutral and descriptive of the reasons behind the order. It also has the effect of clearly anticipating when the order will cease.
- Laws that prevent the pre-charge publication of children's names.

[3] Suppressing names and evidence, Law Commission (NZ) Report 109 October 2009

b) Any NSW legislation that affects access to, and disclosure and publication of, court and tribunal information,

including:

- The *Court Suppression and Non-Publication Orders Act* 2010 (NSW);
- The *Court Information Act 2010* (NSW); and
- The *Children (Criminal Proceedings) Act* 1987.

The introduction *Court Suppression and Non-Publication Orders Act* 2010 (Suppression Act), was a welcome development to the NSW laws concerning suppression and non-publication, because it consolidated the relevant principles into one statutory instrument and codified the test to be applied in making an order. Sections 6, 7 and 8 clearly set out that the public interest lies in open justice and appropriately limits the grounds on which suppression or non-publication orders may be made.

Since the introduction of the *Suppression Act* the procedure for applying for suppression or non-publication orders has been clarified and simplified and there is greater consistency in the orders that are being made by the courts. We believe the *Suppression Act* achieves the right balance between open justice and the competing considerations, of the administration of justice, national security, and personal safety. However, we consider that the undue distress or embarrassment test under Section 8(3) of the *Suppression Act* carries too much weight and requires reconsideration.

We do not support the commencement of the *Court Information Act* 2010 (CI Act), and we have consistently raised issues with the operation of this Act should it ever commence.

We strongly support the prohibition on naming children involved in criminal proceedings and believe the current framework set out in the *Children (Criminal Proceedings) Act* 1987 (CCP Act) should remain.

We will discuss the operation of the Suppression Act, the CI Act and the CCP Act further below.

c) Whether the current arrangements strike the right balance between the proper administration of justice, the rights of victims and witnesses, privacy, confidentiality, public safety, the right to a fair trial, national security, commercial/business interests, and the public interest in open justice.

Rights of victims and witnesses, Privacy and Confidentiality,

In our view the most contentious concepts to be considered are privacy and confidentiality, because in our view these concepts are not well understood in the context of criminal proceedings. Namely, in a general sense the only protection of privacy for victims and witnesses in most criminal proceedings is section 280 *Criminal Procedure Act* 1986 that provides for questions seeking addresses or other non-relevant identifying information not be asked.

There is a further protection for some victims covered by s578A *Crimes Act* NSW, which provides the name of a victim of a prescribed sexual offence is not to be published. The important public policy basis of this protection is to ensure that sexual assault victims will not be discouraged from reporting sexual offences. However, from a public perception point of view we question why victims of some other serious and intimate crimes, where there are equally compelling policy reasons to encourage reporting, are not entitled to the same protection, an obvious example being domestic violence.

Section 8 (1) (d) of the *Suppression Act* provides that for a suppression order to be made is it is necessary to avoid causing undue distress or embarrassment to a party or a witness in criminal proceedings involving an offence of a sexual nature. Section 8 (3) further provides that the order may only be made in exceptional circumstances. It is our experience that despite a victim's name not being published, reporting of the details of the crime can cause distress to victims and often victims perceive that the details of the offence can make them identifiable to friends and acquaintances. A recent example highlighting these issues involves the abduction of a child who, while detained, was subjected to degrading sexual acts. The descriptions of the crime have been reported in salacious detail, including details of child abuse material depicting the complainant found on the accused's telephone. This reporting has caused the complainant and her family a great deal of distress. Further the family perceives that details published about ethnicity and location tend to identify the family. An application by the Crown before the Trial Judge pursuant to the Suppression Act to supress these details was rejected. We consider that this example suggests that the prohibition in section 8 (3) carries too much weight and its effect should be ameliorated.

A further issue arises in this example in relation to details about a tendency witness who is now deceased. To date her name has not be published pursuant to section 578A of the *Crimes Act*. However, section 578A 4(f) provides that s578A (1) does not apply if the publication is made after the persons death. The witness before her death had made it clear that she did not wish family members to know about certain aspects of her life. As currently framed it also seems that section 8 (1) (d) would not support an application on behalf of a deceased person.

Lifting statutory protection

The statutory protections available in terms of complainants of sexual assault and witnesses can have a perverse or counterproductive effect. The statutory prohibition on publishing a victim's name may give rise to the accused's name being suppressed because they share a name. One only needs to look at the reported decisions involving child sexual abuse and in a significant proportion the accused party will be referred to by initials.

As the non-publication of name orders are automatic, there is usually no formal procedure or explanation by the court as to the purpose of the order. However, we consider that in many cases it would be valuable if the court could explain clearly exactly what its purpose is, as frequently an order is thought to be "protecting an accused from embarrassment" when in fact it is to protect the victim.

The recent decision of *AB (A Pseudonym) v R (No 3)* [2019] NSWCCA 46 concerned a case where the victims had given consented for their names to be published. The accused sought a pseudonym order to address extra curial punishment arising from inaccurate reporting by the media. One of the arguments the Director of Public Prosecutions raised in opposing the application was that to prohibit the victims from publicly stating that the applicant had committed sexual offences against them would accentuate the harm to them and bring the administration of justice into disrepute.

The CCA was concerned to emphasise that our system is one of institutionalised rather than retributive justice. However, in that context the Court commented (at [105]): that

"*…The role of the victim or victims of the crime is generally limited to giving evidence in the prosecution case. They are usually informed as to the progress of the case and the sentence imposed and may, in certain cases, provide victim impact statements which can be taken into account in specified circumstances….'*

Arguably, this comment fails to recognise the ongoing impact that offending can have on victims. Consequently, we suggest that it is worthwhile to consider recognising victims' interests in being able to speak publicly about the impact of an offence (should they choose to) as a relevant factor in determining whether to make a suppression or non-publication order.

d) The effectiveness of current enforcement provisions in achieving the right balance, including appeal rights.

LRC report on contempt by publication

We note the LRC report[4] made 39 recommendations most of which have not been implemented. In summary, the report proposed the introduction of legislation to replace the common law in relation to sub judice contempt. The ODPP supports codifying the law in this area. Codification will clarify the law in relation sub judice contempt and thereby decrease the potential for contempt be committed by publication of material in circumstances where the publisher was ignorant of the law or is unclear to its effect.

We also support recommendations 34 and 35 in that report concerning amendments to the *Costs in Criminal Cases Act* 1967.

Enforcement of Non-Publication Orders and Statutory Prohibitions on Publication - time to commence proceedings

An issue that the ODPP has encountered on several occasions is that investigation into an alleged breach of a Non-Publication or Suppression Order takes significant time (particularly if it's in a Facebook post or an obscure publication), and the investigation may not be able to be completed within the 6-month time limit for prosecution of those offences. We suggest that consideration be given to an amendment to s 16 of the *Courts Suppression and Non-Publications Act* (and also s 15A of the *Children (Criminal Proceedings) Act* and s578A of the *Crimes Act* to extend the time limit for commencement to 2 years.

This should also apply to an offence under s 76 of the *Coroner's Act* 2009 (restricting the publication of evidence before a Coroner), section 105 *Children and Young Persons (Care and Protection) Act* 1998 and any other similar provisions. It is noted that in relation to an offence under s 105 of the *Children and Young Persons (Care and Protection) Act* 1998, in relation to which s 105(5) provides: "The offence created by this section is an offence of strict liability". It is worth considering in this review whether the interests of consistency and clarity require similar provisions in each of the other 'publication' offences.

e) The appropriateness of legislative provisions prohibiting the identification of children and young people involved in civil and criminal proceedings, including prohibitions on the identification of adults convicted of offences committed as children and on the identification of deceased children associated with criminal proceedings.

[4] 2003 Contempt by Publication

The principle that a child offender should be afforded special protection and enjoy a right to privacy has been consistently promulgated by the United Nations in the declarations on the rights of the child, the "Beijing rules" and other international instruments.

In 2008 the NSW Standing Committee on Law and Justice held an enquiry into the naming of children in connection with criminal proceedings. The report of that committee examines in depth the issues associated with the naming of children, and ultimately concluded that:

> *"the committee believes the naming of juvenile offenders would stigmatise them and have a negative impact on their rehabilitation, potentially leading to increased recidivism by strengthening juveniles bonds with criminal subcultures and their self-identity as a criminal or deviant, and undermining attempts to address the underlying causes of offending."* (Report 35 April 2008 xi)

The ODPP submitted to that Committee;

> "*the policy objectives of the prohibition of valid and appropriate. The criminal justice system must reflect the values of a civilized society and uphold the basis that the child must be protected and allowed to reintegrate into society would take part in community life without fear of lingering consequences of past actions or bearing the stigma of being related to an offender* ..".

This remains our view.

f) Whether, and to what extent, suppression and non-publication orders can remain effective in the digital environment, and whether there are any appropriate alternatives.

The past couple of decades have witnessed substantial advances in technology and significant changes in the way users communicate. There has been an evolution towards social media and a trend away from traditional news sources controlled by large media organisations towards individual/small publishers of news in online forums. The proliferation of online platforms for comment has greatly expanded the potential for prejudicial pretrial publication and has made controlling the content of publications harder to achieve.

We note in the United Kingdom such an order is termed a "postponement" order. We submit that this terminology has benefits over "non-publication", because it conveys that the order is not permanent, distinguishing this type of order from suppression or non-publication orders that are often permanent.

Taking down material from the internet

Richard Ackland has said in an article titled "Legal Frictions" published in the Walkley Magazine.[5]

> "*suppression orders are effective at suppressing information when it is the preserve of basically mainstream publishers, but when it remains available through open media sources it renders futile judicial efforts to protect the jury system*."

We agree that courts are often powerless to control information published and archived on the internet. The task falls to the ODPP to approach national and international media outlets, social media

[5] 24 July 2018

sites and blogs to take down material that either contravenes legislation, breaches a suppression orders or is prejudicial to a matter currently before the court. Our requests meet with varying success. We are finding this increasingly an onerous task that falls outside what might be traditionally considered the role of a prosecuting agency. Where there is a clear breach of a court order, court registries are best placed to advise publishers about the court's order. The ODPP certainly has a role in drawing any such matters to the attention of the court but should not be responsible for sending out notices requesting that offending material be removed.

Speiglman CJ's observed in *John Fairfax Publications Pty Ltd v District Court* (NSW)[6]:

> "*There are now a significant number of cases in which the issue has arisen as to whether or not an accused was able to have a fair trial in the light of substantial media publicity, indeed publicity much more sensational and sustained than anything that occurred here. Those cases have decisively rejected the previous tendency to regard jurors as exceptionally fragile and prone to prejudice. Trial judges of considerable experience have asserted, again and again, that jurors approach the task in accordance with the oath they take, that they listen to the directions that are given and implement them. In particular they listen to the direction that they are to determine guilt only on the evidence before them."*

Our general view is that directions to the jury not to conduct their own research about a matter and to trust juror's will be true to their oath are adequate safeguards to ensure a fair trial in the preponderance of cases.

We suggest the Law Reform Commission consider whether the criminal courts are routinely observing this fundamental principle when deciding whether they should make "take down orders" or other measures like moving the trial location away from the location where the crime was committed.

Forthcoming trials

An example of how this issue may arise in a trial follows:

Last year the ODPP was directed by the court, at the request of the accused, to seek the takedown or amendment of about twenty articles concerning the case. The accused owned a winery and a marijuana business, and his wines were admired internationally by wine writers and food critics.

The ODPP sent letters to a range of publications including a UK tabloid, an American magazine, a Sydney newspaper, and three independent wine blogs. The correspondence was complicated to draft as it is necessary to indicate what precisely needed to be amended and why it needed to be amended. Further we were required to commit to advising the publisher when the trial was finalised, so the material could be restored to its original content. The wine blogs were instantly compliant. The American publication wanted further detailed explanations but eventually agreed to comply, and the Sydney paper complied partially.

In this case our efforts were relatively successful, but in many cases the request is refused, and we are told to get a court order.

Children named before proceedings commence

We note consideration is being given in the UK to introducing legislation that prohibits the pre-charge naming of children. We support similar consideration being given to this issue in NSW, noting that there may need to be an exception in the case of a missing child.

[6] (2004) 61NSWLR 344 at 366, [103]

g) The impact of any information access regime on the operation of NSW courts and tribunals.

CI Act and Supreme Court practice note

The CI Act was assented to on 26 May 2010. The intention was that that Act would legislate the flow of information from courts to the public and media. The Act has not been proclaimed. The ODPP is one of several stakeholders who have called for the Act to be repealed. In our submission the Practice Note issued by the Supreme Court and adopted by the District and Local Courts operates practically and effectively addresses this issue.

The CI Act sets up a regime where information is classified as "open access" information or "restricted" access. In criminal proceedings open access information includes statements, facts, submissions, transcript and judgments. However, restricted access Information includes "personal identification information". The proposal was that for the CI Act to operate, either the parties to the proceedings or the court staff would be required to vet the open access documents and redact any personal identification information. This new responsibility is coupled with the creation of an offence of "Unauthorised Disclosure of Court Information by a Court Officer" which carries a maximum penalty of 2 years[7].

The assumption underlying the structure of the CI Act is that it is a relatively easy task, that could be accommodated on current resourcing, to redact information from documents either prior to filing or subsequently. This assumption is flawed in several ways:

1) Many cases involve a significant volume of material.
2) Checking for personal identification information would require all the material to be read by court staff making the decision.
3) The risk of human error failing to remove all offending information is extremely high.
4) There were no increases to resources in court staff or other agencies to attend to the redaction of material.
5) The task becomes even more onerous when the consequences of making a mistake by a court officer could result in them being prosecuted for an offence.

h) Whether, and to what extent, technology can be used to facilitate access to court and tribunal information.

We note that several Inquiries, such as the Lindt Inquest, the Folbigg Inquiry and the Royal Commission into Institutional Child Sexual Abuse, have utilised web sites and new media and this works very well, by providing a lot of information in real time. Their achievements in this area have been made possible as they are resourced to provide information in this way, are dealing with defined subject matter and only one courtroom. Their success also highlights the difficulties that there would be in trying to replicate this kind of service in busy courts.

[7] Section 20 *Court Information Act* 2010

Thank you for the opportunity to make these submissions. Should you require further information about any of the issues raised in this submission, inquiries should be directed to Johanna Pheils, Deputy Solicitor (Legal) [redacted]

Office of the Director of Public Prosecutions

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