



Victims Of Crime Assistance League Inc NSW

## **NSW Law Reform Commission Open Justice Review**

### **Court and Tribunal Information: Access, Disclosure and Publication Preliminary Submission**

#### **Introduction**

The Victims of Crime Assistance League NSW (VOCAL) welcomes the opportunity to contribute to legislative and operational reforms in respect of access, disclosure and publication of court and tribunal information.

VOCAL supports men, women and children whose lives have been impacted by crime. The NSW Department of Justice, via Victims Services, funds our Victim Support Unit to provide emotional support and practical assistance to crime victims in the Hunter region. VOCAL is also a registered charity providing support and information to any victim of crime throughout NSW.

We are particularly interested in the following terms of reference:

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

This submission argues that issues of victims' competing interests in privacy and disclosure should be addressed in the subsequent consultation and review process. Ultimately we recommend that any legislative change accommodate a victim's right to choose, as far as possible, how information relating to their matter is managed.



## Background

Open justice is a principle fundamental to confidence in our judicial system. Jeremy Bentham has observed, '[w]here there is no publicity there is no justice. Publicity is the very soul of justice.'<sup>1</sup> This interdependence means that court proceedings must be accessible to public scrutiny, and this often takes place through the publication or disclosure of information. In practice, departure from the principle of open justice is justified by the pursuit of the proper administration of justice. This is made possible by the inherent power of superior courts and legislation such as the *Court Suppression and Non-publication Orders Act 2010* (NSW). Of course, this is a complex field subject to competing interests and governed by various instruments.

We are of the view that any reform should be approached with two fundamental issues in mind: firstly, that open justice is done and seen to be done, and secondly, that any arrangement attempts to strike a balance between the interests of victims with other competing interests, including the proper administration of justice and the public interest in open justice. We comment only on the criminal jurisdiction as this is where our experience lies.<sup>2</sup>

## Victims' rights to privacy

Protections for victims' personal information exist in the *Criminal Procedure Act 1986* (NSW) ss 280 and 280A. These relate to the disclosure of the address or telephone number of a witness, and disclosure of personal information in court documents. We are of the view that this is a necessary protection and we urge the court to take seriously matters of victim and witness confidentiality. We have seen several different cases of the inadvertent disclosure of a victim's address during Local Court proceedings. The importance of non-disclosure of contact details is reflected in the Charter of Victims Rights, contained in the *Victims Rights and Support Act 2013* (NSW): 'Your address and telephone number will not be disclosed unless a court directs otherwise.'<sup>3</sup>

There is also a prohibition offered in s 578A of the *Crimes Act 1900* (NSW) against identifying victims of certain sexual offences. Given the common

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<sup>1</sup> In Peter Gregory, *Court Reporting in Australia*, Cambridge University Press, 2005, 174. On the subject that publicity is the hallmark of judicial procedure, see also *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465, 477–479.

<sup>2</sup> A detailed analysis of suppression and non-publication orders in civil litigation has been authored by BC Cairns (2018): 'Suppression and Non-publication Orders in Civil Litigation', 7 *Journal of Civil Litigation and Practice* 63.

<sup>3</sup> Charter Right 8. The NSW Code of Practice for the Charter of Victims Rights was introduced in 2015 and is available on Victims Services website. We note limitations with the Charter given its non-statutory basis.

occurrence of sexual violence within a family and domestic violence context, we recommend that this provision be extended to include family violence offences. Highlighting the general importance of the protection of identity to victims, the Charter of Victims Rights contains a ‘right to protection of identity of victim’, making the provision that ‘your privacy [will] be respected in court’.<sup>4</sup> It is also important that the victim retain the ability to *elect* to have their identity disclosed, as provided for in s 578A(4)(b).

The option for a court to make a suppression or non-publication order on the basis of it being ‘necessary to avoid causing undue distress of embarrassment to a party to or witness’ in criminal proceedings involving an offence of a sexual nature is provided for in s 8(1)(d) of the *Court Suppression and Non-publication Orders Act 2010* (NSW). It can only take place if there are exceptional circumstances (s 8(3)) and if it is necessary.<sup>5</sup> It is our experience that some victims welcome the publication of their story, and find empowerment in strength in having a voice. Other victims feel very strongly about keeping their name and photograph out of the media. We continually see how poor journalism often comments on victim blaming behaviours, which significantly adds to the psychological trauma, shame and embarrassment already felt by many victims. In smaller communities or regional areas like the Hunter, it is easy for the publication of certain details to lead to identification of a victim, even if their name has been suppressed. For this reason, we are interested in options for strengthening s 8(1)(d).

Section 8(1)(d) of the *Court Suppression and Non-publication Orders Act 2010* (NSW) not only relates to witnesses but also applies to any party to proceedings. This means that an accused has recourse to the same protection offered by this provision on grounds of ‘undue distress or embarrassment’. The joint treatment of party and witness (effectively perpetrator and victim) arguably strikes the wrong balance between the rights of victims/witnesses with broader privacy/confidentiality issues. We are interested in whether those exceptional cases do appropriately necessitate a suppression order for a party. Further, we suggest that consideration of granting such an order needs to be balanced with the interests of those victims seeking to share the story of their crime experience, including details about the offender, for the purpose of community safety. We strongly believe that involving the victim in discussions around a suppression order is essential.

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<sup>4</sup> Charter Right 8 is titled ‘Protection of identity of victim’.

<sup>5</sup> Note that what is ‘necessary’ often depends on the context, as discussed by Brian Fitzgerald and Cheryl Foong in relation to the NSW Court of Criminal Appeal case, *Fairfax v Ibrahim*, in ‘Suppression orders after *Fairfax v Ibrahim*: Implications for internet communications’ (2013) 37 Australian Bar Review, 175-191.

## **Victims' rights to disclosure**

Disclosing any type of abuse takes enormous courage, and we know the amount of sexual assault cases that make it to the criminal justice system is significantly low in comparison to reporting rates. While it is the case that some victims are concerned with the protection of their identity, as noted above there are other instances where a victim will seek to speak publicly of their experience. Whether matters are historical or current, many of our clients have expressed frustration where suppression orders are in place surrounding their matter. Many victims report they wish to speak publically hoping to prevent similar crimes by the same offender, or to empower other survivors, but feel silenced by the legal system. Victims report feeling disempowered and betrayed, arguing that suppression orders serve largely to protect the offender's identity. This is especially the case once a conviction has been made and the suppression order remains in place. Adult victims of sexual assault or family and domestic violence should be afforded the choice of whether to disclose their identity after an offender has been convicted. This should also apply where the victim was abused as a child. This sentiment is echoed in Recommendation 15 of the 2017 review into the *Open Courts Act 2013* (Vic).<sup>6</sup>

Victims also frame concerns with perceived oppressive suppression orders in terms of community safety, arguing that a neighbourhood has a right to know if a convicted sex offender is living nearby. One victim we have supported is particularly vocal on this issue. She attests to ongoing distress hearing the family of a convicted child sex offender tell the community that he is incarcerated for driving offences. Reconciling the tension between a right to free speech and principles of privacy or the administration of justice is a multifaceted issue. In the majority of cases that we work with, where there is a suppression order put in place, victims were unaware what that meant. We believe it is imperative that the DPP have discussions with victims of crime about suppressions orders as soon as practical. Our recommendation is that where a suppression or non-publication order is the source of non-disclosure, a court should be required to provide publicly-available reasons for the order. This is also a recommendation made in the *Open Courts Act (Vic) Review*.<sup>7</sup> As the law currently stands, such an order must only 'specify the ground or grounds on which the order is made'<sup>8</sup> which only obscures the transparent operation of the judicial system.

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<sup>6</sup> Frank Vincent, '*Open Courts Act 2013* (Vic) Review', 2017.

<sup>7</sup> Recommendations 6 and 7.

<sup>8</sup> Section 8(3), *Court Suppression and Non-publication Orders Act 2010* (NSW).

**Conclusion**

We hope these preliminary thoughts are useful to the reference and will be taken into account in the subsequent review process. Please do not hesitate to contact us if we can be of further assistance.

**For further information**

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