

OPEN JUSTICE

Court and tribunal information: access, disclosure and publication

22

New South Wales
Law Reform Commission

CONSULTATION
PAPER

December 2020



**New South Wales
Law Reform Commission**

**Consultation
Paper**

22

OPEN JUSTICE

**Court and tribunal information:
access, disclosure and
publication**

**December 2020
www.lawreform.justice.nsw.gov.au**

Copyright permissions

You may copy, distribute, display, download and otherwise freely deal with this publication for any personal or non-commercial purpose, on condition that you include proper acknowledgment on all uses.

However, you must obtain permission from the NSW Law Reform Commission if you wish to:

- charge others for access to the publication (other than at cost)
- include all or part of the publication in advertising or a product for sale, or
- modify the publication.

Disclaimer

While this publication has been formulated with due care, the NSW Law Reform Commission does not warrant or represent that it is free from errors or omission, or that it is exhaustive.

This publication deals with the law at the time it was first published and may not necessarily represent the current law.

Readers are responsible for making their own assessment of this publication and should verify all relevant representations, statements and information with their own professional advisers.

Other publication formats

The NSW Law Reform Commission is committed to meeting fully its obligations under state and Commonwealth anti-discrimination legislation to ensure that people with disabilities have full and equal access to our services.

This publication is available in alternative formats. If you require assistance, please contact the Commission on email nsw-lrc@justice.nsw.gov.au.

Contact details

NSW Law Reform Commission
GPO Box 31
Sydney NSW 2001 Australia

Email: nsw-lrc@justice.nsw.gov.au

Internet: www.lawreform.justice.nsw.gov.au

Cataloguing-in-publication

Cataloguing-in-publication data is available from the National Library of Australia.

ISSN 1834-6901
ISBN 978-1-922254-47-4

Make a submission

We seek your responses to this Consultation Paper. To tell us your views you can send your submission by:

Email: nsw-lrc@justice.nsw.gov.au

Post: GPO Box 31, Sydney NSW 2001

It would assist us if you could provide an electronic version of your submission.

If you have questions about the process, please email.

The closing date for submissions is **19 February 2021**.

Use of submissions and confidentiality

We generally publish submissions on our website and refer to them in our publications.

Please let us know if you do not want us to publish your submission, or if you want us to treat all or part of it as confidential.

We will endeavour to respect your request, but the law provides some cases where we are required or authorised to disclose information. In particular, we may be required to disclose your information under the *Government Information (Public Access) Act 2009* (NSW).

In other words, we will do our best to keep your information confidential if you ask us to do so, but we cannot promise to do so, and sometimes the law or the public interest says we must disclose your information to someone else.

About the NSW Law Reform Commission

The Law Reform Commission is an independent statutory body that provides advice to the NSW Government on law reform in response to terms of reference given to us by the Attorney General. We undertake research, consult broadly, and report to the Attorney General with recommendations.

For more information about us, and our processes, see our website:
www.lawreform.justice.nsw.gov.au

Table of contents

Make a submission	iii
Participants	xii
Terms of reference	xiii
Questions	xv
1. Overview	1
Why this review is needed	2
The meaning and importance of open justice	4
Elements of open justice	5
Open courts	5
Fair and accurate reporting of court proceedings	5
Access to court information	6
Purposes of open justice	7
Ensuring the accountability of the courts	7
Educating the public	7
Maintaining public confidence in the courts	7
Limits to open justice	8
The right to a fair trial	8
The need to protect certain people's identities	9
Departing from open justice	9
Common law powers to depart from open justice	9
Statutory sources for departing from open justice	11
The history of open justice in NSW	12
A fundamental principle of NSW law	12
A period of review: 2003–2010	12
The Court Information Act	14
The Court Suppression and Non-publication Orders Act	14
Our process	15
Key terms in this paper	16
Reference to “court” generally, includes tribunal	16
Chapter outline	16

2.	The open court principle and its exceptions	19
	What is the open court principle?	20
	Rationale for the open court principle	20
	Ways in which legislation gives effect to the open court principle	21
	When should proceedings be held in private?	22
	Common law exceptions to the open court principle	22
	Statutory requirements to hold proceedings in private	23
	Discretionary powers to exclude people from proceedings	27
3.	Non-disclosure and suppression: statutory prohibitions	35
	Should legislation automatically prohibit publication or disclosure of certain information?	37
	What information should be protected from publication or disclosure?	38
	Current prohibitions on publishing or disclosing identities	38
	Current prohibitions on publishing or disclosing other information	44
	Additional statutory prohibitions that may be needed	46
	What should be the scope of the prohibitions?	49
	The types of action a statute may automatically prohibit	49
	Duration of the statutory prohibition	51
	Extension of the statutory prohibition to appeals or other related proceedings	52
	When should publication or disclosure be permitted?	53
	General or specific exceptions	53
	Issues relating to certain exceptions	54
4.	Non-disclosure and suppression: discretionary orders	57
	A variety of powers to make orders	59
	Types of action an order may prohibit or require	60
	Types of information that may be subject to orders	61
	When the subject of the proposed order consents to publication	62
	The scope of orders	63
	Orders under the Court Suppression and Non-publication Orders Act cannot address “the world at large”	63
	An order can contain exceptions and conditions	64
	Duration and geographic limits of an order	65
	Procedures for making orders	67
	By application or court motion	67
	When an order can be made	67
	Who can appear and be heard in an application for an order	67

Service and notice requirements	68
Costs in proceedings	69
The public interest in open justice	70
Should the principle of open justice be embedded in other statutes that empower the making of suppression and non-publication orders?	72
Is the principle as currently worded effective and appropriate?	72
Grounds for making orders	73
The “necessary” test in the Court Suppression and Non-publication Orders Act	73
Grounds for making orders under the Court Suppression and Non-publication Orders Act	75
Grounds for making orders in other statutes	80
A requirement to give reasons for decisions	81
Interim orders	81
Review and appeal of orders	83
Appeal and review procedures under the Court Suppression and Non-publication Orders Act	83
Challenges in framing effective orders	85
The interaction between statutes that contain overlapping powers to make suppression and non-publication orders	86
Interaction between the Court Suppression and Non-publication Orders Act and other statutes that permit orders	87
Interaction between the Court Suppression and Non-publication Orders Act and statutory prohibitions	88
Consolidation or standardisation of powers	89
5. Monitoring and enforcing prohibitions on publication and disclosure	91
Sources of sanctions for breaches of prohibitions on publication and disclosure	92
Statutory offences	93
Contempt of court	97
How often are prohibitions breached?	100
Outcomes of court appearances for these offences	101
Who is responsible for monitoring and enforcing prohibitions?	102
Enforcing breaches of prohibitions on publication and disclosure	104
Informal enforcement: take down notices and orders	104
Formal enforcement: criminal proceedings	106
Challenges in enforcing prohibitions on publication or disclosure	107

6.	Access to information	115
	The need for open access to court information	117
	Current access regimes in NSW	118
	Should NSW consolidate its access regimes?	118
	A single, consolidated regime	119
	Partial consolidation	120
	Features of an access regime	121
	How much discretion should decision-makers have?	121
	What principles or considerations should apply in the exercise of discretion?	123
	What types of information should be made available?	129
	When should access to information be prohibited?	136
	Who should be able access information?	138
	How should the access regime protect privacy?	141
	Procedures for accessing information	145
	How should access be provided?	148
	Should applicants be charged a fee?	151
	Other options for improving access to information	154
	A national access regime	154
	Greater public availability of judgments and decisions	155
7.	Protections for children and young people	159
	Protections in criminal proceedings where the child is a defendant	160
	Prohibition on the publication and disclosure of identifying information	162
	Closed court orders	169
	Protections in non-criminal proceedings	170
	Criminal diversion processes	171
	Proceedings for apprehended domestic violence orders	171
	Care and protection proceedings	172
	Adoption proceedings	175
	Parentage and surrogacy proceedings	177
	Should children be protected in other types of proceedings?	178
8.	Victims and witnesses: privacy protections and access to information	181
	General protections for victims and witnesses	182
	Closing the court to the public for the reading of a victim impact statement	182
	Automatic prohibitions on publishing or disclosing certain information	183
	Suppression and non-publication orders	184

Should there be more general protections for victims and witnesses?	185
Protections for specific types of victims and witnesses	187
Children and young people	187
Complainants in sexual offence proceedings	191
Complainants and witnesses in domestic violence proceedings	192
Should there be protections for other types of victims or witnesses?	195
Access to information by victims	197
Entitlements under the current access regimes in NSW	197
Other entitlements to receive information	199
Access entitlements a victim would have under the uncommenced Court Information Act	201
Additional access entitlements that could be considered	202
9. Protections for sexual offence complainants	203
The prohibition on publishing the identities of complainants in sexual offence proceedings	204
Perspectives on the prohibition	207
Closing courts during sexual offence proceedings	209
When courts must, or may, be closed	209
Perspectives on the situations where courts may, or must, be closed	212
Exceptions for media access	213
10. Media access to information	215
The need for media access to court information and proceedings	216
Media access to court information in NSW	217
The media's right to inspect certain documents in criminal proceedings	217
Media access to information under other access regimes	221
Access to documents relating to sentencing	225
Media access to court information elsewhere in Australia	226
Harmonisation or separate treatment?	228
Media access to court proceedings	231
Media access to closed proceedings	231
Access restrictions during the COVID-19 pandemic	233
Broadcasting court proceedings	234
Restrictions on publication	237
Automatic prohibitions on publishing information	237
Suppression and non-publication orders	238
Contemporary media	242

How is “the media” defined in legislation?	242
How should “the media” be defined?	244
11. Researcher access to information	247
Who is a researcher and what is research?	248
What information is important to researchers?	249
Researcher access to court information in NSW	250
Information in the Supreme Court	250
Information in the Coroners Court	251
Information in the Children’s Court	251
Judgments and transcripts	251
Other information relating to criminal proceedings	254
Other information relating to civil proceedings	255
Bureau of Crime Statistics and Research data	255
Researcher access to court archives	256
Researcher access to information under the Court Information Act	258
Access schemes for researchers in other places	258
Federal Court of Australia	258
Victoria	259
England and Wales	260
New Zealand	260
12. Digital technology and open justice	263
Online courts	264
Virtual courtrooms	264
Recording and broadcasting their own proceedings	267
Electronic access to court information	269
Electronic access regimes in other jurisdictions	271
Advantages and disadvantages of electronic access to court information	272
Suppression and non-publication orders in the digital environment	274
The Pell case	274
The difficulties of enforcing breaches outside Australia	275
Options to prevent or remedy offending content being available overseas	276
Tweeting and posting in court	279
13. Other proposals for change	283
A register of suppression and non-publication orders	284
An open justice advocate	286

Education initiatives	289
Media education	289
Public education	290
Educating participants	290
Avoiding juror prejudice	291
The juror oath or affirmation	291
The offence of making inquiries	292
Jury directions	293
Questions from the jury	295
Educating jurors	296
Pre-trial questioning of the jury	297
Judge alone trials	298
Appendix A Preliminary submissions	301
Appendix B Preliminary consultations	303

Participants

Commissioners

The Hon Justice Paul Brereton AM, RFD (Deputy Chairperson)

Mr Alan Cameron AO (Chairperson)

Law Reform and Sentencing Council Secretariat

Ms Kathryn Birtwistle, Policy Officer

Ms Ya'el Frisch, Policy Officer

Ms Erin Gough, Policy Manager

Ms Arizona Hart, Policy Officer

Dr Jackie Hartley, Senior Policy Officer

Ms Emma Holloway, Senior Policy Officer

Ms Hwei-See Kay, Intern

Mr Matthew Nelson, Senior Policy Officer

Mr Henry Robinson, Intern

Mr Alexander Roussos, Intern

Mr Joseph Waugh PSM, Senior Policy Officer

Ms Anna Williams, Research Support Librarian

Terms of reference

Pursuant to section 10 of the Law Reform Commission Act 1967, the NSW Law Reform Commission is to review and report on the operation of:

1. legislative prohibitions on the disclosure or publication of NSW court and tribunal information,
2. NSW court suppression and non-publication orders, and tribunal orders restricting disclosure of information, and
3. access to information in NSW courts and tribunals;

In particular, the Commission is to consider:

- a) 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.
- 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.
- c) The effectiveness of current enforcement provisions in achieving the right balance, including appeal rights.
- d) 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.
- e) Whether, and to what extent, suppression and non-publication orders can remain effective in the digital environment, and whether there are any appropriate alternatives.
- f) The impact of any information access regime on the operation of NSW courts and tribunals.
- g) Whether, and to what extent, technology can be used to facilitate access to court and tribunal information.
- h) The findings of the Royal Commission into Institutional Responses to Child Sexual Abuse regarding the public interest in exposing child sexual abuse offending.
- i) Comparable legal and practical arrangements elsewhere in Australia and overseas.
- j) Any other relevant matters. *[Received 27 February 2019]*

Questions

1. Overview

Question 1.1: We welcome your ideas and comments

This consultation paper contains a number of questions through which we seek your views about the issues raised. Once you have read this paper, you may have ideas for addressing issues about access to, and disclosure and publication of, court information that do not fit this paper's structure or the questions we ask. We welcome any other ideas or comments that you may wish to make.

2. The open court principle and its exceptions

Question 2.1: Statutory requirements to hold proceedings in private

- (1) Are the current laws that require certain proceedings to be closed to the public appropriate? Why or why not?
- (2) What changes, if any, should be made to these laws?
- (3) Are the current statutory exceptions to the requirement to hold proceedings in private appropriate? Why or why not?
- (4) Should there be standard exceptions that apply in all (or most) circumstances? If so, what should they be, and in what circumstances should they apply?

Question 2.2: Statutory powers to hold proceedings in private

- (1) Are the existing laws that give courts discretionary powers to make exclusion orders appropriate? Why or why not?
- (2) What changes, if any, should be made to these existing laws?
- (3) Should there be standard grounds that need to be satisfied before a court can make a discretionary exclusion order in all (or most) circumstances? If so, what should they be and in what circumstances should they apply?
- (4) Should there be standard procedures by which an exclusion order could be made in all (or most) circumstances? If so, what should they be and in what circumstances should they apply?
- (5) Should there be a standard offence for breaching an exclusion order in most (or all) circumstances? If so:
 - (a) what should be the elements of the offence and in what circumstances should it apply, and
 - (b) what should be the penalty?

3. Non-disclosure and suppression: statutory prohibitions

Question 3.1: Statutory prohibitions on publishing or disclosing certain information

As a matter of principle, should there ever be automatic statutory prohibitions on publishing or disclosing certain information? Why or why not?

Question 3.2: Current statutory prohibitions on publishing or disclosing information

- (1) Are the current statutory prohibitions on publishing or disclosing certain information appropriate? Why or why not?
- (2) What changes, if any, should be made to the current statutory prohibitions?

Question 3.3: Additional statutory prohibitions that may be needed

What further information, if any, should be protected by automatic statutory prohibitions on publication or disclosure?

Question 3.4: Types of action a statute may prohibit

- (1) Is the existing variety of types of action that a statute may prohibit justified? Why or why not?
- (2) What changes, if any, should be made?
- (3) Should a standard provision setting out the types of action that a statute may prohibit be developed? If so:
 - (a) what should the provision say
 - (b) how should key terms be defined, and
 - (b) when should it apply?

Question 3.5: Duration of the statutory prohibition

- (1) Should the statutory prohibitions on publishing or disclosing certain information always specify the duration of the prohibition? Why or why not?
- (2) What changes, if any, should be made to the existing duration provisions attached to statutory prohibitions on publishing or disclosing information?
- (3) What prohibitions, if any, should include a duration provision that do not already? What should these duration provisions say?

Question 3.6: Application of the statutory prohibition to related proceedings

In what circumstances, if any, should statutory prohibitions that protect the identities of people involved in proceedings apply in appeal or other related proceedings?

Question 3.7: When publication or disclosure of information should be permitted

- (1) Are the existing exceptions attached to statutory prohibitions on publishing or disclosing information appropriate? Why or why not?
- (2) What changes, if any, should be made to the existing exceptions?

- (3) What prohibitions, if any, should include exceptions that do not already? What should these be?
- (4) Should standard exceptions apply to all (or most) statutory prohibitions on publishing or disclosing information? If so, what should they be and in what circumstances should they apply?
- (5) Where exceptions allow a court to permit disclosure of protected information, what criteria, if any, should guide that court?

4. Non-disclosure and suppression: discretionary orders

Question 4.1: Actions targeted by an order

- (1) Are the existing definitions of “suppression order” and “non-publication order” in the *Court Suppression and Non-publication Orders Act 2010* (NSW) appropriate? Why or why not?
- (2) What changes, if any, should be made to these definitions?
- (3) What other statutes should these definitions (with or without amendment) apply to?
- (4) What other changes (if any) should be made to these statutes in relation to the types of action an order may prevent?

Question 4.2: Types of information that may be subject to an order

- (1) Are the current provisions that identify the types of information that may be the subject of a suppression or non-publication order, adequate? Why or why not?
- (2) What changes, if any, should be made to these provisions?

Question 4.3: Consent to publication or disclosure

What provision, if any, should be made about making an order where a person consents to the publication of information that would reveal their identity?

Question 4.4: Limits to orders

- (1) Are the existing provisions relating to the scope of suppression and non-publication orders appropriate? Why or why not?
- (2) What changes, if any, should be made to existing provisions in relation to:
 - (a) the exceptions and conditions that apply
 - (b) the geographic limits of such orders
 - (c) the duration of such orders, and
 - (d) any other aspects of the scope of such orders?

Question 4.5: Service and notice requirements

- (1) Are the existing procedures (under the *Court Suppression and Non-publication Orders Act 2010* (NSW), or any other statute) for making suppression and non-publication orders adequate? Why or why not?
- (2) What changes, if any, should be made to existing procedures in relation to:

- (a) who may make an application for an order
- (b) when an order can be made
- (c) who can appear and be heard in an application for an order
- (d) the service and notice requirements for an order, or
- (e) any other matter?

Question 4.6: Costs in proceedings for orders

What provision, if any, should be made for cost orders in relation to applications for suppression or non-publication orders?

Question 4.7: The public interest in open justice

- (1) Does the *Court Suppression and Non-publication Orders Act 2010* (NSW) deal with the consideration of the public interest in open justice appropriately? Why or why not?
- (2) What changes, if any, should be made to the existing provision?
- (3) What provision, if any, should be made in other statutes that grant power to make suppression or non-publication orders for recognising the public interest in open justice?
- (4) What other considerations should be taken into account before an order is made?

Question 4.8: The “necessary” test for making orders

- (1) What changes, if any, should be made to the “necessary” test?
- (2) Should a definition of “necessary” be included in the *Court Suppression and Non-publication Act 2010* (NSW) or any other statute? If so, what should it be?

Question 4.9: Grounds for making orders

- (1) Are the grounds for making suppression and non-publication orders under the *Court Suppression and Non-publication Act 2010* (NSW) and other NSW statutes appropriate? Why or why not?
- (2) What changes, if any, should be made to them?

Question 4.10: A requirement to give reasons

- (1) Should courts be required to give reasons for a decision to make or refuse to make a suppression or non-publication order in some or all circumstances? Why or why not? In what circumstances should this requirement apply?
- (2) If there was to be a requirement, how should it be expressed?

Question 4.11: Interim orders

- (1) Is the current provision in the *Court Suppression and Non-publication Orders Act 2010* (NSW) for interim orders appropriate and effective? Why or why not?
- (2) What changes, if any, should be made to the existing provision?
- (3) What provision, if any, should be made for interim orders in other statutes that grant powers to make suppression or non-publication orders?

Question 4.12: Review and appeal of orders

- (1) Are the existing provisions relating to the review and appeal of suppression and non-publication orders appropriate? Why or why not?
- (2) What changes, if any, should be made to these provisions?
- (3) To what extent should review and appeal provisions be available for suppression and non-publication orders that are not covered by the *Court Suppression and Non-publication Orders Act 2010* (NSW)?

Question 4.13: Framing effective orders

How could the *Court Suppression and Non-publication Orders Act 2010* (NSW) provisions be amended to assist courts in framing more effective orders?

Question 4.14: Interaction between the *Court Suppression and Non-publication Orders Act 2010* (NSW) and other statutes

- (1) Should the *Court Suppression and Non-publication Orders Act 2010* (NSW) only apply to situations that are not subject to other automatic prohibitions or provisions that allow suppression and non-publication orders to be made? Why or why not?
- (2) Which provisions for suppression and non-publication, if any, should be consolidated or standardised?

5. Monitoring and enforcing prohibitions on publication and disclosure

Question 5.1: Sources of sanctions for breaches of prohibitions

- (1) Is the current regime, in which some breaches of prohibitions on publication or disclosure of information are enforced through statutory offences and others are enforced by contempt proceedings, satisfactory? Why or why not?
- (2) What changes, if any, should be made to the existing arrangements? To what extent should there be greater consistency in the statutory offences?
- (3) In particular, what changes, if any, should be made in relation to:
 - (a) a mental element for any offence
 - (b) the definition of terms used for publication or disclosure
 - (c) exceptions to any of the statutory offences, or
 - (d) the current maximum penalties for any statutory offences?
- (4) What changes, if any, should be made to the current arrangements for enforcing contempt of court in relation to breaches of prohibitions on publication or disclosure?

Question 5.2: Monitoring prohibitions on publication and disclosure

- (1) How should prohibitions on publication and disclosure of information be monitored?
- (2) Is public transparency about the number of people who are proceeded against for offences involving breaches of the prohibitions necessary or desirable? Why or why not? How could public transparency about these numbers be improved?

Question 5.3: Enforcing prohibitions on publication and disclosure

- (1) Are the existing arrangements for managing breaches of prohibitions on publication and disclosure of information effective? Why or why not?
- (2) If not, what changes should be made?

Question 5.4: Challenges in enforcing prohibitions on publication or disclosure

- (1) What changes, if any, could make it easier for justice agencies to identify and prosecute people who breach prohibitions on publication or disclosure of information?
- (2) Should there be a scheme for mutual recognition and enforcement of suppression and non-publication orders across Australia? If so, what would the scheme entail?
- (3) How should the law and/or justice agencies deal with situations where prohibitions on the publication or disclosure of information under NSW law are breached outside Australia?
- (4) Should the time limits for enforcing the statutory offences considered in this Chapter be extended? Why or why not?

6. Access to information

Question 6.1: Consolidation of the court information access regimes in NSW

- (1) Should the regimes governing access to court information be consolidated? Why or why not?
- (2) If so, how should the regimes be consolidated?
- (3) What principles and rules should underpin a consolidated regime?

Question 6.2: Discretion to permit or deny access to information

- (1) In what circumstances, if any, should courts have discretion to permit or deny access to court information?
- (2) In what circumstances, if any, should information be available as of right?

Question 6.3: Considerations in determining access requests

- (1) What, if any, standard considerations or principles should all (or most) courts apply when determining an access request?
- (2) Are there any circumstances that would warrant different considerations to the standard considerations being applied? If so:
 - (a) what circumstances, and
 - (b) what should the considerations be?

Question 6.4: Types of court information available for access

- (1) What types of court information should be available for access?
- (2) Should different access rules apply to different types of information?

Question 6.5: Prohibiting access to court information

Should access to court information be prohibited in certain circumstances? If so, when?

Question 6.6: Who can access court information?

Who should be able to access what types of court information and on what conditions?

Question 6.7: Privacy protections for personal information

How should the privacy of personal identification information contained in court information be protected?

Question 6.8: Applying for access to court information

- (1) What procedures, if any, should apply when a person seeks access to court information?
- (2) What guidance, if any, should be given in relation to these procedures?

Question 6.9: How access to court information should be provided

- (1) By what methods should courts provide a person with access to court information?
- (2) Should the available methods be different depending on the applicant and the situation? If so, how?

Question 6.10: Fees for accessing information

- (1) In what circumstances should a person be charged a fee to access court information?
- (2) In what circumstances should any fees for accessing information be waived or reduced?

Question 6.11: A national access regime

Should there be a national regime governing access to documents? Why or why not?

Question 6.12: Public availability of judgments and decisions

How could NSW courts and tribunals improve access to judgments and decisions?

7. Protections for children and young people

Question 7.1: Criminal proceedings – prohibition on the publication and disclosure of identifying information

- (1) Should there continue to be a general prohibition on publishing or broadcasting the identities of children involved in criminal proceedings in NSW? Why or why not?
- (2) What changes, if any, should be made to the existing prohibition and the exceptions to it?

Question 7.2: Criminal proceedings – closed court orders

- (1) Should criminal proceedings involving children continue to be held in closed court as a rule? Why or why not?

- (2) Are the current exceptions to the rule appropriate? If not, what changes should be made?

Question 7.3: Criminal diversion processes

- (1) Is the prohibition on publishing or broadcasting the identities of young offenders who take part in criminal diversion processes appropriate? Why or why not?
- (2) What changes, if any, should be made to the existing prohibition?

Question 7.4: Proceedings for apprehended domestic violence orders

- (1) Is the prohibition on publishing the identities of children involved in apprehended domestic violence order proceedings appropriate? Why or why not?
- (2) What changes, if any, should be made to the existing prohibition?

Question 7.5: Care and protection proceedings – prohibition on the publication and disclosure of identifying information

- (1) Is the prohibition on publishing or broadcasting the identities of children involved in care and protection proceedings appropriate? Why or why not?
- (2) What changes, if any, should be made to the existing prohibition and exceptions?

Question 7.6: Care and protection proceedings – closed court orders

- (1) Are the existing provisions relating to the exclusion of people (including the child or young person themselves) from court and non-court proceedings under the *Children and Young Persons (Care and Protection) Act 1998* (NSW) appropriate? Why, or why not?
- (2) What changes, if any, should be made to these provisions?

Question 7.7: Adoption proceedings

- (1) Should there continue to be prohibitions on the publication or disclosure of material that identifies people involved in adoption proceedings? Why, or why not?
- (2) What changes, if any, should be made to the existing prohibitions and exceptions?
- (3) Should adoption proceedings continue to be held in closed court? Why, or why not?
- (4) What changes, if any, should be made to the existing closed court provisions?

Question 7.8: Parentage and surrogacy proceedings

- (1) Should there continue to be prohibitions on the publication or disclosure of material relating to parentage and surrogacy proceedings? Why or why not?
- (2) What changes should be made to the existing restrictions?
- (3) Should parentage and surrogacy proceedings continue to be held in closed court? Why or why not?
- (4) What changes, if any, should be made to the existing closed court provisions?

Question 7.9: Other proceedings

What further protections, if any, should there be against the publication and disclosure of, or public access to, types of legal proceedings involving children other than those to which protections already apply?

8. Victims and witnesses: privacy protections and access to information

Question 8.1: General protections for victims and witnesses

- (1) Are the general privacy protections for victims and witnesses in NSW appropriate? Why or why not?
- (2) What changes, if any, should be made?

Question 8.2: Current protections for specific types of victims and witnesses

- (1) Are the privacy protections for specific types of victims and witnesses in NSW appropriate? Why or why not?
- (2) What changes, if any, should be made?

Question 8.3: Protections for other types of victims and witnesses

What privacy protections, if any, are needed for other types of victims and witnesses?

Question 8.4: Access to court information by victims

- (1) Are the current arrangements governing access to court information by victims appropriate? Why or why not?
- (2) What changes, if any, should be made?

9. Protections for sexual offence complainants

Question 9.1: The prohibition on publishing the identities of sexual offence complainants

- (1) Is the prohibition on publishing the identities of complainants in sexual offence proceedings and the exceptions to the prohibition appropriate? Why or why not?
- (2) What changes, if any, should be made?

Question 9.2: Closing courts during sexual offence proceedings

- (1) Are the situations in which courts may be closed during sexual offence proceedings appropriate? Why or why not?
- (2) What changes, if any, should be made?

10. Media access to information

Question 10.1: Media access to court information in NSW

- (1) Are the current arrangements for the media to access court information in relation to both civil and criminal proceedings appropriate? Why or why not?
- (2) Should the media have special privileges to access court information in relation to civil and/or criminal proceedings? Why or why not?
- (3) What changes, if any, should be made to the current arrangements, including in relation to:
 - (a) the nature of the access provided
 - (b) the types of documents that may be accessed
 - (c) time limits on access, and
 - (d) application procedures?

Question 10.2: Media access to court proceedings

- (1) Is the current regime governing media access to proceedings appropriate and workable? Why or why not?
- (2) What changes, if any, should be made to the current regime, including in relation to:
 - (a) prescribed sexual offence proceedings
 - (b) proceedings involving children
 - (c) accessing “virtual courtrooms”, and
 - (d) orders excluding people under the *Court Security Act 2005* (NSW)?

Question 10.3: Broadcasting court proceedings

- (1) Are the rules that apply to media recording and broadcasting of court proceedings appropriate? Why or why not?
- (2) What changes, if any, should be made?

Question 10.4: Impact of publication restrictions on the media

- (1) Are the laws that restrict the media from publishing or broadcasting information relating to court proceedings appropriate? Why or why not?
- (2) What changes, if any, should be made?
- (3) In relation to suppression and non-publication orders:
 - (a) are the interests of the media adequately reflected in the grounds for making such orders?
 - (b) is the list of people with standing to be heard in applications for suppression or non-publication orders appropriate?
 - (c) are the current arrangements for communicating the existence of suppression and non-publication orders adequate?
- (4) What changes, if any, should be made to the laws and procedures relating to the media and suppression and non-publication orders?

Question 10.5: Contemporary media

- (1) Are the current definitions and use of the terms “media” and “news media organisation” appropriate? Why or why not?
- (2) What changes, if any, should be made to these terms and their definitions?
- (3) How else could members of the media be identified for the purposes of the laws dealing with media access to court information and proceedings?

11. Researcher access to information

Question 11.1: Researcher access to information

- (1) What changes, if any, should be made to the existing arrangements for providing researchers with access to court information?
- (2) In particular, what changes, if any, should be made in relation to:
 - (a) a centralised scheme for giving researchers access to court information, including a research committee
 - (b) the kinds of researchers who should be able to access court information
 - (c) the kinds of research that court information should be available for
 - (d) the other considerations that may be relevant to granting a researcher access to court information
 - (e) the type of court information researchers should be able to access
 - (f) the types of conditions that should be placed on researchers who are given access to court information
 - (g) applicable fees and arrangements for fee waiver
 - (h) access to archived court records, and
 - (i) requests to collate data and/or statistics?

12. Digital technology and open justice

Question 12.1: Online courts

If virtual courtrooms are to be available, what provision, if any, should be made to ensure that:

- (a) open justice principles are given effect to, where possible, and
- (b) risks of prohibited disclosure or publication are managed effectively?

Question 12.2: Electronic access to court information

- (1) What arrangements, if any, should be made for electronic access to court information?
- (2) In particular, what should the arrangements be in relation to:
 - (a) the type of information that can be accessed
 - (b) who can access the information, and
 - (c) any necessary protections against unauthorised disclosure or publication of such information?

Question 12.3: Suppression and non-publication orders in the digital environment

- (1) What, if anything, can be done to deal with situations where suppression and non-publication orders under NSW law are breached outside Australia?
- (2) In particular, what, if anything can be done to minimise the risk of offending content affecting the fairness of a trial?

Question 12.4: Tweeting and posting in court

- (1) Are current provisions regulating use of social media by the media and public in court adequate? Why or why not?
- (2) What changes, if any, should be made to the existing provisions?

13. Other proposals for change

Question 13.1: A register of orders

- (1) Should there be a publicly accessible register of suppression and non-publication orders made by NSW courts? Why or why not?
- (2) If so:
 - (a) who should be able to access the register,
 - (b) what details should be included in the register, and
 - (c) who should build and maintain the register?

Question 13.2: An open justice advocate

- (1) Is there a need for an advocate to appear and be heard in applications for suppression and non-publication orders? Why or why not?
- (2) If so, what responsibilities should the advocate have?

Question 13.3: Education initiatives

- (1) What education initiatives could be implemented to improve people's understanding of open justice and associated restrictions?
- (2) Who should be responsible for delivering those initiatives?

Question 13.4: Other ways to avoid juror prejudice

- (1) Could the juror oath and affirmation be amended to better ensure jurors appreciate, and take seriously, the obligation not to seek or rely on potentially prejudicial information? If so, how could they be improved?
- (2) Is the current *Jury Act 1977* (NSW) offence of making inquiries effective? If not, how could it be improved?
- (3) Are the current jury directions about avoiding media publicity and making inquiries about the case appropriate? If not, what reforms are required?
- (4) Could improving the way that juror questions are managed better ensure jurors do not conduct their own inquiries? If so, what improvements could be made?
- (5) Could more educational guidance be provided to jurors about avoiding media publicity and making inquiries prior to the trial? If so, what should this guidance say?

- (6) Could pre-trial questioning of jurors be used more effectively to determine which potential jurors have been exposed to prejudicial information? If so, how?
- (7) Should NSW adopt the Queensland approach of allowing judge alone trials where there has been significant pre-trial publicity that may affect jury deliberations? Why or why not?
- (8) Are there any other ways in which current law or practice can be improved to prevent jurors from being influenced by potentially prejudicial information?

1. Overview

In Brief

The Attorney General has asked us to review and report on the laws that govern the disclosure and publication of court and tribunal information. This includes the laws that determine who can access such information and in what circumstances. Recent developments have raised questions about whether the law is meeting its objectives. We seek your views on whether the law needs to change.

Why this review is needed	2
The meaning and importance of open justice	4
Elements of open justice	5
Open courts	5
Fair and accurate reporting of court proceedings	5
Access to court information	6
Purposes of open justice	7
Ensuring the accountability of the courts	7
Educating the public	7
Maintaining public confidence in the courts	7
Limits to open justice	8
The right to a fair trial	8
The need to protect certain people's identities	9
Departing from open justice	9
Common law powers to depart from open justice	9
Courts' inherent powers to regulate proceedings	9
Courts' powers to deal with contempt	11
Statutory sources for departing from open justice	11
The history of open justice in NSW	12
A fundamental principle of NSW law	12
A period of review: 2003–2010	12
The Court Information Act	14
The Court Suppression and Non-publication Orders Act	14
Our process	15
Key terms in this paper	16

- 1.1 The NSW Law Reform Commission is an independent statutory body. We provide law reform advice to the Government on matters referred to us by the NSW Attorney General.
- 1.2 On 27 February 2019, the Attorney General asked us to review and report on the laws that govern the disclosure and publication of court and tribunal information, as well as who has access to such information and in what circumstances. The Terms of Reference are on page xiii.
- 1.3 The concept of open justice – a fundamental principle at the heart of our legal system – is central to this review. In this Consultation Paper, we consider how to balance open justice with the principles that sometimes compete with it, such as the need to protect certain people’s identities and the right to a fair trial.
- 1.4 In doing this, we examine when information can be suppressed and the mechanisms that govern suppression and non-publication orders. We also examine the laws, procedures and practices that govern who can access information held by courts and tribunals. We seek your views on what needs to change.

Why this review is needed

- 1.5 When working well, open justice allows the public to be informed about what takes place in a courtroom and to understand the basis on which judicial officers make their decisions. Most of the laws that affect access to court and tribunal information were drafted at a time when the media and legal landscapes looked very different to what they do today. For laws, procedures and practices that seek to achieve open justice to operate effectively, they must appropriately align with these landscapes.
- 1.6 Since the NSW Law Reform Commission issued its last report in this subject area, in 2003,¹ and the *Court Suppression and Non-publication Orders Act 2010* (NSW) (“CSNPO Act”) commenced in 2011, developing technologies have dramatically changed the way people access and share information. The internet has supplanted traditional forms of publication and delivers current news as well as giving users easy access to past news archives. Social media platforms allow individuals and organisations to publish instantly, meaning, for example, that a person in a courtroom can share the details of a case as it unfolds.

1. NSW Law Reform Commission, *Contempt by Publication*, Report 100 (2003).

- 1.7 Because social media platforms generally do not recognise national boundaries, shared information can reach audiences across the world. We saw this in 2018 when the suppression order of a Victorian court failed to prevent overseas media outlets publishing details about the conviction (subsequently overruled) of Cardinal George Pell, allowing people in Australia to access that information.
- 1.8 Changes to the way the legal system operates have also affected open justice. Information once provided to the court orally is more often tendered. This makes it difficult for people observing a case to follow its details. Barriers to accessing tendered documents, including fees regarded as prohibitive, can prevent fair and accurate reporting of cases.
- 1.9 On the other hand, technology has provided opportunities for courts to facilitate open justice. Many use websites to publish judgments and transcripts, and sometimes even livestream cases. The advent of the global pandemic has prompted other innovations and we will also explore their implications for open justice.
- 1.10 The time has clearly come to consider whether the laws are operating as intended.
- 1.11 Submissions to this review present a wide range of perspectives on the *CSNPO Act*. Positive responses suggest that the Act:
- has simplified and clarified the procedure for applying for suppression and non-publication orders²
 - has led to greater consistency in the orders being made,³ and
 - strikes a good balance between open justice and other considerations, such as the right to a fair trial, the administration of justice, national security and personal safety.⁴
- 1.12 Others are concerned that the Act operates too broadly, allowing for orders to be made in cases that should not be immune from public scrutiny.⁵
- 1.13 Then there is the question of the *Court Information Act 2010 (NSW)* (“*Court Information Act*”), which was enacted at the same time as the *CSNPO Act*, and that was intended to consolidate the regulation of access to court information. It remains uncommenced a decade after its enactment.

2. NSW, Office of the Director of Public Prosecutions, *Preliminary Submission PCI12*, 6.

3. NSW, Office of the Director of Public Prosecutions, *Preliminary Submission PCI12*, 6.

4. NSW, Office of the Director of Public Prosecutions, *Preliminary Submission PCI12*, 6; NSW Council for Civil Liberties, *Preliminary Submission PCI29*, 3; NSW, Public Defenders, *Preliminary Submission PCI33*, 3.

5. K Duggan, *Preliminary Submission PCI20*, 2.

- 1.14 In the absence of such a consolidating law, the rules that govern access to information are drawn from a variety of different sources, and are not always consistent, clear or easy to locate. While there is some support for commencing the *Court Information Act*,⁶ the issues that have prevented its commencement would need to be addressed. This includes the question of whether personal identification information in court documents should be redacted and if so, who bears the responsibility for this. Given the time since the Act was passed, the broader appropriateness of its provisions should also be reviewed.⁷

The meaning and importance of open justice

- 1.15 Open justice is the principle that “justice should not only be done, but should manifestly and undoubtedly be seen to be done”.⁸ It requires the administration of justice to occur in public.⁹
- 1.16 Broadly, the open justice principle requires that courts are open to members of the public who wish to attend. It also expects that those who attend can publish fair and accurate reports of proceedings.¹⁰ Access to court information is increasingly recognised as an essential element of open justice.¹¹
- 1.17 The significance of open justice is widely recognised. It has been described as a “fundamental rule of the common law”.¹² In international human rights instruments, open justice is regarded as a key aspect of the right to a fair trial.¹³

6. See, eg, J Johnston, P Keyzer, A Wallace and M Pearson, *Preliminary Submission PCI26*, 9; Banki Haddock Fiora, *Preliminary Submission PCI27*, 1–2; NSW Council for Civil Liberties, *Preliminary Submission PCI29*, 4.

7. Australia’s Right to Know Media Coalition, *Preliminary Submission PCI13*, 2; Legal Aid NSW, *Preliminary Submission PCI39*, 5.

8. See *R v Sussex Justices; ex parte McCarthy* [1924] KB 256, 259 (Lord Hewart CJ).

9. See, eg, *Scott v Scott* [1913] AC 417, 435; *Dickason v Dickason* (1913) 17 CLR 50, 51; *Russell v Russell* (1976) 134 CLR 495, 505 (Barwick CJ), 520 (Gibbs J), 532–533 (Stephen J); *Hogan v Hinch* [2011] HCA 4, 243 CLR 506 [20] (French CJ).

10. See, eg, *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47, 55; *Hogan v Hinch* [2011] HCA 4, 243 CLR 506 [22].

11. See, eg, L McNamara and J Quilter, *Preliminary Submission PCI14*, 1; NSW, Attorney General’s Department, *Report on Access to Court Information* (2008) 4; New Zealand Law Commission, *Access to Court Records*, Report 93 (2006) [2.102].

12. *John Fairfax and Sons Pty Ltd v Police Tribunal of NSW* (1986) 5 NSWLR 465, 476.

13. See, eg, *International Covenant on Civil and Political Rights*, 999 UNTS 171 (entered into force 23 March 1976) art 14(1).

- 1.18 Open justice also has constitutional significance. The fact that court proceedings are conducted in public is the “hallmark” that distinguishes judicial power from executive or administrative power.¹⁴
- 1.19 Open justice has several important purposes. It ensures the courts are subject to public scrutiny and kept accountable. It also enables the public to know what happens in courts and the way justice is administered. Open justice, therefore, helps to maintain public confidence in the court system.¹⁵

Elements of open justice

Open courts

- 1.20 The open courts principle is at the core of open justice.¹⁶ In the leading United Kingdom (“UK”) case on open justice, the House of Lords recognised that, as a general rule, justice must be administered in public.¹⁷
- 1.21 The open courts principle is well accepted in Australia. For example, in one case, Justice Gibbs said it is the “ordinary rule” of Australian courts that their proceedings are conducted “publicly and in open view”.¹⁸ Without this publicity, “abuses may flourish undetected”.¹⁹
- 1.22 Historically, it was more common for people to attend and observe court proceedings in person.²⁰ This is rarer in today’s courtrooms. The public now mostly relies on media reports for information about what has taken place in courts.²¹

Fair and accurate reporting of court proceedings

- 1.23 The open justice principle extends to the media being able to publish fair and accurate reports of proceedings.²² Courts have recognised that this is “a corollary of the right of

14. J J Spigelman, “Seen to be Done: The Principle of Open Justice: Part I” (2000) 74 *Australian Law Journal* 290, 293; *Russell v Russell* (1976) 134 CLR 495, 520. See also *John Fairfax Publications Pty Ltd v AG (NSW)* [2000] NSWCA 198 [52]–[54].

15. Supreme Court of Queensland, *Electronic Publication of Court Proceedings*, Report (2016) [24].

16. L McNamara and J Quilter, *Preliminary Submission PCI14*, 1; UTS Faculty of Law, *Preliminary Submission PCI21*, 8.

17. *Scott v Scott* [1913] AC 417, 445.

18. *Russell v Russell* (1976) 134 CLR 495, 520 citing *Scott v Scott* [1913] AC 417, 441.

19. *Russell v Russell* (1976) 134 CLR 495, 520.

20. S Rodrick, “Opportunities and Challenges for Open Justice in Light of the Changing Nature of Judicial Proceedings” (2017) 26 *Journal of Judicial Administration* 76, 78.

21. See, eg, M Kumar, “Keeping Mum: Suppression and Stays in the Rhinehart Family Dispute” (2012) 10 *Macquarie Law Journal* 49, 50.

access to the court by members of the public” and “[n]othing should be done to discourage fair and accurate reporting on proceedings”.²³ In performing the reporting role, media organisations act as surrogates for the public.²⁴

Access to court information

- 1.24 Access to court information is increasingly recognised as an essential aspect of open justice.²⁵ Historically, the evidence and arguments at trial were typically oral in nature, which meant that anyone present could generally understand the nature of proceedings.²⁶
- 1.25 In today’s courtrooms, there is greater reliance on documentary evidence and written submissions.²⁷ This means that, without access to court records, it is sometimes difficult for observers to gain a proper understanding of a case.²⁸
- 1.26 Access to court records is a more contested aspect of open justice.²⁹ There is no common law right to inspect court records.³⁰ Access is largely governed by a complex mixture of legislation, court rules, practice directions and policies.³¹

22. See, eg, *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47, 55; *John Fairfax and Sons Pty Ltd v Police Tribunal of NSW* (1986) 5 NSWLR 465, 481; *Hogan v Hinch* [2011] HCA 4, 243 CLR 506 [22].

23. *John Fairfax Publications v District Court of NSW* [2004] NSWCA 324, 61 NSWLR 344 [20]. See also *John Fairfax and Sons Pty Ltd v Police Tribunal of NSW* (1986) 5 NSWLR 465, 476–477.

24. D Butler and S Rodrick, *Australian Media Law* (Thomson Reuters, 5th ed, 2015) [5.30].

25. See, eg, L McNamara and J Quilter, *Preliminary Submission PCI14*, 1; NSW, Attorney General’s Department, *Report on Access to Court Information* (2008) 4; New Zealand Law Commission, *Access to Court Records*, Report 93 (2006) [2.102].

26. NSW, Attorney General’s Department, *Review of the Policy on Access to Court Information* (2006) 12.

27. S Rodrick, “Open Justice, the Media and Avenues of Access to Documents on the Court Record” (2006) 29 *UNSW Law Journal* 90, 90.

28. See, eg, J Bellis, “Public Access to Court Records in Australia: An International Comparative Perspective and some Proposals for Reform” (2010) 19 *Journal of Judicial Administration* 197, 199–200; NSW, Attorney General’s Department, *Report on Access to Court Information* (2008) 12.

29. E Cunliffe, “Open Justice: Concepts and Judicial Approaches” (2012) 40 *Federal Law Review* 385, 410.

30. See, eg, *John Fairfax Publications Pty Ltd v Ryde Local Court* [2005] NSWCA 101, 62 NSWLR 512.

31. J Bellis, “Public Access to Court Records in Australia: An International Comparative Perspective and some Proposals for Reform” (2010) 19 *Journal of Judicial Administration* 197, 201, 221. See further Chapter 6.

Purposes of open justice

Ensuring the accountability of the courts

- 1.27 The traditional function of the open justice principle is ensuring the accountability and integrity of the courts. Exposing court proceedings to public scrutiny is meant to encourage judges to act fairly and impartially.³²
- 1.28 It also acts as a check on the veracity of witnesses, as it is said that witnesses are more likely to be truthful if they have to testify in public.³³ It has further been suggested that open court proceedings may “induce unknown witnesses to come forward with relevant testimony”.³⁴

Educating the public

- 1.29 Open justice allows the public to be informed about what takes place in the courtroom, and to understand the basis for judges’ decisions.³⁵ It equips the public to discuss and critique the operation of the courts and their decisions.³⁶ This may bring about reforms to the law or legal system.³⁷

Maintaining public confidence in the courts

- 1.30 Australian courts have recognised that open justice is critical to maintaining public confidence in the courts.³⁸ The public can see that the courts administer justice fairly, impartially and according to the law.³⁹
- 1.31 By preserving public confidence in the justice system, the open justice principle also helps to maintain the legitimacy of the courts.⁴⁰ Members of the public will be willing to submit to the courts’ authority, obey their orders, and accept the outcomes, even when

32. See, eg, *Russell v Russell* (1976) 134 CLR 495, 520; *Attorney-General (UK) v Leveiler Magazine Ltd* [1979] AC 440, 450; *Richmond Newspapers Inc v Virginia* (1980) 448 US 555, 592, 596.

33. See, eg, *Witness v Marsden* [2000] NSWCA 52, 49 NSWLR 429 [141].

34. *West Australian Newspapers Ltd v Western Australia* [2010] WASCA 10 [30].

35. NSW, Attorney General’s Department, *Report on Access to Court Information* (2008) 4.

36. S Rodrick, “Open Justice, the Media and Identifying Children Involved in Criminal Proceedings” (2010) 15 *Media and Arts Law Review* 409, 426.

37. S Rodrick, “Open Justice, the Media and Avenues of Access to Documents on the Court Record” (2006) 29 *UNSW Law Journal* 90, 94.

38. See, eg, *Hogan v Hinch* [2011] HCA 4, 243 CLR 506; *Russell v Russell* (1976) 134 CLR 495; *John Fairfax Publications Pty Ltd v District Court of NSW* [2004] NSWCA 324, 61 NSWLR 344 [56].

39. B McLachlin, “Courts, Transparency and Public Confidence: To the Better Administration of Justice” (2003) 8 *Deakin Law Review* 1, 8–9.

40. B McLachlin, “Courts, Transparency and Public Confidence: To the Better Administration of Justice” (2003) 8 *Deakin Law Review* 1, 7.

they are unfavourable, controversial or unpopular.⁴¹ This is critical for preserving the rule of law and stability of society.⁴²

Limits to open justice

- 1.32 While important, the principle of open justice is not, and cannot be, absolute.⁴³ Courts and legislators have recognised that, in some circumstances, the open justice principle must give way to other interests.⁴⁴ These include the right to a fair trial and the need to protect the identities of certain people.
- 1.33 The exceptions to open justice arise from another fundamental principle: the need to administer justice.⁴⁵ The administration of justice is a broad concept. It not only requires that trials are fair, but that the people who can assist in the process are encouraged to do so.⁴⁶

The right to a fair trial

- 1.34 A fair trial involves several elements, including that the jury (where there is one) decides the case solely on the evidence presented and tested in court.⁴⁷ Publicity about court cases may give potential jurors inappropriate prior knowledge or prejudice them in favour of or against a party. In extreme cases, publicity may make it impossible to find an impartial jury.⁴⁸
- 1.35 Courts and legislators have recognised that, in some cases, the open justice principle must give way to these concerns, and publication of information must be limited.

41. S Rodrick, "Achieving the Aims of Open Justice? The Relationship between the Courts, the Media and the Public" (2014) 19 *Deakin Law Review* 123, 126.

42. See, eg, *In Re S (A Child)* [2004] UKHL 47, [2005] 1 AC 593 [30]; *Hogan v Hinch* [2011] HCA 4, 243 CLR 506 [20].

43. A Marusevich, "Suppression Orders: Old but not obsolete" (2019) 251 *Ethos* 22, 22.

44. J Bellis, "Public Access to Court Records in Australia: An International Comparative Perspective and some Proposals for Reform" (2010) 19 *Journal of Judicial Administration* 197, 199.

45. *Scott v Scott* [1913] AC 417, 437.

46. C Davis, "The Injustice of Open Justice" (2001) 8 *James Cook University Law Review* 92, 105; New Zealand Law Commission, *Access to Court Records*, Report 93 (2006) [2.51].

47. *Murphy v R* (1989) 167 CLR 94, 98–99.

48. B McLachlin, "Courts, Transparency and Public Confidence: To the Better Administration of Justice" (2003) 8 *Deakin Law Review* 1, 5.

The need to protect certain people's identities

- 1.36 In general, open justice requires that courts function in public, even where this means a loss of privacy, embarrassment or distress for a party or witness.⁴⁹ This is endured because public trials are considered “the best security for the pure, impartial and efficient administration of justice”.⁵⁰
- 1.37 However, courts and legislators have recognised the need to protect the identities of certain people; for example, children involved in court proceedings and complainants in sexual offence proceedings. The common law permits departures from open justice in certain cases, such as cases involving blackmail, police informants and national security.
- 1.38 These protections and exceptions are not only to protect the privacy of the individuals, but also to encourage complainants and other witnesses to come forward in these types of cases, and assist them to give evidence.⁵¹ It is in the public interest, and in the interests of the administration of justice, for witnesses to give evidence.⁵²

Departing from open justice

- 1.39 There are a number of common law and statutory sources for suppressing or restricting publication of court information and closing court proceedings to the public.

Common law powers to depart from open justice

Courts' inherent powers to regulate proceedings

- 1.40 It has long been accepted at common law that courts can depart from open justice where this is necessary to secure the proper administration of justice.⁵³ This power is part of superior courts' inherent jurisdiction to regulate their proceedings and inferior courts' implied powers.⁵⁴

49. T Bathurst, “Who Judges the Judges, and How Should They be Judged?” (2019 Opening of Law Term Address, 1 January 2019) 6.

50. *Scott v Scott* [1913] AC 417, 463.

51. See, eg, *R v Savvas* (1989) 43 A Crim R 331, 336; *R v CAL* (1993) 67 A Crim R 562, 564.

52. Supreme Court of Queensland, *Electronic Publication of Court Proceedings* (2016) [28].

53. *Hogan v Hinch* [2011] HCA 4, 243 CLR 506 [21].

54. *Hogan v Hinch* [2011] HCA 4, 243 CLR 506 [21]. See also A T Kenyon, “Not Seeing Justice Done: Suppression Orders in Australian Law and Practice” (2006) 27 *Adelaide Law Review* 279, 287.

- 1.41 Superior courts are the Supreme Courts of a state or territory and the High Court of Australia. A superior court’s inherent jurisdiction is “derived, not from any statute or rule of law, but from the very nature of the court as a superior court of law”.⁵⁵
- 1.42 Inferior courts are those whose jurisdiction is conferred solely by statute, such as the District Court of NSW. Inferior courts do not have inherent jurisdiction like superior courts. However, they have implied powers that enable them to do what is necessary to exercise their statutory functions, powers and duties, and control their own processes.⁵⁶ These powers are similar to the inherent powers of a superior court, but more limited.⁵⁷
- 1.43 In exercising its inherent jurisdiction or implied powers, a court may make an order to:
- hold part or all of the proceedings in the absence of the public⁵⁸
 - conceal certain information from those present in court⁵⁹
 - use a pseudonym to conceal a person’s identity⁶⁰
 - prohibit publication of reports of proceedings or certain information,⁶¹ and
 - take down particular evidence or information from the internet (known as a “take down order”).⁶²
- 1.44 The test to depart from the open justice principle is based on necessity; that is, whether it is “really necessary to secure the proper administration of justice”.⁶³ Cases in which it may be necessary to depart from open justice include those involving care of children or people with mental illnesses, trade secrets, police informants or undercover police officers, blackmail and national security.⁶⁴

55. I H Jacob, “The Inherent Jurisdiction of the Court” (1970) 23 *Current Legal Problems* 23, 27.

56. See, eg, *John Fairfax and Sons Pty Ltd v Police Tribunal of NSW* (1986) 5 NSWLR 465; *Grassby v R* (1989) 168 CLR 1, 16.

57. *Grassby v R* (1989) 168 CLR 1, 16–17. See also W Lacey, “Inherent Jurisdiction, Judicial Power, and Implied Guarantees under Chapter III of the Constitution” (2003) 31 *Federal Law Review* 57, 67–70.

58. See, eg, *John Fairfax Group Pty Ltd v Local Court of NSW* (1992) 26 NSWLR 131, 160; *Hogan v Hinch* [2011] HCA 4, 243 CLR 506 [21], [46].

59. See, eg, *R v Socialist Worker Printers and Publishers Ltd; Ex parte Attorney-General* [1975] 1 QB 637; *R v Tait* (1979) 46 FLR 386.

60. See, eg, *Witness v Marsden* [2000] NSWCA 52, 49 NSWLR 429 [125].

61. See, eg, *John Fairfax and Sons Pty Ltd v Police Tribunal of NSW* (1986) 5 NSWLR 465.

62. See, eg, *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125, 83 NSWLR 52 [61].

63. *John Fairfax and Sons Pty Ltd v Police Tribunal of NSW* (1986) 5 NSWLR 465, 477.

64. See, eg, *Hogan v Hinch* [2011] HCA 4, 243 CLR 506 [21].

- 1.45 Orders made in exercise of the courts' inherent or implied powers are more limited than statutory suppression and non-publication orders. For example, they cannot bind people who are not parties to or witnesses in the proceedings, or otherwise present in the courtroom.⁶⁵

Courts' powers to deal with contempt

- 1.46 The inherent jurisdiction of a superior court includes the power to deal with contempt.⁶⁶ The law of contempt deals with publications and other conduct that could prejudice the administration of justice. Two forms of contempt relevant to restrictions on publication or disclosure are contempt by breaching court orders and contempt by publication, or *sub judice* contempt. We discuss these two forms in Chapter 5.⁶⁷
- 1.47 Superior courts can issue an injunction to prevent a threatened contempt by publication from occurring.⁶⁸ This is rare, as courts tend to rely on statutory suppression or non-publication orders to prevent prejudicial material from being published.
- 1.48 Superior courts also have the power to punish a person for contempt. A person may be fined, imprisoned, or both. However, prosecutions for contempt by publication are relatively rare.⁶⁹
- 1.49 Where a court makes a suppression or non-publication order using their inherent or implied powers, rather than statutory powers, contempt is the only mechanism for enforcing the order. However, breaching a statutory suppression or non-publication order may constitute contempt of court as well as being an offence under the relevant statute.⁷⁰

Statutory sources for departing from open justice

- 1.50 In NSW, there are many statutory sources for suppressing or restricting publication of reports of proceedings and closing courts to the public. These sources generally take one of two forms. They are either:
- automatic; in that they require courts to be closed in certain circumstances or automatically prevent the publication or disclosure of certain information, or

65. *John Fairfax and Sons Pty Ltd v Police Tribunal of NSW* (1986) 5 NSWLR 465, 477.

66. See, eg, *R v Metal Trades Employers' Association* (1951) 82 CLR 208, 241–243.

67. See [5.28]–[5.38].

68. This power is not available to inferior courts, unless it is expressly conferred by statute: see *United Telecasters Sydney Ltd v Hardy* (1991) 23 NSWLR 323, 332.

69. J Bosland, "Restraining 'Extraneous' Prejudicial Publicity: Victoria and New South Wales Compared" (2018) 41 *UNSW Law Journal* 1263, 1266.

70. New Zealand Law Commission, *Reforming the Law of Contempt of Court: A Modern Statute*, Report 140 (2017) [5.40]–[5.41].

- discretionary; in which case, legislation sets out the circumstances in which the court can consider making an order to close the court or prohibit publication or disclosure of information.⁷¹

1.51 We discuss these statutory sources for closing court proceedings, and suppressing or restricting publication of information, in Chapters 2, 3 and 4.

The history of open justice in NSW

A fundamental principle of NSW law

1.52 The open justice principle underpins the open court principle and the information access schemes that exist in NSW courts and tribunals. To maintain an appropriate balance with competing principles, NSW law has always specified limited circumstances in which the open justice principle can be overridden. This includes restricting access to court information and empowering courts to make suppression and non-publication orders.

1.53 For a long time, these restrictions and powers were contained in multiple statutes, regulations and court rules, creating confusion and inconsistency in application. A shift occurred when the *Civil Procedure Act 2005* (NSW) was enacted. It permitted a court to prohibit the publication or disclosure of information that revealed the identity of a party or witness if it was “necessary to do so to secure the proper administration of justice in the proceedings”.⁷² This applied to all civil proceedings.

1.54 However, the introduction of twin statutes, the *CSNPO Act* and the *Court Information Act*, was the first significant attempt at consolidating the law. These Acts were the culmination of the review and consultation processes outlined below.⁷³

A period of review: 2003–2010

1.55 In 2003, the NSW Law Reform Commission published its *Review of the Law of Contempt by Publication*.⁷⁴ While the Report’s focus was the law of contempt by publication, it also made a number of recommendations about access to court information and powers to suppress information.

1.56 The Report recommended a right of public access to, and publication of, a wide range of court documents. This right would only be overridden if a grant of access would be

71. D Butler and S Rodrick, *Australian Media Law* (Thomson Reuters, 5th ed, 2015) [5.380].

72. *Civil Procedure Act 2005* (NSW) s 72, as enacted; repealed by the *Court Suppression and Non-publication Orders Act 2010* (NSW) sch 2 item 2.1.

73. NSW, *Parliamentary Debates*, Legislative Council, Second Reading Speech, 18 May 2010, 22800.

74. NSW Law Reform Commission, *Contempt by Publication*, Report 100 (2003).

contrary to the due administration of justice. Access would be subject to any conditions the court imposed.⁷⁵

1.57 The Report also recommended substantial reforms to the procedures for suppressing material relating to court proceedings.⁷⁶ It recommended provisions to give:

- any court the power to suppress the publication of reports of civil or criminal court proceedings where this is necessary for the administration of justice
- any person with sufficient interest in the matter a right to apply to the court for the making, variation or revocation of a suppression order, as well as appeal rights in relation to the order, and
- the court the power to make interim suppression orders.⁷⁷

1.58 In 2004, the Supreme Court conducted community consultation on the topic of access to court records. This consultation raised issues about the existing framework for access to court information including:

- the extent to which privacy principles are relevant when dealing with court records
- differing approaches by individual courts
- the extent to which exhibits should be available, and
- processes to review decisions about granting access to third parties.⁷⁸

1.59 From 2006 to 2008 the NSW Attorney General's Department conducted an extensive review about access to court information. The resulting report recommended:

- consolidating the framework for access to information in criminal and civil proceedings
- making certain court information available to the general public as of right
- allowing the media access to a broader category of information than the general public
- consolidating the existing legislative provisions relating to the non-publication and suppression of information

75. NSW Law Reform Commission, *Contempt by Publication*, Report 100 (2003) rec 23–25.

76. NSW Law Reform Commission, *Contempt by Publication*, Report 100 (2003) [10.1].

77. NSW Law Reform Commission, *Contempt by Publication*, Report 100 (2003) rec 22.

78. NSW, Attorney General's Department, *Review of the Policy on Access to Court Information* (2006) 4.

- drawing a clear distinction between the effect of a suppression order and a non-publication order, and
- applying the test for imposing suppression and non-publication orders consistently.⁷⁹

1.60 In 2008, the Standing Committee of Attorneys-General commenced a review of the use of suppression and non-publication orders within Australia. The review found that there was significant variation in the laws across different states and territories. It identified many areas where harmonisation could, and should, be achieved. To further this, the Standing Committee released a Model Law in 2010.⁸⁰

1.61 The Model Law set out a new, consolidated scheme for making, reviewing and enforcing suppression and non-publication orders. The NSW government consulted on the Model Law in 2010 and found considerable support for it among legal stakeholders.

The Court Information Act

1.62 The *Court Information Act* was passed by Parliament on 26 May 2010. It was intended as a statutory framework for accessing documents and other information held by NSW courts in connection with criminal and civil proceedings.⁸¹

1.63 The plan was for the Act to work in concert with the *CSNPO Act*. Together, the statutes would consolidate the law relating to the access to, and publication of, court information. However, the *Court Information Act* has never come into force. Access to court information continues to be regulated by a mix of legislation, court rules, practice notes and policies. We discuss the current access regimes in Chapter 6.

The Court Suppression and Non-publication Orders Act

1.64 The *CSNPO Act* came into force on 1 July 2011. With the exception of a few provisions, it was identical to the Model Law of the Standing Committee of Attorneys-General.

1.65 In introducing the Bill to NSW Parliament, the Parliamentary Secretary for Justice said:

The ... Government is committed to the principles of open justice and to improving the ability of the public to access appropriate court information, in order to better understand what takes place in New South Wales courtrooms.

79. NSW, Attorney General's Department, *Report on Access to Court Information* (2008) rec 6.

80. Australia, Standing Committee of Attorneys-General, *Court Suppression and Non-publication Orders Bill 2010*, Draft Model Bill (2010).

81. NSW, *Parliamentary Debates*, Legislative Council, Second Reading Speech, 18 May 2010, 22800.

The Court Suppression and Non-publication Orders Bill 2010 is another reflection of that commitment.⁸²

- 1.66 The *CSNPO Act* is now the principal legislation concerning suppression and non-publication orders in NSW. We discuss it further in Chapter 4.

Our process

- 1.67 To help us identify issues relevant to the review, we invited submissions on our terms of reference. We received 44 such submissions. With the exception of a few confidential submissions, we have published these on our website: www.lawreform.justice.nsw.gov.au. They are listed in Appendix A.
- 1.68 We also undertook a number of consultations to help us understand the current landscape. These are listed in Appendix B.
- 1.69 This Consultation Paper invites your comments on the issues we have identified. It is informed by the submissions, the consultations and research. We have considered comparable laws in other jurisdictions, academic commentary and the recent findings of reviews similar to this one; for example, the UK Home Office inquiry into the impact of social media on the administration of justice⁸³ and the Victorian Law Reform Commission's review of contempt.⁸⁴
- 1.70 Once we have considered submissions to this Paper, we will meet with people and organisations with experience and expertise in the relevant issues. We will also post online surveys that you can complete instead of making a formal submission. Our final report will be informed by these meetings, the submissions and survey responses we receive, and our further research.
- 1.71 We may adapt our approach in response to the information we receive.
- 1.72 All public documents produced as part of our review will be on our website. Follow us on Facebook (www.facebook.com/NSWLawReform) and Twitter (@NSWLawReform) for further information and updates.

82. NSW, *Parliamentary Debates*, Legislative Assembly, Agreement in Principle Speech, 29 October 2010, 27195.

83. UK, Attorney General's Office, *Response to Call for Evidence on the Impact of Social Media on the Administration of Justice* (2019).

84. Victorian Law Reform Commission, *Contempt of Court*, Report (2020).

Key terms in this paper

1.73 Below are some of the key terms we use in this Paper:

- **Automatic statutory prohibition:** In the context of this review, this means laws that automatically prohibit the publication or disclosure of certain information without a court needing to exercise its discretion to make an order.
- **Court information:** In this review, we use this shorthand term to describe information held by courts and tribunals. It may include hard copy and digital information, and the contents of a court’s electronic database, as well as physical court files. Documents such as judgments, transcripts, fact sheets, pleadings, affidavits and witness statements are all information that may be held by the court, as are items such as closed-circuit television footage and exhibits.
- **Discretionary power:** When the law gives the court the power to decide whether or not to make an order (and, in some cases, what the order should contain and how and when it should apply).
- **Non-publication order:** Under the *CSNPO Act*, a non-publication order is “an order that prohibits or restricts the publication of information (but that does not otherwise prohibit or restrict the disclosure of information)”.⁸⁵ The definition is different under some other statutes.
- **Suppression order:** Under the *CSNPO Act*, a suppression order is “an order that prohibits or restricts the disclosure of information (by publication or otherwise)”.⁸⁶ The definition is different under some other statutes.

Reference to “court” generally, includes tribunal

1.74 We have been asked to consider open justice in the context of tribunals as well as courts. For the sake of brevity, when we refer to “court”, “courts” or “court information” generally, we are referring to tribunals and tribunal information as well. When we are referencing a specific court or tribunal, or tribunals as distinct from courts and vice versa, we make this clear.

Chapter outline

1.75 In **Chapter 2 – The open court principle and its exceptions**, we discuss the open court principle, under which the public (including the media) are entitled to attend and

85. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 3 definition of “non-publication order”.

86. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 3 definition of “suppression order”.

observe proceedings. Both common law and legislation recognise certain exceptions to the principle. We look at the different exceptions and consider when court proceedings should be held in private.

- 1.76 In **Chapter 3 – Non-disclosure and suppression: statutory prohibitions**, we consider the NSW statutes that automatically prohibit publication or disclosure of certain information. There are strong public policy reasons behind many of the prohibitions, including the need to protect vulnerable people from the harmful effects of publicity. The scope of the prohibitions varies widely and different exceptions apply. We look at the various prohibitions and consider opportunities to consolidate them.
- 1.77 In **Chapter 4 – Non-disclosure and suppression: discretionary orders**, we consider the NSW laws that empower courts to make orders restricting the publication, disclosure and broadcast of information. The *CSNPO Act*, which establishes a consolidated regime for suppression orders and non-publication orders, is the most notable. We look at how different laws compare and how they might be improved. We also discuss how they interact and consider whether the powers they contain should be further consolidated or standardised.
- 1.78 In **Chapter 5 – Monitoring and enforcing restrictions on publication and disclosure**, we consider the ways in which prohibitions on publishing or disclosing information are monitored and enforced. We review statutory offences and consider the differences between them. We also discuss the law of contempt. Finally, we consider some of the contemporary challenges in enforcing breaches of these restrictions.
- 1.79 In **Chapter 6 – Access to information**, we consider the importance of access to court information as an essential aspect of open justice. The regimes in NSW governing access are complex, inconsistent and not always easy to locate. There may be some opportunities to improve access to information in NSW, such as consolidating regimes or improving their features.
- 1.80 In **Chapter 7 – Protections for children and young people**, we consider exceptions to open justice in proceedings involving children and young people, including restrictions on the publication or disclosure of information and closed court orders. These protections exist across a range of different types of proceedings, including criminal, domestic violence, care and protection, adoption and parentage proceedings. We also consider whether further protections for children and young people are needed, for example, in civil proceedings.
- 1.81 In **Chapter 8 – Victims and witnesses: privacy protections and access to information**, we consider the NSW provisions that protect the privacy of victims and witnesses and assist them to give evidence. We also consider victims' special rights to access information about court proceedings. We seek your views about whether these laws are appropriate and adequate.

- 1.82 In **Chapter 9 – Protections for sexual offence complaints**, we consider certain protections that are designed to assist complainants in sexual offence proceedings. We discuss the prohibition against publishing complainants’ identities and provisions allowing or requiring the court to be closed at certain times during sexual offence proceedings.
- 1.83 In **Chapter 10 – Media access to information**, we explain the media’s important role in facilitating open justice by informing the public about court proceedings. The law recognises this by giving the media a special right to access documents in criminal proceedings, allowing the media to attend court proceedings that are otherwise closed to the public, and giving the media standing to oppose suppression and non-publication orders. At a time when the media landscape is changing, it is timely to consider who should have special access, and whether the current arrangements are appropriate.
- 1.84 In **Chapter 11 – Researcher access to information**, we explain how there is no single entry point for researchers to access court information in NSW. Generally, researchers must rely on public access schemes to obtain court information for research purposes, which can be expensive, time-consuming and uncertain. We consider how courts facilitate academic research and potential improvements to researcher access to court information.
- 1.85 In **Chapter 12 – Digital technology and open justice**, we explore the impact of digital innovation on open justice. We consider the challenges it brings to the task of identifying and enforcing compliance with prohibitions on publication and broadcast of court information. We also discuss its impact on accessing court information and proceedings.
- 1.86 In **Chapter 13 – Other proposals for change**, we consider suggestions for some alternative ways of ensuring adherence to the open justice principle and compliance with prohibitions on the publication and disclosure of court information. We consider the possible benefits of a register for suppression and non-publication orders, establishing an open justice advocate, and various education initiatives. We also discuss possible ways of keeping prejudicial information from jurors without resorting to non-publication and suppression orders.

Question 1.1: We welcome your ideas and comments

This consultation paper contains a number of questions through which we seek your views about the issues raised. Once you have read this paper, you may have ideas for addressing issues about access to, and disclosure and publication of, court information that do not fit this paper’s structure or the questions we ask. We welcome any other ideas or comments that you may wish to make.

2. The open court principle and its exceptions

In Brief

Under the open court principle, the public (including the media) is entitled to attend and observe proceedings. Both the common law and legislation recognise certain exceptions to the principle. We look at the different exceptions and consider when court proceedings should be held in private.

- What is the open court principle? 20**
 - Rationale for the open court principle 20
 - Ways in which legislation gives effect to the open court principle 21
- When should proceedings be held in private? 22**
 - Common law exceptions to the open court principle 22
 - Statutory requirements to hold proceedings in private 23
 - Types of proceedings that must be held in private 24
 - Exceptions to the requirement to hold proceedings in private 25
 - Discretionary powers to exclude people from proceedings 27
 - When discretionary exclusion orders can be made 27
 - Grounds for making exclusion orders 29
 - Procedures for making exclusion orders 31
 - Consequences for breaching exclusion orders 32

- 2.1 The principle that courts are open to the public is at the core of open justice.¹ It ensures that justice is seen to be done. However, the common law recognises that proceedings can be heard “in camera” (that is, in the absence of the public) in certain circumstances. A range of statutes also recognise certain situations in which court proceedings must be, or can be, held in private.
- 2.2 This Chapter examines how the open court principle is applied and the exceptions to it. It asks what circumstances will justify closing a court.

1. See [1.20].

What is the open court principle?

2.3 The open court principle is the principle that “judicial proceedings must be conducted in an open court to which the public and the press have access”.² It is well accepted in the Australian justice system.

2.4 For example, in the NSW Court of Appeal, Justice McHugh said:

The fundamental rule of the common law is that the administration of justice must take place in open court. A court can only depart from this rule where its observance would frustrate the administration of justice or some other public interest for whose protection Parliament has modified the open justice rule.³

2.5 In the High Court of Australia, the notion that Australian courts conduct their proceedings openly and not in secret was described as “an essential aspect of their character”.⁴

Rationale for the open court principle

2.6 Holding court proceedings in public makes public scrutiny possible and helps ensure that courts are accountable. The public can see whether courts administer justice fairly, impartially and according to the law.⁵ Judges are also encouraged to act fairly and impartially.⁶ If proceedings are not open to the public, it is said that “abuses may flourish undetected”.⁷

2.7 When the public sees the proper administration of justice, this can help “to maintain confidence in the integrity and independence of the courts”.⁸ Public scrutiny can also ensure that problems in the administration of justice are detected and remedied.

2.8 Opening court proceedings to the public also serves an educative function. It allows the public to learn about the court’s processes and how the law is interpreted and applied.⁹

2. J J Spigelman, “The Principle of Open Justice: A Comparative Perspective” (2006) 29 *UNSW Law Journal* 147, 151.

3. *John Fairfax and Sons Pty Ltd v Police Tribunal of NSW* (1986) 5 NSWLR 465, 476.

4. *Russell v Russell* (1976) 134 CLR 495, 520.

5. B McLachlin, “Courts, Transparency and Public Confidence: To the Better Administration of Justice” (2003) 8 *Deakin Law Review* 1, 8–9.

6. See, eg, *AG (UK) v Levenson Magazine Ltd* [1979] AC 440, 450; *Richmond Newspapers Inc v Virginia* (1980) 448 US 555, 592, 596.

7. *Russell v Russell* (1976) 134 CLR 495, 520.

8. *Russell v Russell* (1976) 134 CLR 495, 520.

9. J Bosland and J Gill, “The Principle of Open Justice and the Judicial Duty to Give Public Reasons” (2014) 38 *Melbourne University Law Review* 482, 490.

Ways in which legislation gives effect to the open court principle

- 2.9 Some NSW statutes expressly enact the open court principle. For example, the *Court Security Act 2005* (NSW) (“*Court Security Act*”), which applies to multiple courts and tribunals,¹⁰ provides that a person has a right to enter and remain in parts of court premises that are open to the public. They may do so if they comply with:
- all relevant orders made by a judicial officer, and
 - all directions or requirements made by a security officer.¹¹
- 2.10 This right under the *Court Security Act* is subject to any inherent or implied jurisdiction of a court to regulate its proceedings, and any other Act or law about who may be present in or around a court.¹²
- 2.11 Some other statutes specifically recognise that certain proceedings should be held in public or in open court.¹³ These include committal and summary proceedings,¹⁴ proceedings before the Land and Environment Court, Dust Diseases Tribunal, Mental Health Review Tribunal (“MHRT”) and NSW Civil and Administrative Tribunal,¹⁵ applications for apprehended violence orders (unless the defendant is under 18),¹⁶ and ballots for the jury in a criminal or civil trial.¹⁷ Exceptions apply in certain circumstances, allowing some of these proceedings to be held in private.
- 2.12 Some statutes expressly recognise the right of the media to enter and remain in court, subject to any other laws, directions or orders. For example, the media is entitled to attend a Children’s Court hearing concerning a child or young person.¹⁸ This is despite

10. This Act applies to the Supreme Court, District Court, Local Court, Industrial Relations Commission, Land and Environment Court, Drug Court, Children’s Court, NSW Civil and Administrative Tribunal, Dust Diseases Tribunal, State Parole Authority, a person exercising or performing the functions of a coroner, and any other prescribed tribunal, body or person: *Court Security Act 2005* (NSW) s 4(1) definition of “court”.

11. *Court Security Act 2005* (NSW) s 6(1).

12. *Court Security Act 2005* (NSW) s 6(3).

13. See, eg, *Local Court Act 2007* (NSW) s 54; *Racing Appeals Tribunal Act 1983* (NSW) s 16(2); *Constitution Further Amendment (Referendum) Act 1930* (NSW) s 30; *Electoral Act 2017* (NSW) s 226.

14. *Criminal Procedure Act 1986* (NSW) s 57(1), s 191(1).

15. *Land and Environment Court Act 1979* (NSW) s 62; *Dust Disease Tribunal Act 1989* (NSW) s 13(1); *Mental Health Act 2007* (NSW) s 151(3); *Civil and Administrative Tribunal Act 2013* (NSW) s 49(1).

16. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 58(1).

17. *Jury Act 1977* (NSW) s 48(1), s 49(1).

18. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 104C; *Children (Criminal Proceedings) Act 1987* (NSW) s 10.

the fact that members of the general public are not allowed to attend such hearings. We discuss media access to closed proceedings in Chapter 10.¹⁹

When should proceedings be held in private?

- 2.13 Closing a court has been described as “one of the most severe encroachments on the open justice principle”. It necessarily “involve[s] a prohibition on the attendance of the public, or at least certain members of the public, against the general rule that justice must be administered in open court”.²⁰
- 2.14 Instead of closing to the public, courts will sometimes use other methods to secure confidentiality or protect the privacy of people involved in proceedings. Common methods are making a suppression or non-publication order (see Chapter 4), and relying on statutory provisions that automatically prohibit the publication or disclosure of certain information (see Chapter 3). However, such methods may not always be sufficient.
- 2.15 The International Covenant on Civil and Political Rights recognises that the media and public can be excluded from all or part of a trial for the following reasons:
- morals, public order, or national security
 - the interest of the private lives of the parties, or
 - where publicity would prejudice the interests of justice.²¹
- 2.16 In NSW, both common law and legislation identify the circumstances in which proceedings may, or must, be closed to the public or certain people. We outline these exceptions to the open court principle and seek your views on them.

Common law exceptions to the open court principle

- 2.17 The power to hold closed proceedings is part of a superior court’s inherent jurisdiction and an inferior court’s implied powers.²² At common law, a court can only be closed to

19. See [10.73]–[10.83].

20. Judicial College of Victoria, *Open Courts Bench Book*, “5.4 Closed Court Orders” [6] (last updated 14 February 2020) <www.judicialcollege.vic.edu.au/eManuals/OCBB/67747.htm> (retrieved 9 October 2020).

21. *International Covenant on Civil and Political Rights*, 999 UNTS 171 (entered into force 23 March 1976) art 14(1).

22. See [1.40], [1.43].

the public where this is necessary in the interests of the administration of justice, either in proceedings before the court or as an ongoing process.²³

- 2.18 The categories of cases where the common law accepts that departing from the open court principle is “necessary” are “few and strictly defined”.²⁴ One is where there is a need to maintain order in the court by restricting public attendance. It has been argued that controlling crowding in a courtroom is necessary so that people who are essential to the proceedings can attend.²⁵
- 2.19 Another category is where a public hearing could reveal trade secrets, secret processes or documents, or other confidential information.²⁶ Having to reveal such information might deter some people from seeking to enforce their legal rights, or might unfairly force some people to disclose confidential information to avoid legal liability. In these situations, “it may be that justice could not be done at all if it had to be done in public”.²⁷
- 2.20 A further category is where the case involves a ward of the state or a person with mental health issues. In these cases, a court’s primary function is to guard and protect the person’s interest. To achieve this, it may be necessary for the court to exclude the public.²⁸
- 2.21 Other categories of cases that may be closed to the public include those concerning national security.²⁹
- 2.22 While courts are reluctant to expand on these common law categories, legislation in NSW greatly increases the range of circumstances in which proceedings may, or must, be held in private.

Statutory requirements to hold proceedings in private

- 2.23 In NSW, some laws require certain types of proceedings to be closed to the public or only open to certain people. The closure can be absolute or subject to exceptions. The starting point, however, is exclusion.

23. See, eg, *Scott v Scott* [1913] AC 417.

24. *John Fairfax Publications Pty Ltd v District Court of NSW* [2004] NSWCA 324, 61 NSWLR 344 [19]; *AG (NSW) v Nationwide News Pty Ltd* [2007] NSWCCA 307, 73 NSWLR 635 [29].

25. See, eg, *Ex parte Tubman; Re Lucas* (1970) 92 WN (NSW) 520, 543–544; *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47, 54.

26. See, eg, *Scott v Scott* [1913] AC 417, 437, 445, 450, 483.

27. D A Butler and others, *Australian Media Law* (Thomson Reuters, 5th ed, 2015) [5.60].

28. See, eg, *Scott v Scott* [1913] AC 417, 437, 441–442, 445, 462, 482–483; *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47, 54.

29. See, eg, *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47, 54; *Hogan v Hinch* [2011] HCA 4, 243 CLR 506 [21].

2.24 This is different to other laws that confer discretionary powers to exclude the public or certain people from proceedings in some circumstances. The starting point, in these cases, is an open court. We discuss these discretionary powers later in the Chapter.³⁰

Types of proceedings that must be held in private

2.25 Certain proceedings involving children or young people must be closed to the public or certain people. These include:

- criminal proceedings to which a child is a party³¹
- non-criminal proceedings in the Children’s Court relating to a child or young person,³² and
- proceedings relating to an apprehended violence order.³³

2.26 The purpose of closing the court in such cases is protective and to avoid stigmatisation.³⁴ We discuss protections for children and young people further in Chapter 7.

2.27 Some proceedings concerning particularly sensitive matters must be held in private. For example, proceedings for certain sexual offences are to be held in private when the complainant gives evidence “unless the court otherwise directs”.³⁵ This is meant to:

- protect complainants from stress, embarrassment and humiliation
- encourage them to give accurate, reliable, coherent and complete evidence, and
- protect their privacy.³⁶

2.28 We discuss protections for sexual offence complainants further in Chapter 9.

2.29 Proceedings under the *Public Health Act 2010* (NSW) for offences involving the non-disclosure and transmission of sexually transmitted infections must occur in the

30. See [2.42]–[2.66].

31. *Children (Criminal Proceedings) Act 1987* (NSW) s 10(1)(a).

32. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 104B.

33. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 41, s 41AA, s 58(1)(a).

34. Tasmania Law Reform Institute, *Protecting the Anonymity of Victims of Sexual Crimes*, Final Report 19 (2013) [2.3.4].

35. *Criminal Procedure Act 1986* (NSW) s 291(1).

36. *R v Cannon* [2020] NSWDC 327 [26], [28].

absence of the public.³⁷ It is suggested that such a provision indicates that maintaining a person's privacy is in the best interests of public health.³⁸

2.30 Some proceedings that concern secret or confidential information must be held in private.³⁹ These include:

- proceedings in which the identity of a law enforcement officer or other person involved in an authorised operation, or who otherwise has an assumed identity, may be disclosed⁴⁰
- proceedings concerning warrants for surveillance devices,⁴¹ and
- applications and other matters dealing with covert search warrants in relation to terrorist acts.⁴²

2.31 Other types of proceedings that must be held in private include:

- proceedings in the Court of Appeal concerning a question of law arising out of criminal contempt proceedings in which the accused person was acquitted (and where the finding of the Court of Appeal cannot affect the acquittal),⁴³ and
- proceedings in the Court of Criminal Appeal concerning a question of law arising out of certain trials in which the accused person was acquitted (and where the finding of the Court of Criminal Appeal cannot affect the acquittal).⁴⁴

Exceptions to the requirement to hold proceedings in private

2.32 Several statutes that require certain proceedings to be held in private do not contain any exceptions.⁴⁵ In other words, these proceedings must always be held in private, regardless of the circumstances.

37. *Public Health Act 2010* (NSW) s 78–80.

38. National Association of People with HIV Australia and HIV AIDS Legal Centre, *Preliminary Submission PCI28*, 5.

39. See, eg, *Law Enforcement and National Security (Assumed Identities) Act 2010* (NSW) s 11(3), s 14(3); *Terrorism (Police Powers) Act 2002* (NSW) s 26P(2).

40. *Law Enforcement (Controlled Operations) Act 1997* (NSW) s 28(1)(a); *Law Enforcement and National Security (Assumed Identities) Act 2010* (NSW) s 34(1)(a).

41. *Surveillance Devices Act 2007* (NSW) s 17(6), s 25(6), s 33(5).

42. *Terrorism (Police Powers) Act 2002* (NSW) s 27Y.

43. *Supreme Court Act 1970* (NSW) s 101A(7).

44. *Crimes (Appeal and Review) Act 2001* (NSW) s 108(5).

45. See, eg, *Public Health Act 2010* (NSW) s 80; *Status of Children Act 1996* (NSW) s 24(1); *Surveillance Devices Act 2007* (NSW) s 17(6), s 25(6), s 33(5); *Terrorism (Police Powers) Act 2002* (NSW) s 26P(2), s 27Y.

- 2.33 One question is whether there should be standard exceptions attached to more, or even all, provisions that require proceedings to be held in private. This could ensure that proceedings are open where the circumstances are judged to be appropriate.
- 2.34 If standard exceptions are considered appropriate, the next issue to consider is what they should be.
- 2.35 One option is to allow courts, in all cases, to make discretionary orders allowing the proceedings to be open to the public or certain people. Several statutes in NSW already provide that proceedings must be held in private unless the court “orders” or “directs” otherwise.⁴⁶
- 2.36 Some statutes go further by specifying the grounds on which such a discretionary order can be made. In some cases, the grounds are broadly expressed and permit a court to make an order to open the proceedings to the public or certain people where it considers that this is appropriate,⁴⁷ or the interests of justice require it.⁴⁸
- 2.37 In other cases, there are more specific grounds for making orders. For example, some statutes provide that a court can only make an order to open proceedings:
- at the request of a party, and
 - if satisfied that “special reasons in the interests of justice” require the proceedings to be open, or the complainant or victim in the proceedings consents to this.⁴⁹
- 2.38 There are, therefore, a variety of options for guiding a court’s approach to making a discretionary order to open proceedings. The grounds could be broadly expressed and consistent across multiple statutory provisions, or they could be individually tailored to take account of contextual factors such as the nature of the proceedings to which the provision relates.
- 2.39 Another option is to include category-based exceptions to the statutory requirements to close certain proceedings. That is, the legislation could permit certain categories of people to be present in proceedings that are closed to the public generally.

46. See, eg, *Children and Young Persons (Care and Protection Act) 1998* (NSW) s 104B; *Children (Criminal Proceedings) Act 1987* (NSW) s 10(1)–(2); *Criminal Procedure Act 1986* (NSW) s 291(1); *Supreme Court Act 1970* (NSW) s 101A(7); *Surrogacy Act 2010* (NSW) s 47.

47. See, eg, *Adoption Act 2000* (NSW) s 119; *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 58.

48. See, eg, *Law Enforcement (Controlled Operations) Act 1997* (NSW) s 28(1)(a); *Law Enforcement and National Security (Assumed Identities) Act 2010* (NSW) s 34(1)(a); *Witness Protection Act 1995* (NSW) s 26(1)–(2).

49. *Criminal Procedure Act 1986* (NSW) s 291(3); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30(1).

- 2.40 Some statutes in NSW already contain category-based exceptions. For example, legislation that requires Court of Appeal proceedings dealing with a question of law, arising out of a criminal contempt case where the accused person was acquitted, allows “an Australian legal practitioner” to be present “for the purpose of reporting the case for any lawful purpose of the Council of Law Reporting for New South Wales”.⁵⁰
- 2.41 In the case of criminal proceedings against children, and non-criminal Children’s Court proceedings, a person who is “directly interested in the proceedings” is not to be excluded, unless the court orders otherwise.⁵¹ In the case of criminal proceedings against a child:
- a person engaged in “preparing a report of the proceedings for dissemination through a public news medium” is entitled to attend, unless the court orders otherwise, and
 - a person who is a “family victim” (that is, an immediately family member of a deceased victim of the offence) is also entitled to attend.⁵²

Question 2.1: Statutory requirements to hold proceedings in private

- (1) Are the current laws that require certain proceedings to be closed to the public appropriate? Why or why not?
- (2) What changes, if any, should be made to these laws?
- (3) Are the current statutory exceptions to the requirement to hold proceedings in private appropriate? Why or why not?
- (4) Should there be standard exceptions that apply in all (or most) circumstances? If so, what should they be, and in what circumstances should they apply?

Discretionary powers to exclude people from proceedings

- 2.42 Several statutes in NSW have open courts as a starting point but confer discretionary powers to exclude the public or certain people from proceedings. The provisions in these statutes vary as to the circumstances in which a court can make such orders, the grounds for making those orders, the procedures to be followed and the consequences for breaching them.

When discretionary exclusion orders can be made

- 2.43 There are various circumstances in which a discretionary order can be made to exclude the public or certain people from proceedings. Some provisions align with the common law exceptions to the open court principle, which we outline above.⁵³

50. *Supreme Court Act 1970* (NSW) s 101A(7).

51. *Children (Criminal Proceedings) Act 1987* (NSW) s 10(1)(a); *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 104B.

52. *Children (Criminal Proceedings) Act 1987* (NSW) s 10(1)(b)–(c).

- 2.44 For example, a judicial officer may order members of the public to leave, or not be admitted to, all or part of a court’s premises, if this is necessary for securing order and safety. An order is effective for up to 28 days and can be renewed.⁵⁴ This aligns with the common law exception to the open court principle, which permits courts to exclude people to ensure order in the courtroom.⁵⁵
- 2.45 The MHRT may conduct proceedings wholly or partly in private if satisfied it is desirable to do so for the welfare of the person to whom the proceedings relate.⁵⁶ This may involve asking participants in the room to leave while the MHRT hears evidence on a particular topic.⁵⁷
- 2.46 The statutory power to hold MHRT proceedings in private aligns broadly with the common law exception to the open court principle, which permits proceedings relating to people with mental health issues to be conducted in private.⁵⁸ The MHRT may exercise this power for a range of reasons, including to enable discussion of highly sensitive and personal information.⁵⁹
- 2.47 The *Civil Procedure Act 2005* (NSW) sets out a variety of circumstances in which proceedings may be conducted in the absence of the public. Some of them align with the common law exceptions to the open court principle, while others go beyond them. The circumstances that align with the common law include where:
- the presence of the public would “defeat the ends of justice”
 - the business concerns the guardianship, custody or maintenance of a child, and
 - the court thinks this is fitting in proceedings in the Equity Division of the Supreme Court (most likely in the Supreme Court protective jurisdiction).⁶⁰
- 2.48 The other circumstances include where:
- the proceeding is an interlocutory application (unless a witness is giving evidence)

53. See [2.17]–[2.21].

54. *Court Security Act 2005* (NSW) s 7.

55. See [2.18].

56. *Mental Health Act 2007* (NSW) s 151(4)(a).

57. Mental Health Review Tribunal, “Access to Tribunal Hearings and Media Contact” (30 March 2020) <mail.mhrt.nsw.gov.au/the-tribunal/access-to-tribunal-hearings-and-medial-contact.html> (retrieved 3 December 2020).

58. See [2.20].

59. Mental Health Review Tribunal, “Access to Tribunal Hearings and Media Contact” (30 March 2020) <mail.mhrt.nsw.gov.au/the-tribunal/access-to-tribunal-hearings-and-medial-contact.html> (retrieved 3 December 2020).

60. *Civil Procedure Act 2005* (NSW) s 71(b)–(c), s 71(f).

- the proceedings are “formal or non-contentious” and not before a jury, and
- the business does not involve anyone’s appearance before the court.⁶¹

2.49 Other circumstances in which proceedings may be held in private go beyond the common law exceptions to the open court principle. For example:

- a coroner may hear coronial proceedings in a room or building that is not open to the public (such as a room or building in a correctional centre) if special circumstances make it necessary or desirable to do so⁶²
- applications in the Local Court for an annulment of a person’s conviction or sentence may be dealt with in private,⁶³ and
- a court may grant leave to a victim to read their victim impact statement in a closed court.⁶⁴

Grounds for making exclusion orders

2.50 Some statutes that give powers to exclude the public or certain people from proceedings do not specify any grounds that must be satisfied before these powers can be exercised,⁶⁵ whereas others do.⁶⁶

2.51 Several statutes provide that proceedings can be closed if in the “public interest”.⁶⁷ The *Coroners Act 2009* (NSW) goes further and sets out certain matters a coroner can consider “in forming an opinion as to the public interest”. These include the principle that coronial proceedings should generally be open to the public, the likelihood that the evidence of a witness might be influenced by other evidence, national security, and the personal security of the public or an individual.⁶⁸

61. *Civil Procedure Act 2005* (NSW) s 71(a), s 71(d)–(e).

62. *Coroners Act 2009* (NSW) s 47(2).

63. *Crimes (Appeal and Review) Act 2001* (NSW) s 7(1).

64. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30K.

65. See, eg, *Crimes (Appeal and Review) Act 2001* (NSW) s 7(1); *Evidence (Audio and Audio Visual Links) Act 1998* (NSW) s 15; *Royal Commissions Act 1923* (NSW) s 12B(2).

66. See, eg, *Children and Young Persons (Care and Protection Act) 1998* (NSW) s 104, s 104A; *Coroners Act 2009* (NSW) s 74.

67. See, eg, *Coroners Act 2009* (NSW) s 74(1); *Health Practitioner Regulation National Law* (NSW) s 165K; *Thoroughbred Racing Act 1996* (NSW) s 43(4).

68. *Coroners Act 2009* (NSW) s 74(2).

- 2.52 Some statutes allow courts to close proceedings to the public with the consent of certain people involved in the proceedings.⁶⁹ Other grounds on which proceedings can be held in private are where the court:
- considers it “necessary”⁷⁰
 - “is satisfied that it is desirable to do so by reason of the confidential nature of any evidence or matter or for any other reason”⁷¹
 - “is satisfied that it is desirable to do so in the public interest for reasons connected with the subject-matter of the proceedings or the nature of the evidence to be given”.⁷²
- 2.53 One question is whether more, or even all, NSW statutes that confer powers to make exclusion orders should specify the grounds that must be satisfied before such an order is made. This could help to ensure they are only made in appropriate circumstances.
- 2.54 A related question is whether standard grounds should apply across different forums and proceedings.
- 2.55 One approach that NSW could consider is that taken in Victoria. The *Open Courts Act 2013* (Vic) (“*Open Courts Act*”) gives a broad range of courts and tribunals the power to make a “closed court order” (that is, an order closing the court to the public for some or all of a proceeding, or that permits certain people to be present).⁷³ This is different to NSW, where the powers to close proceedings are contained in different statutes.
- 2.56 Under the *Open Courts Act*, there is a statutory presumption in favour of having proceedings in open court, which all courts and tribunals must consider in determining whether to make a closed court order.⁷⁴ The Act also contains standard grounds for making an order. This is also different to NSW, where the grounds for making exclusion orders differ across the statutes.
- 2.57 Under the *Open Courts Act*, a court or tribunal, other than the Coroners Court,⁷⁵ can make a closed court order if satisfied that the order is necessary to:

69. See, eg, *Crimes (Sentencing Procedure) Act 1999* (NSW) s 91(2); *Criminal Procedure Act 1986* (NSW) s 57(3).

70. *Industrial Relations Act 1996* (NSW) s 162(2)(b).

71. *Civil and Administrative Tribunal Act 2013* (NSW) s 49(2).

72. *Health Practitioner Regulation National Law* (NSW) s 165K.

73. *Open Courts Act 2013* (Vic) s 3 definition of “court or tribunal”, s 30(1).

74. *Open Courts Act 2013* (Vic) s 28.

75. *Open Courts Act 2013* (Vic) s 30(3).

- prevent a real and substantial risk of prejudice to the proper administration of justice, which cannot be prevented by other reasonably available means (for example, by making a “proceeding suppression order”)⁷⁶
- prevent prejudice to the interests of the Commonwealth or a state or territory in relation to national or international security
- protect the safety of any person
- avoid causing undue distress or embarrassment to a complainant or witness in any criminal proceeding involving a sexual offence or a family violence offence, or
- avoid causing undue distress or embarrassment to a child who is a witness in any criminal proceeding.⁷⁷

2.58 The *Open Courts Act* also includes some specific grounds for making closed court orders, which apply to particular courts and tribunals.⁷⁸

Procedures for making exclusion orders

2.59 Most statutes in NSW that contain powers to make exclusion orders do not set out specific details about the procedure for making these orders. They state that a court “may” make an order, or similar.⁷⁹

2.60 Some statutes specify the procedures by which an order can be made to hold proceedings wholly or partly in private.⁸⁰ One question is whether more, or even all, statutes conferring powers to hold proceedings in private should set out the procedures for making an order. This could provide greater certainty and guidance. It could also ensure certain safeguards are included.

76. *Open Courts Act 2013* (Vic) pt 3.

77. *Open Courts Act 2013* (Vic) s 30(2)(a)–(e).

78. See, eg, *Open Courts Act 2013* (Vic) s 30(2)(f), s 30(3).

79. See, eg, *Crimes (Appeal and Review) Act 2001* (NSW) s 7(1); *Criminal Procedure Act 1986* (NSW) s 291A(1); *Civil Procedure Act 2005* (NSW) s 71; *Conveyancers Licensing Act 2003* (NSW) s 107(1); *Evidence Act 1995* (NSW) s 126E(a); *Evidence (Audio and Audio Visual Links) Act 1998* (NSW) s 15(a); *Royal Commissions Act 1923* (NSW) s 12B(2)–(3); *Property and Stock Agents Act 2002* (NSW) s 140(1).

80. See, eg, *Criminal Procedure Act 1986* (NSW) s 57(3); *Civil and Administrative Tribunal Act 2013* (NSW) s 49(2); *Mental Health Act 2007* (NSW) s 151(4)(a).

- 2.61 For example, procedures could allow individuals to apply for an order, as well as empowering a court to make an order on its own motion.⁸¹ This could allow the court to consider opposing arguments and balance competing interests.
- 2.62 The Australian Law Reform Commission has also suggested that courts be required to give a written statement of reasons for an order. This could help ensure that courts properly consider whether an order is necessary and proportionate.⁸² On the other hand, such procedures could unreasonably disrupt court proceedings and impact on court resources.

Consequences for breaching exclusion orders

- 2.63 Some statutes specify that the breach of an exclusion order is a statutory offence and state the maximum penalty for the breach.⁸³ The penalties vary, and can include fines, imprisonment or both. The number of penalty units and lengths of imprisonment also vary.⁸⁴
- 2.64 The majority of statutes that confer powers to make exclusion orders do not specify that the breach of an order is a statutory offence.⁸⁵ Contravention of these orders can be treated as contempt of court.⁸⁶ There are some statutes that say this explicitly.⁸⁷
- 2.65 Penalties for contempt are unlimited. A court may, for example, impose a fine or a term of imprisonment. However, if contempt proceedings are taken in the Local Court or District Court, there are statutory limits to the penalties that may be imposed.⁸⁸
- 2.66 On one view, specifying that breach of an order constitutes a statutory offence may provide greater certainty about the consequences, and allow Parliament to set appropriate maximum penalties. On another view, leaving courts to deal with breaches

81. See, eg, *Civil and Administrative Tribunal Act 2013* (NSW) s 49(2); *Drug and Alcohol Treatment Act 2007* (NSW) s 37(4)(a); *Mental Health Act 2007* (NSW) s 151(4)(a).

82. Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, Report 98 (2004) [11.158].

83. See, eg, *Court Security Act 2005* (NSW) s 7(2); *Coroners Act 2009* (NSW) s 74(3); *Witness Protection Act 1995* (NSW) s 31E(6)–(7).

84. See, eg, *Court Security Act 2005* (NSW) s 7(2); *Coroners Act 2009* (NSW) s 74(3); *Witness Protection Act 1995* (NSW) s 31E(6)–(7).

85. See, eg, *Criminal Procedure Act 1986* (NSW) s 291A; *Conveyancers Licensing Act 2003* (NSW) s 107(1); *Drug and Alcohol Treatment Act 2007* (NSW) s 37(4); *Evidence Act 1995* (NSW) s 126E; *Property and Stock Agents Act 2002* (NSW) s 140(1); *Royal Commissions Act 1923* (NSW) s 12B.

86. See Chapter 6.

87. See, eg, *Evidence (Audio and Audio Visual Links) Act 1998* (NSW) s 16; *Witness Protection Act 1995* (NSW) s 31E(8).

88. See Chapter 6.

as contempt of court allows them to control their own processes, and gives them flexibility in determining the appropriate penalty.

Question 2.2: Statutory powers to hold proceedings in private

- (1) Are the existing laws that give courts discretionary powers to make exclusion orders appropriate? Why or why not?
- (2) What changes, if any, should be made to these existing laws?
- (3) Should there be standard grounds that need to be satisfied before a court can make a discretionary exclusion order in all (or most) circumstances? If so, what should they be and in what circumstances should they apply?
- (4) Should there be standard procedures by which an exclusion order could be made in all (or most) circumstances? If so, what should they be and in what circumstances should they apply?
- (5) Should there be a standard offence for breaching an exclusion order in most (or all) circumstances? If so:
 - (a) what should be the elements of the offence and in what circumstances should it apply, and
 - (b) what should be the penalty?

3. Non-disclosure and suppression: statutory prohibitions

In Brief

Many NSW statutes automatically prohibit publication or disclosure of certain information. There are strong public policy reasons behind many of the prohibitions, including the need to protect vulnerable people from the harmful effects of publicity. The scope of the prohibitions varies widely and different exceptions apply. We look at the various prohibitions and consider opportunities to consolidate them.

Should legislation automatically prohibit publication or disclosure of certain information?	37
What information should be protected from publication or disclosure?	38
Current prohibitions on publishing or disclosing identities	38
Children and young people	38
Complainants of certain sexual offences	39
Victims and witnesses	40
People involved in mental health proceedings	40
People involved in guardianship and community welfare proceedings	41
People who report children or young people at risk of harm	42
Current or former jurors	42
Undercover law enforcement officers	42
Participants in witness protection programs	43
Suspects who undergo forensic procedures	43
Associates of an accused person or offender	44
Acquitted people	44
Current prohibitions on publishing or disclosing other information	44
Information about covert police operations	45
Prohibited or disallowed questions in court proceedings	45
Certain information about coronial proceedings	45
Certain information about tribunal proceedings	46
Additional statutory prohibitions that may be needed	46
Complainants in domestic or family violence proceedings	46

People with HIV	47
Earlier stages of indictable criminal proceedings	47
Sensitive evidence in criminal proceedings	47
What should be the scope of the prohibitions?	49
The types of action a statute may automatically prohibit	49
Duration of the statutory prohibition	51
Extension of the statutory prohibition to appeals or other related proceedings	52
When should publication or disclosure be permitted?	53
General or specific exceptions	53
Issues relating to certain exceptions	54
Consent of the person whose identity is protected	54
Consent of the court	55

- 3.1 In this and the following chapter, we consider laws that limit the disclosure of court information. In this Chapter, we look at NSW laws that are “self-executing” or “automatic”. By this, we mean laws that prohibit or restrict the publication or disclosure of certain information, without a court needing to exercise its discretion to make an order. In Chapter 4, we examine the laws in NSW that empower courts to use their discretion to make suppression and non-publication orders.
- 3.2 Several of the automatic statutory prohibitions in NSW prohibit disclosure of information by publication or another form of disclosure. Others prohibit the publication of information only.
- 3.3 Many statutes impose a negative obligation, in that they require a person to refrain from publishing or disclosing certain information. Breach of the prohibition constitutes an offence, punishable by a fine, a term of imprisonment, or both. Others impose a positive obligation, in that they mandate orders to ensure certain information is not disclosed or published.¹

1. See, eg, *Law Enforcement (Controlled Operations) Act 1997* (NSW) s 28(1)(b); *Law Enforcement and National Security (Assumed Identities) Act 2010* (NSW) s 34(1)(b); *Witness Protection Act 1995* (NSW) s 26(1)(b).

Should legislation automatically prohibit publication or disclosure of certain information?

- 3.4 An initial issue to consider is whether there should be any automatic prohibitions on publishing or disclosing information.
- 3.5 If there were no automatic prohibitions, courts could still have discretion to impose a suppression or non-publication order in a particular case. An order could be made on the court's own motion, or on the application of a party to the proceeding.² This process could allow the court to balance competing principles and interests.³
- 3.6 On the other hand, it may be appropriate that certain prohibitions are automatic. Statutes that contain such prohibitions tend to have a strong public policy reason for doing so.⁴ For example, the *Crimes Act 1900* (NSW) ("*Crimes Act*") prohibits anyone from publishing the identities of complainants in certain sexual offence proceedings.⁵ This is meant to:
- encourage people to report sexual offences committed against them, and
 - protect them from the harm that identification may cause.⁶
- 3.7 If this automatic prohibition did not exist, complainants in such proceedings would have to bear the burden of applying for suppression orders to keep their identities unknown.⁷ A departure from the current, default position of anonymity may also undermine awareness of, and compliance with, prohibitions on identifying sexual offence complainants.⁸
- 3.8 In a previous review, the NSW Law Reform Commission supported automatic statutory prohibitions on publishing certain information, so long as:
- the policies underlying these prohibitions are clear and justifiable, and

2. See [4.36]–[4.37].

3. Victorian Law Reform Commission, *Contempt of Court*, Consultation Paper (2019) [9.8].

4. NSW Law Reform Commission, *Contempt by Publication*, Report 100 (2003) [10.13].

5. *Crimes Act 1900* (NSW) s 578A.

6. Tasmania Law Reform Institute, *Protecting the Anonymity of Victims of Sexual Crimes*, Final Report 19 (2013) [2.3.2].

7. Victorian Law Reform Commission, *Contempt of Court*, Consultation Paper (2019) [9.54]; knowmore, *Preliminary Submission PCI35*, 2.

8. Victorian Law Reform Commission, *Contempt of Court*, Consultation Paper (2019) [9.54].

- the scope of the prohibitions is narrow and well-defined.⁹

Question 3.1: Statutory prohibitions on publishing or disclosing certain information

As a matter of principle, should there ever be automatic statutory prohibitions on publishing or disclosing certain information? Why or why not?

What information should be protected from publication or disclosure?

- 3.9 If it is considered appropriate for legislation to automatically prohibit publishing or disclosing certain information, it is worth asking what kinds of information should be protected in this way.

Current prohibitions on publishing or disclosing identities

- 3.10 Many automatic prohibitions in NSW prohibit publication of information identifying vulnerable people involved in proceedings. This is to ensure they are not subject to unnecessary additional distress through publication of information to the public.¹⁰
- 3.11 Other prohibitions protect the identities of people such as undercover police officers, current or former jurors, participants in witness protection programs, and associates of an accused person or offender. The purposes of these protections are varied.
- 3.12 Below, we discuss some of the key statutory prohibitions that protect certain identities. We note that prohibitions also exist in some non-statutory instruments like practice directions.¹¹

Children and young people

- 3.13 In NSW, statutory prohibitions that protect the identities of children include:
- the *Children (Criminal Proceedings) Act 1987* (NSW), which prohibits publishing or broadcasting the name of a person who was a child when they were involved in criminal proceedings (as the defendant, a witness, the victim, the sibling of a victim or a person who is mentioned or otherwise involved)¹²
 - the *Crimes (Domestic and Personal Violence) Act 2007* (NSW), which prohibits publishing the name or identifying information of a child involved in apprehended

9. NSW Law Reform Commission, *Contempt by Publication*, Report 100 (2003) [10.13]–[10.14].

10. NSW, Attorney General's Department, *Report on Access to Court Information* (2008) 39.

11. See, eg, Drug Court of NSW, *Non-Publication Order* (20 December 2011).

12. *Children (Criminal Proceedings) Act 1987* (NSW) s 15A.

violence order (“AVO”) proceedings (as the person protected by the AVO, a witness, or a the person against whom an AVO is sought)¹³

- the *Children and Young Persons (Care and Protection) Act 1998* (NSW) (“*Children and Young Persons (Care and Protection) Act*”), which prohibits publishing or broadcasting the name of a child or young person involved in civil proceedings before the Children’s Court¹⁴
- the *Young Offenders Act 1997* (NSW), which prohibits publishing or broadcasting the name or identifying information of any child dealt with under it,¹⁵ and
- the *Adoption Act 2000* (NSW), which prohibits publishing identifying information of a person affected by an adoption application.¹⁶

3.14 Several submissions support automatic protections for children and young people.¹⁷ Legal Aid NSW (“Legal Aid”) observes that they are “widely acknowledged” as necessary to prevent harm to, and stigmatising of, children, and, in some cases, to avoid negatively impacting on their rehabilitation and reintegration.¹⁸ We discuss these protections further in Chapter 7.

Complainants of certain sexual offences

3.15 The *Crimes Act* prohibits publishing anything that would identify the complainant in proceedings for a prescribed sexual offence.¹⁹ There are similar prohibitions in other

13. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 45(1).

14. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 105.

15. *Young Offenders Act 1997* (NSW) s 65.

16. *Adoption Act 2000* (NSW) s 180.

17. NSW, Office of the Director of Public Prosecutions, *Preliminary Submission PCI12*, 6; NSW Council for Civil Liberties, *Preliminary Submission PCI29*, 5; Banki Haddock Fiora, *Preliminary Submission PCI27*, 3; Legal Aid NSW, *Preliminary Submission PCI39*, 10; NSW, Public Defenders, *Preliminary Submission PCI33*, 6, 11.

18. Legal Aid NSW, *Preliminary Submission PCI39*, 10, citing NSW, Legislative Council Standing Committee on Law and Justice, *The Prohibition on the Publication of Names of Children Involved in Criminal Proceedings*, Report 35 (2008) ix.

19. *Crimes Act 1900* (NSW) s 578A(2).

Australian states and territories.²⁰ This protection is widely supported.²¹ We discuss it further in Chapter 9.²²

Victims and witnesses

- 3.16 Some statutory prohibitions in NSW protect the privacy of victims and witnesses. For example, the *Criminal Procedure Act 1986* (NSW) prohibits disclosing the address or telephone number of a witness in criminal proceedings, unless certain exceptions apply.²³
- 3.17 The *Mental Health (Forensic Provisions) Regulation 2017* (NSW) prohibits a “registered victim” (that is, a victim of a forensic patient who has been registered on the Victims Register), or any other person, from publishing any information contained in the Victims Register, unless certain exceptions apply.²⁴ The Victims Register includes information about each registered victim of a forensic patient, including the identifying information of the victim and the name of the forensic patient.²⁵
- 3.18 We discuss privacy protections for victims and witnesses further in Chapter 8.²⁶

People involved in mental health proceedings

- 3.19 The *Mental Health Act 2007* (NSW) (“*Mental Health Act*”), prohibits publishing or broadcasting information that could identify a person involved in proceedings before the Mental Health Review Tribunal (“MHRT”), unless the MHRT consents to it.²⁷ There are similar statutory prohibitions elsewhere in Australia.²⁸
- 3.20 A person can apply for the MHRT’s consent to publication.²⁹ The MHRT will conduct a hearing to consider the application and issue reasons for its decision.³⁰

20. *Criminal Law (Sexual Offences) Act 1978* (Qld) s 6, s 10; *Evidence Act 1929* (SA) s 71A(4); *Evidence Act 2001* (Tas) s 194K; *Evidence Act 1906* (WA) s 36C; *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 74; *Judicial Proceedings Reports Act 1958* (Vic) s 4(1A); *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 6.

21. See, eg, Legal Aid NSW, *Preliminary Submission PCI39*, 8; NSW Young Lawyers Criminal Law Committee, *Preliminary Submission PCI37*, 5; knowmore, *Preliminary Submission PCI35*, 10.

22. See [9.4]–[9.20].

23. *Criminal Procedure Act 1986* (NSW) s 280.

24. *Mental Health (Forensic Provisions) Regulation 2017* (NSW) cl 13F.

25. *Mental Health (Forensic Provisions) Regulation 2017* (NSW) cl 13A(a)–(b).

26. See [8.4]–[8.28].

27. *Mental Health Act 2007* (NSW) s 162.

28. See, eg, *Mental Health Act 2014* (Vic) s 194; *Mental Health Act 2016* (Qld) s 791; *Mental Health Act 2009* (SA) s 106; *Mental Health and Related Services Act 1998* (NT) s 138.

29. Mental Health Review Tribunal, *Practice Direction: Publication of Names* (29 August 2018) 2.

30. Mental Health Review Tribunal, *Practice Direction: Publication of Names* (29 August 2018) 2.

- 3.21 The MHRT is a specialist tribunal that exercises two separate jurisdictions. In its jurisdiction under the *Mental Health Act*, the MHRT can make orders requiring a person to receive involuntary mental health treatment. The MHRT can also conduct reviews for people who have been long-term voluntary patients.³¹
- 3.22 In its forensic jurisdiction, the MHRT can make decisions concerning forensic patients.³² A forensic patient is a person who has been found unfit to be tried for a criminal offence, or not guilty by reason of mental illness, and who has been ordered to be detained in a correctional or mental health facility or other place, or released into the community under conditions.³³
- 3.23 The prohibition on publication recognises that “intensely personal information” may be discussed in MHRT proceedings, and that people with mental health issues experience “ongoing stigma”.³⁴ It is aimed at protecting the privacy of all participants in proceedings and ensuring that sensitive personal and health information can be exchanged freely.³⁵
- 3.24 There is some confusion about the purpose of the prohibition and the specific information it covers. Some victims of forensic patients have felt that they cannot share their experiences without being in breach of the prohibition.³⁶
- 3.25 However, the prohibition only applies to information that would identify a person as being involved in MHRT proceedings.³⁷ A forensic patient’s pathway through the courts, before they reach the MHRT, is often discussed in public judgments, with no restrictions on reporting.³⁸ The section may require amendment, to delineate more clearly between the types of information that can and cannot be published.

People involved in guardianship and community welfare proceedings

- 3.26 The *Civil and Administrative Tribunal Act 2013* (NSW) (“NCAT Act”) prohibits publication of the names of people involved in proceedings in its Guardianship Division and

31. Mental Health Review Tribunal, *Preliminary Submission PCI23*, 1.

32. Mental Health Review Tribunal, *Preliminary Submission PCI23*, 1; A Whealy, *A Review in Respect of Forensic Patients* (Mental Health Review Tribunal, 2017) 23.

33. See *Mental Health (Forensic Provisions) Act 1900* (NSW) s 42.

34. Mental Health Review Tribunal, *Preliminary Submission PCI23*, 1.

35. A Whealy, *A Review in Respect of Forensic Patients* (Mental Health Review Tribunal, 2017) 55. See also Mental Health Review Tribunal, *Practice Direction: Publication of Names* (29 August 2018) 1.

36. Mental Health Review Tribunal, *Preliminary Submission PCI23*, 3; A Whealy, *A Review in Respect of Forensic Patients* (Mental Health Review Tribunal, 2017) 56.

37. Mental Health Review Tribunal, *Preliminary Consultation PCI10*.

38. Mental Health Review Tribunal, *Preliminary Submission PCI23*, 3.

proceedings relating to a decision made under community welfare legislation.³⁹ These types of proceedings can involve deeply personal issues.⁴⁰ Legislation elsewhere in Australia has similar prohibitions.⁴¹

People who report children or young people at risk of harm

- 3.27 The *Children and Young Persons (Care and Protection) Act* restricts disclosure in legal proceedings of the identity of a person who reported that a child or young person is at risk of harm.⁴² The rationale for this protection is that, for many people, “concern that they may be identified as the reporter is a strong impediment to their reporting”.⁴³

Current or former jurors

- 3.28 The *Jury Act 1977* (NSW) prohibits a person from wilfully publishing, broadcasting or disclosing anything likely to identify a juror or former juror in a trial or inquest, unless certain exceptions apply.⁴⁴ This is meant to protect the privacy of jurors, reassure them about their personal security, and prevent others from approaching them improperly.⁴⁵ Legislation elsewhere in Australia has similar protections.⁴⁶

Undercover law enforcement officers

- 3.29 Legislation restricts disclosure in legal proceedings of the identity of participants in authorised operations and officers with approval to use an assumed identity.⁴⁷

39. *Civil and Administrative Tribunal Act 2013* (NSW) s 65(1)–(2). See also NSW Civil and Administrative Tribunal, *NCAT Policy 4: Access to, and Publication of, Information Derived from Proceedings in the Tribunal* (October 2019) [3].

40. See, eg, NSW Law Reform Commission, *Safeguards and Procedures*, Review of the Guardianship Act 1987, Question Paper 4 (2017) [8.58].

41. See, eg, *Guardianship of Adults Act 2016* (NT) s 80(2); *Guardianship and Administration Act 1993* (SA) s 81(3); *Guardianship and Administration Act 1995* (Tas) s 13(1); *Guardianship and Administration Act 1990* (WA) sch 1 cl 12; *Victorian Civil and Administrative Tribunal Act 1998* (Vic) sch 1 cl 37(1).

42. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 29(1)(f).

43. NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 11 November 1998, 9761.

44. *Jury Act 1977* (NSW) s 68(1).

45. NSW Law Reform Commission, *Criminal Procedure: The Jury in a Criminal Trial*, Report 48 (1986) [5.13].

46. *Criminal Law Consolidation Act 1935* (SA) s 246; *Juries Act 1967* (ACT) s 42C; *Juries Act 1962* (NT) s 49B; *Juries Act 2003* (Tas) s 57; *Juries Act 2000* (Vic) s 77; *Juries Act 1957* (WA) s 56A–56E, s 57; *Jury Act 1995* (Qld) s 70.

47. *Law Enforcement (Controlled Operations) Act 1997* (NSW) s 28; *Law Enforcement and National Security (Assumed Identities) Act 2010* (NSW) s 34.

- 3.30 An authorised operation is an authorised law enforcement operation involving activities that may otherwise be unlawful⁴⁸ (for example a drug operation with a police officer posing as a buyer).⁴⁹ It may involve an officer using an assumed identity.⁵⁰
- 3.31 Assumed identities are used to protect the life and safety of officers and their families. The purpose of the statutory prohibitions is to extend this protection through to any legal proceedings arising from a law enforcement or national security operation.⁵¹

Participants in witness protection programs

- 3.32 The *Witness Protection Act 1995* (NSW) restricts disclosure in legal proceedings of the identity of a participant in a witness protection program.⁵² Such programs are designed to protect the safety and welfare of a witness and may involve the witness establishing a new identity.⁵³ Similar prohibitions on publication exist in other Australian states and territories.⁵⁴

Suspects who undergo forensic procedures

- 3.33 The *Crimes (Forensic Procedures) Act 2000* (NSW) prohibits publishing the name or identifying information of a suspect of a criminal offence, on whom a forensic procedure is carried out, or is proposed to be carried out.⁵⁵ A “forensic procedure” includes both intimate forensic procedures, such as taking a blood sample, and non-intimate forensic procedures, such as taking photographs or fingerprints.⁵⁶ There are some exceptions to the prohibition, including where the suspect has been charged with the offence.⁵⁷

48. See *Law Enforcement (Controlled Operations) Act 1997* (NSW) s 3 definition of “authorised operation”, definition of “controlled operation”.

49. NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 20 November 1997, 2322.

50. NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 20 November 1997, 2322.

51. NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 20 November 1997, 2323. See also NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 10 November 1998, 9537.

52. *Witness Protection Act 1995* (NSW) s 26.

53. See *Witness Protection Act 1995* (NSW) s 5.

54. See, eg, *Witness Protection Act 1996* (ACT) s 16; *Witness Protection Act 1996* (SA) s 25; *Witness Protection (Western Australia) Act 1996* (WA) s 32.

55. *Crimes (Forensic Procedures) Act 2000* (NSW) s 43.

56. See *Crimes (Forensic Procedures) Act 2000* (NSW) s 3 definition of “forensic procedure”, definition of “intimate forensic procedure”, definition of “non-intimate forensic procedure”.

57. *Crimes (Forensic Procedures) Act 2000* (NSW) s 43.

Associates of an accused person or offender

- 3.34 The *Bail Act 2013* (NSW) prohibits publishing the name or identifying information of a “prohibited associate” of an accused person (that is, a person that the accused is prohibited or restricted from associating with, in line with their bail conditions).⁵⁸ Similarly, the *Crimes (Sentencing Procedure) Act 1999* (NSW) prohibits publishing information that identifies a person named in a non-association order (other than the offender).⁵⁹ There are several exceptions to these prohibitions, including where the information is disclosed to the accused person or offender.⁶⁰
- 3.35 The rationale for these prohibitions is that while people named in non-association conditions or orders may not themselves be accused of a criminal offence, publication of their name could result in people assuming negative things about them.⁶¹

Acquitted people

- 3.36 Some statutory prohibitions in NSW protect the identities of people who have been acquitted of an offence, where further proceedings may occur in relation to that offence.⁶²
- 3.37 For example, the *Crimes (Appeal and Review) Act 2001* (NSW) (“*Crimes (Appeal and Review) Act*”) prohibits publication of anything that would identify an acquitted person who is the subject of a police investigation (or an application for authority to conduct one), an application for retrial or appeal, an order for a retrial, or a retrial.⁶³ This is meant to ensure that potential jurors are not exposed to media publicity about any police investigation of an acquitted person, any application for retrial, or any further steps in the legal process, until the retrial (if there is one) is concluded.⁶⁴

Current prohibitions on publishing or disclosing other information

- 3.38 Below, we discuss some of the statutory prohibitions that prevent publication or disclosure of information other than the identities of certain people.

58. *Bail Act 2013* (NSW) s 89.

59. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 100H.

60. See *Bail Act 2013* (NSW) s 89(3)(a); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 100H(2)(a).

61. NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 26 October 2001, 18106.

62. See, eg, *Crimes (Appeal and Review) Act 2001* (NSW) s 108(6); *Supreme Court Act 1970* (NSW) s 101A(8).

63. *Crimes (Appeal and Review) Act 2001* (NSW) s 111(1).

64. See J Mathews, *Safeguards in Relation to Proposed Double Jeopardy Legislation* (NSW Attorney General’s Department, 2003) 20.

Information about covert police operations

- 3.39 Certain statutory prohibitions in NSW protect information about covert police operations. For example, the *Surveillance Devices Act 2007* (NSW) restricts publishing information disclosed in legal proceedings that could reveal details of surveillance device technology and how it is used.⁶⁵ The *Terrorism (Police Powers) Act 2002* (NSW) prohibits publishing certain information about covert search warrants.⁶⁶ There are similar statutory prohibitions elsewhere in Australia.⁶⁷

Prohibited or disallowed questions in court proceedings

- 3.40 The *Evidence Act 1995* (NSW) prohibits publishing a prohibited question; that is:
- an improper question that the court has disallowed
 - a question that has been disallowed because its answer would contravene the rule that credibility evidence about a witness is not admissible, or
 - any question that is part of a cross-examination about a defendant's credibility, in respect of which the court has refused leave.⁶⁸
- 3.41 There must be express permission from the court before such questions can be published.

Certain information about coronial proceedings

- 3.42 The *Coroners Act 2009* (NSW) prohibits publishing a report of coronial proceedings in which there was a finding of suicide, unless the coroner expressly permits publication.⁶⁹ This is because in some cultures, suicide remains a source of embarrassment or shame for bereaved families.⁷⁰
- 3.43 It is also an offence to publish, without the express permission of a coroner, certain other details of coronial proceedings, including any questions asked of a witness that the coroner has forbidden or disallowed, and any objections made by a witness to giving evidence on the ground that the evidence may tend to prove that they have committed

65. *Surveillance Devices Act 2007* (NSW) s 42(5)–(6).

66. *Terrorism (Police Powers) Act 2002* (NSW) s 27ZA(1).

67. See, eg, *Criminal Investigation (Covert Operations) Act 2009* (SA) s 38; *Witness (Identity Protection) Act 2006* (Tas) s 11(4).

68. *Evidence Act 1995* (NSW) s 195.

69. *Coroners Act 2009* (NSW) s 75(5).

70. J Abernethy and others, *Waller's Coronial Law and Practice in New South Wales* (LexisNexis Butterworths, 4th ed, 2010) [75.3].

an offence.⁷¹ This is meant to prevent damage to the reputation of witnesses.⁷² There is a similar prohibition in Queensland.⁷³

Certain information about tribunal proceedings

- 3.44 Certain sections of the *NCAT Act* restrict disclosure of information about proceedings in the NSW Civil and Administrative Tribunal (“NCAT”).⁷⁴ For example, one section restricts the disclosure of information provided in proceedings where there is “an overriding public interest against disclosure” under the *Government Information (Public Access) Act 2009* (NSW). NCAT must do all things necessary to ensure that the information is not disclosed to anyone other than a tribunal member, unless the person or body disclosing the information to NCAT consents.⁷⁵

Question 3.2: Current statutory prohibitions on publishing or disclosing information

- (1) Are the current statutory prohibitions on publishing or disclosing certain information appropriate? Why or why not?
- (2) What changes, if any, should be made to the current statutory prohibitions?

Additional statutory prohibitions that may be needed

Complainants in domestic or family violence proceedings

- 3.45 Several submissions argue that the identities of complainants in domestic or family violence proceedings should be better protected,⁷⁶ for the same reasons that the identities of sexual offence complainants are protected;⁷⁷ that is, to:
- encourage reporting of these offences,⁷⁸ and
 - protect complainants from re-traumatisation, stigma and shame when entering the court process.⁷⁹

71. See *Coroners Act 2009* (NSW) s 76.

72. See *John Fairfax and Sons Ltd v Gill* (1988) 12 NSWLR 77, 81 in relation to *Coroners Act 1980* (NSW) s 45(3).

73. *Coroners Act 2003* (Qld) s 41(3).

74. See *Civil and Administrative Tribunal Act 2013* (NSW) pt 4 div 6.

75. *Civil and Administrative Tribunal Act 2013* (NSW) s 66(3).

76. NSW, Office of the Director of Public Prosecutions, *Preliminary Submission PCI12*, 6; Victims of Crime Assistance League Inc NSW, *Preliminary Submission PCI32*, 2–3; NSW Young Lawyers Criminal Law Committee, *Preliminary Submission PCI37*, 5; No to Violence, *Preliminary Submission PCI38*, 1–2.

77. NSW, Office of the Director of Public Prosecutions, *Preliminary Submission PCI12*, 6; No to Violence, *Preliminary Submission PCI38*, 1–2.

78. NSW Young Lawyers Criminal Law Committee, *Preliminary Submission PCI37*, 5.

3.46 We discuss protections for domestic violence complainants further in Chapter 8.⁸⁰

People with HIV

3.47 One submission argues that legislation should automatically suppress or prohibit publication of “the identity of parties to civil or criminal proceedings where HIV status is a material factor”.⁸¹ Disclosure of a person’s HIV status in a court setting may place the person at risk of violence, stigma, discrimination and harassment. This may deter the person from participating in the justice system.⁸²

Earlier stages of indictable criminal proceedings

3.48 Legal Aid NSW argues that, in the early stages of indictable criminal proceedings, there should be restrictions on publishing information. It says this is needed to ensure a jury trial can proceed without being “jeopardised by the publication of potentially prejudicial information”.⁸³

3.49 For example, proceedings for a bail application may refer to previous convictions of the accused person. If there have been media reports of the bail proceedings (including reference to the previous convictions), there is a risk that jurors in the trial will become aware of them and be influenced by them.⁸⁴ In Tasmania, it is an offence to publish an account of a bail application, other than purely giving an account of the fact an application and order have been made.⁸⁵

3.50 Arguably, there is considerable public interest in reporting on preliminary criminal proceedings. Open justice is particularly important for bail proceedings, as this is when decisions are made about the liberty of the accused person.⁸⁶

Sensitive evidence in criminal proceedings

3.51 One submission supports prohibiting the disclosure and publication of sensitive evidence in sexual offence proceedings, such as “personal information or graphic details of the violence perpetrated”.⁸⁷

79. Domestic Violence NSW, *Preliminary Submission PCI42*, 5.

80. See [8.51]–[8.66].

81. National Association of People with HIV Australia and HIV AIDS Legal Centre, *Preliminary Submission PCI28*, 6.

82. National Association of People with HIV Australia and HIV AIDS Legal Centre, *Preliminary Submission PCI28*, 2, 3.

83. Legal Aid NSW, *Preliminary Submission PCI39*, 4.

84. NSW Law Reform Commission, *Contempt by Publication*, Discussion Paper 43 (2000) [10.48].

85. See *Justices Act 1959* (Tas) s 37A(1).

86. See Victorian Law Reform Commission, *Contempt of Court*, Report (2020) [12.36]–[12.37].

87. Rape and Domestic Violence Services Australia, *Preliminary Submission PCI36*, 5.

- 3.52 Similarly, a 2017 review of the *Open Courts Act 2013 (Vic)* recommended restrictions on publishing sensitive information in criminal proceedings for sexual and family violence offences. The review recommended that, in these cases, an interim suppression order should be automatically issued at initial bail hearings.⁸⁸ This would give victims time to consider applying for a suppression order before sensitive information about them or the offence had been published.⁸⁹
- 3.53 More recently, the Victorian Law Reform Commission (“VLRC”) recommended against this change. One reason it gave was that such a prohibition was contrary to the trend of recent law reform, which recognises the value of raising awareness about the nature and prevalence of sexual offending and family violence, and in countering the stigma attached to victims. Another reason was that, although a temporary restriction gives the victim more time, they still need to be made aware of their right to apply for a suppression order and be supported in exercising that right effectively.⁹⁰
- 3.54 Instead, the VLRC recommended that victims be given early advice, guidance and support to apply for suppression orders. It also recommended that, in cases involving sexual and family violence offences, courts should be required to inquire whether there is a need for any suppression order.⁹¹
- 3.55 Another submission supports restrictions on publishing sensitive evidence in criminal proceedings more broadly, such as sensitive images and video evidence. It argues that this information has the potential to spread across the internet and social media, which can create stigma for victims, witnesses and people accused of offences. In some cases, it may result in risks to safety.⁹²
- 3.56 In NSW, legislation restricts the circulation of sensitive evidence to some extent. An accused person is not entitled to a copy of evidence that the prosecution “reasonably considers to be sensitive evidence” (that is, images or audio recordings of a person that are obscene or indecent, that would interfere with a person’s privacy or are of a person after they have died). Certain procedures must also be followed in giving the accused person access to such evidence. In addition, the prosecution is entitled to retain possession of sensitive evidence during criminal proceedings and must not improperly copy or circulate it.⁹³

88. F Vincent, *Review of the Open Courts Act 2013 (Vic)* (2017) rec 17.

89. Victorian Law Reform Commission, *Contempt of Court*, Report (2020) [12.124].

90. Victorian Law Reform Commission, *Contempt of Court*, Report (2020) [12.148], [12.151].

91. See Victorian Law Reform Commission, *Contempt of Court*, Report (2020) rec 106–107.

92. Legal Aid NSW, *Preliminary Submission PCI39*, 4.

93. See *Criminal Procedure Act 1986 (NSW)* s 281C–281F.

Question 3.3: Additional statutory prohibitions that may be needed

What further information, if any, should be protected by automatic statutory prohibitions on publication or disclosure?

What should be the scope of the prohibitions?

- 3.57 Since automatic statutory prohibitions infringe on the principle of open justice, it is important to ensure that their scope is appropriate and well-defined.⁹⁴
- 3.58 The scope of the current statutory prohibitions in NSW varies widely, in terms of the types of action that a statute may prohibit and the duration of the prohibition. A related issue is whether a prohibition that applies in particular court proceedings should also apply in related proceedings, such as a subsequent appeal.

The types of action a statute may automatically prohibit

- 3.59 The current automatic statutory prohibitions in NSW apply to different types of action. For example, where some statutes may prohibit a person from “publishing” certain information,⁹⁵ others may prohibit a person from “printing or publishing”,⁹⁶ or “publishing or broadcasting”.⁹⁷ “Use”, “disclosure”, and “suppression” of information are other terms employed to frame prohibitions.⁹⁸
- 3.60 The varied use of terminology means it can be difficult to compare the scope of different prohibitions. The issue is complicated further by the fact that specific terms are used differently. Several statutes contain definitions of “publish” or “disclose”, but these definitions are not identical.

94. See, eg, NSW Law Reform Commission, *Contempt by Publication*, Report 100 (2003) [10.13]–[10.14].

95. See, eg, *Adoption Act 2000* (NSW) s 180(1)–(2); *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW) s 18(1); *Crimes Act 1900* (NSW) s 578A; *Crimes (Appeal and Review) Act 2001* (NSW) s 108(6), s 111(1)–(2); *Crimes (Forensic Procedures) Act 2000* (NSW) s 43(1); *Coroners Act 1009* (NSW) s 75(5), s 76; *Status of Children Act 1996* (NSW) s 25; *Supreme Court Act 1970* (NSW) s 101A(8); *Terrorism (Police Powers) Act 2002* (NSW) s 27ZA(1).

96. *Evidence Act 1995* (NSW) s 195.

97. See, eg, *Bail Act 2013* (NSW) s 89; *Civil and Administrative Tribunal Act 2013* (NSW) s 65; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 100H; *Mental Health Act 2007* (NSW) s 162; *Young Offenders Act 1997* (NSW) s 65.

98. See, eg, *Criminal Procedure Act 1986* (NSW) s 280; *Children and Young Persons (Care and Protection Act) 1998* (NSW) s 29(1)(f); *Civil and Administrative Tribunal Act 2013* (NSW) s 66(3), s 67; *Jury Act 1977* (NSW) s 68(1); *Law Enforcement (Controlled Operations) Act 1997* (NSW) s 28(1)(b); *Law Enforcement and National Security (Assumed Identities) Act 2010* (NSW) s 34(1)(b); *Surveillance Devices Act 2007* (NSW) s 40(1), *Witness Protection Act 1995* (NSW) s 26(1)(b).

- 3.61 For example, some statutes define “publish” as including publication in a newspaper or other publication, radio or television broadcast, and internet publication.⁹⁹ Others go further, and specify that “publish” includes publication to an internet website that provides the opportunity for, or facilitates or enables, dissemination of information to the public (whether or not the particular publication results in the dissemination of information).¹⁰⁰
- 3.62 Variations similarly arise in the prohibitions on publishing or disclosing identifying information. For example, some statutory prohibitions apply to:
- the “name” of a particular person, and define “name” as including any information, picture or other material that identifies the person or is likely to identify the person¹⁰¹
 - the “name”, “identity” or “particulars identifying” a person, but do not define these terms¹⁰²
 - information that identifies or is likely to identify the person¹⁰³
 - information that identifies a person as being connected to something (for example, material that identifies a person as being affected by an adoption application),¹⁰⁴ and
 - “any information which is likely to lead to the identification” of the person, and this is defined to include “a reference to the disclosure of the address” of the person.¹⁰⁵

99. See, eg, *Children (Criminal Proceedings) Act 1987* (NSW) s 15A(2)–(3); *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 105(1B); *Crimes Act 1900* (NSW) s 578A(1); *Coroners Act 2009* (NSW) s 73. See also *Adoption Act 2000* (NSW) s 176.

100. *Children (Criminal Proceedings) Act 1987* (NSW) s 15A(3); *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 105(1C).

101. *Children (Criminal Proceedings) Act 1987* (NSW) s 15A(5); *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 45(5); *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 105(4); *Young Offenders Act 1997* (NSW) s 65(4); *Mental Health Act 2007* (NSW) s 162(3); *Civil and Administrative Tribunal Act 2013* (NSW) s 65(4).

102. *Status of Children Act 1996* (NSW) s 25; *Law Enforcement (Controlled Operations) Act 1997* (NSW) s 28; *Law Enforcement and National Security (Assumed Identities) Act 2010* (NSW) s 34; *Witness Protection Act 1995* (NSW) s 26; *Crimes (Forensic Procedures) Act 2000* (NSW) s 43(1); *Crimes (Appeal and Review) Act 2001* (NSW) s 108(6)(b); *Supreme Court Act 1970* (NSW) s 101A(8)(b).

103. See, eg, *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW) s 18(1)(d); *Crimes Act 1900* (NSW) s 578A(2); *Crimes (Forensic Procedures) Act 2000* (NSW) s 43(1)(b); *Crimes (Appeal and Review) Act 2001* (NSW) s 111(1).

104. *Adoption Act 2000* (NSW) s 180(1). See also *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW) s 18(1)(a); *Bail Act 2013* (NSW) s 89(1)(b); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 100H(1).

105. *Jury Act 1977* (NSW) s 68(3).

- 3.63 Many statutes do not define the terms they use at all.¹⁰⁶ Courts are left to interpret the meaning of these terms in deciding whether a person has breached the particular prohibition.
- 3.64 On one view, it may be desirable for all the statutory prohibitions on information disclosure in NSW to frame similar restrictions in similar ways and apply consistent definitions of terms. For example, all legislation prohibiting the release of identification information could include an identical non-exhaustive list of matters that are likely to lead to the identification of a person.¹⁰⁷ This could make it easier for people to understand exactly what kinds of information must not be published or disclosed, in accordance with the statutory prohibition. A consistent approach could be taken not just across automatic prohibitions on information disclosure, but also for discretionary orders.
- 3.65 On another view, it may be necessary for different statutes to cover different kinds of conduct, depending on the statute's purpose. If this is the case, it might be that some provisions could be consolidated or made consistent, and others left unchanged.

Question 3.4: Types of action a statute may prohibit

- (1) Is the existing variety of types of action that a statute may prohibit justified? Why or why not?
- (2) What changes, if any, should be made?
- (3) Should a standard provision setting out the types of action that a statute may prohibit be developed? If so:
 - (a) what should the provision say
 - (b) how should key terms be defined, and
 - (b) when should it apply?

Duration of the statutory prohibition

- 3.66 Legislation does not always specify how long a prohibition operates for.¹⁰⁸ Stating the duration could clarify whether a prohibition applies for a specific period of time or indefinitely. It may be difficult to justify indefinite operation.¹⁰⁹

106. See, eg, *Bail Act 2013* (NSW) s 89; *Crimes (Appeal and Review) Act 2001* (NSW) s 108(6), s 111(1); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 100H(1); *Law Enforcement (Controlled Operations) Act 1997* (NSW) s 28(2)(b); *Law Enforcement and National Security (Assumed Identities) Act 2010* (NSW) s 34(2)(b); *Supreme Court Act 1970* (NSW) s 101A(8)(b).

107. See, eg, *Family Violence Protection Act 2008* (Vic) s 168.

108. See, eg, *Bail Act 2013* (NSW) s 89; *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW) s 18; *Crimes (Forensic Procedures) Act 2000* (NSW) s 43; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 100H; *Status of Children Act 1996* (NSW) s 25.

109. Victorian Law Reform Commission, *Contempt of Court*, Report (2020) [12.69].

- 3.67 Sometimes a statute will specify that a prohibition applies before the proceedings commence, during the proceedings, and/or after they are completed.¹¹⁰
- 3.68 Other statutes specify when the prohibition no longer applies.¹¹¹ For example, the *Crimes (Appeal and Review) Act* provides that the prohibition on publishing an acquitted person's identity ceases to have effect when there are no longer any avenues for a retrial, or at the end of the retrial, whichever is the earliest.¹¹²

Question 3.5: Duration of the statutory prohibition

- (1) Should the statutory prohibitions on publishing or disclosing certain information always specify the duration of the prohibition? Why or why not?
- (2) What changes, if any, should be made to the existing duration provisions attached to statutory prohibitions on publishing or disclosing information?
- (3) What prohibitions, if any, should include a duration provision that do not already? What should these duration provisions say?

Extension of the statutory prohibition to appeals or other related proceedings

- 3.69 Another issue is whether prohibitions should extend to related proceedings. For example, legislation prohibits publishing the identity of a person involved in guardianship proceedings in NCAT.¹¹³ However, this prohibition does not apply to guardianship proceedings in the Supreme Court.¹¹⁴ Similarly, a person's identity is protected in proceedings before the MHRT,¹¹⁵ but may not be protected in similar proceedings before the Supreme Court.¹¹⁶
- 3.70 The MHRT says that the Supreme Court allocates pseudonyms where there are appeals against MHRT decisions made under the *Mental Health Act*, but does not consistently allocate pseudonyms where there are appeals against MHRT decisions concerning forensic patients.¹¹⁷
- 3.71 Legal Aid NSW says that when a person applies to the Supreme Court to extend their forensic status, they are identified, and the court's decisions and reasons are published.

110. See, eg, *Children (Criminal Proceedings) Act 1987* (NSW) s 15A(4)(a); *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 105(1); *Crimes Act 1900* (NSW) s 578A(3); *Civil and Administrative Tribunal Act 2013* (NSW) s 65(2); *Mental Health Act 2007* (NSW) s 162(1).

111. See, eg, *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 105(1A).

112. *Crimes (Appeal and Review) Act 2001* (NSW) s 111(5).

113. *Civil and Administrative Tribunal Act 2013* (NSW) s 65(1)(a), s 65(2).

114. *Misrachi v Public Guardian* [2019] NSWCA 67 [17].

115. *Mental Health Act 2007* (NSW) s 162.

116. Legal Aid NSW, *Preliminary Submission PCI39*, 5–6; Mental Health Review Tribunal, *Preliminary Submission PCI23*, 2–3.

117. Mental Health Review Tribunal, *Preliminary Submission PCI23*, 2.

This includes evidence given in the Supreme Court hearing, which necessarily includes evidence from past proceedings before the MHRT.¹¹⁸ Legal Aid NSW argues that the prohibition in the *Mental Health Act*¹¹⁹ should be extended to apply to all forensic patients in all proceedings.¹²⁰

- 3.72 However, there may be good reasons for limiting the prohibition to proceedings in the MHRT only. There is already limited public understanding of the regime that applies to forensic patients and extending the prohibition to other types of proceedings may exacerbate this issue.

Question 3.6: Application of the statutory prohibition to related proceedings

In what circumstances, if any, should statutory prohibitions that protect the identities of people involved in proceedings apply in appeal or other related proceedings?

When should publication or disclosure be permitted?

- 3.73 Most, but not all,¹²¹ of the statutory prohibitions on publication or disclosure contain exceptions. Exceptions arguably provide flexibility, ensure that liability for a breach of a prohibition is not imposed unjustly, and provide greater certainty about the intended scope of the prohibition.¹²²

General or specific exceptions

- 3.74 Many statutory prohibitions contain general exceptions. For example, the prohibition will not apply if publication or disclosure of the relevant information is:
- in an official report of proceedings¹²³
 - with the consent of the person whose identity is protected by the prohibition,¹²⁴ or

118. Legal Aid NSW, *Preliminary Submission PCI39*, 5–6.

119. *Mental Health Act 2007* (NSW) s 162.

120. Legal Aid NSW, *Preliminary Submission PCI39*, 6.

121. See, eg, *Crimes (Appeal and Review) Act 2001* (NSW) s 108(6); *Status of Children Act 1996* (NSW) s 25.

122. See, eg, Queensland Law Reform Commission, *Confidentiality in the Guardianship System: Public Justice, Private Lives*, Discussion Paper, WP 60 (2006) [7.77]–[7.80].

123. See, eg, *Adoption Act 2000* (NSW) s 180(3)(b); *Bail Act 2013* (NSW) s 89(4); *Civil and Administrative Tribunal Act 2013* (NSW) s 65(3); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 100H(2); *Mental Health Act 2007* (NSW) s 162(2).

124. See, eg, *Children (Criminal Proceedings) Act 1987* (NSW) s 15D; *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 45(4)(b); *Children and Young Persons (Care and Protection) Act 1998*

- with permission, consent or leave of the court, tribunal or commission.¹²⁵

3.75 Exceptions can also be specific to the type of information the prohibition protects, or the circumstances in which it operates.¹²⁶ For example, the *Children and Young Persons (Care and Protection) Act* protects the identities of people who make a report about a child or young person at risk of harm, but does not prevent disclosure of this information if:

- non-disclosure would prevent the proper investigation of the report, or
- it is to a law enforcement agency in certain circumstances, including where the disclosure is necessary to safeguard or promote the safety, welfare, and wellbeing of a child or young person.¹²⁷

3.76 It may be desirable for statutory prohibitions to all include the same general exceptions. This could promote consistency and simplicity. Then certain statutes could accommodate contextual factors by including more specific exceptions instead of, or in addition to, the general exceptions.

Issues relating to certain exceptions

Consent of the person whose identity is protected

3.77 As mentioned above, several statutory prohibitions that protect identifying information allow the person to consent to publication of their identity.¹²⁸ For example, the *Crimes Act* enables complainants in certain sexual offence proceedings to consent to publication.¹²⁹

(NSW) s 29(1)(f)(i); *Young Offenders Act 1997* (NSW) s 65(3)(b); *Jury Act 1977* (NSW) s 68(2); *Supreme Court Act 1970* (NSW) s 101A(8).

125. See, eg, *Adoption Act 2000* (NSW) s 180(3); *Children (Criminal Proceedings) Act 1987* (NSW) s 15D; *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 45(4)(b); *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 29(1)(f)(ii); *Mental Health Act 2007* (NSW) s 162(1); *Civil and Administrative Tribunal Act 2013* (NSW) s 65(2); *Law Enforcement Conduct Commission Act 2016* (NSW) s 91(3).

126. See, eg, *Bail Act 2013* (NSW) s 89(4); *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW) s 18(3); *Child Protection (Offenders Prohibition Orders) Regulation 2018* (NSW) cl 9(3); *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 29(4A)–(4B); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 100H(2).

127. See *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 29(4)–(4C).

128. See [3.74].

129. *Crimes Act 1900* (NSW) s 578A(4)(b).

- 3.78 Several submissions support this particular provision.¹³⁰ Speaking publicly about experiences of sexual assault can assist complainants in their recovery from trauma, and encourage other people who have experienced sexual assault to come forward.¹³¹
- 3.79 There might be a case for including this exception in statutes where it is not currently included. For example, one submission suggests that a person affected by an adoption application should be able to consent to the publication of their identity.¹³² Currently, only the Supreme Court can provide this consent in adoption matters.¹³³
- 3.80 A person involved in guardianship proceedings before NCAT, or proceedings before the MHRT, cannot currently consent to publication of their identity. Only NCAT or the MHRT can permit publication.¹³⁴ This means that a person who, for example, was involved in MHRT proceedings as a forensic patient must apply to the MHRT for permission to publish their own name.¹³⁵
- 3.81 It might be that, in some cases, the person does not have the capacity to give consent themselves. However, the person's views could be accommodated in other ways. For example, legislation could expressly require the court or tribunal to consider the person's views in deciding whether to permit publication of their identity. Such a requirement is included in the *Crimes Act* for sexual offence complainants.¹³⁶
- 3.82 In some cases, this might already occur in practice. The MHRT reports that it considers the person's attitude towards publication and their capacity to give consent in deciding whether to permit publication of their identity. It is less likely to do so if the person does not agree.¹³⁷

Consent of the court

- 3.83 When the court has the discretion to permit publication or disclosure of protected information, one question is whether it should have to consider specific criteria before exercising the discretion.

130. See, eg, knowmore, *Preliminary Submission PCI35*, 5–6, 7; Rape and Domestic Violence Services Australia, *Preliminary Submission PCI36*, 6–7. See also H Brown, *Preliminary Submission PCI10*, 4; NSW, Office of the Director of Public Prosecutions, *Preliminary Submission PCI12*, 7–8.

131. Rape and Domestic Violence Services Australia, *Preliminary Submission PCI36*, 6.

132. Banki Haddock Fiora, *Preliminary Submission PCI27*, 4.

133. *Adoption Act 2000* (NSW) s 180(3), s 180A.

134. See *Civil and Administrative Tribunal Act 2013* (NSW) s 65; *Mental Health Act 2007* (NSW) s 162.

135. See, eg, *A v Mental Health Review Tribunal* [2012] NSWSC 293 [5].

136. See *Crimes Act 1900* (NSW) s 578A(5)(a).

137. Mental Health Review Tribunal, *Preliminary Submission PCI23*, 1–2, citing *Mr Ephram* [2013] NSWMHRT 7; *Kerr and Liu* [2014] NSWMHRT 4, 5–6; Mental Health Review Tribunal, *Practice Direction: Publication of Names*, 29 August 2018, 1; Mental Health Review Tribunal, *Preliminary Consultation PCI10*.

- 3.84 On one view, broad or unlimited discretion is more flexible. On another, specific criteria provide greater certainty and guidance and might allow for specific safeguards to be included. For example, the court is sometimes required to consider factors such as whether publication or disclosure of a person’s identity could create a risk to the welfare or protection of the person, or whether the interests of justice require disclosure.¹³⁸
- 3.85 The *Children and Young Persons (Care and Protection) Act* provides that a court or other body cannot give leave for the identity of a person who reported a child at risk of harm to be disclosed, unless it “is satisfied that the evidence is of critical importance in the proceedings and that failure to admit it would prejudice the proper administration of justice”. The court must also:
- state the reasons why leave is granted, and
 - ensure the holder of the report is informed that the person’s identity has been disclosed.¹³⁹
- 3.86 The *Crimes (Appeal and Review) Act* allows a court to make an order authorising publication of an acquitted person’s identity if this is in the interests of justice. The acquitted person must be given a “reasonable opportunity” to be heard on the application for the order.¹⁴⁰

Question 3.7: When publication or disclosure of information should be permitted

- (1) Are the existing exceptions attached to statutory prohibitions on publishing or disclosing information appropriate? Why or why not?
- (2) What changes, if any, should be made to the existing exceptions?
- (3) What prohibitions, if any, should include exceptions that do not already? What should these be?
- (4) Should standard exceptions apply to all (or most) statutory prohibitions on publishing or disclosing information? If so, what should they be and in what circumstances should they apply?
- (5) Where exceptions allow a court to permit disclosure of protected information, what criteria, if any, should guide that court?

138. See, eg, *Criminal Procedure Act 1986* (NSW) s 280(3); *Law Enforcement and National Security (Assumed Identities) Act 2010* (NSW) s 34(1); *Law Enforcement (Controlled Operations) Act 1997* (NSW) s 28(1); *Witness Protection Act 1995* (NSW) s 26(1).

139. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 29(2)–(3).

140. *Crimes (Appeal and Review) Act 2001* (NSW) s 111(2)–(3).

4. Non-disclosure and suppression: discretionary orders

In Brief

Several specific NSW laws empower courts to make orders restricting the publication, disclosure and broadcast of information. The *Court Suppression and Non-publication Orders Act 2010* (NSW), which establishes a consolidated regime for suppression orders and non-publication orders, is the most notable. We look at how different laws compare and how they might be improved. We also discuss how they interact and consider whether the powers they contain should be further consolidated or standardised.

A variety of powers to make orders	59
Types of action an order may prohibit or require	60
Types of information that may be subject to orders	61
When the subject of the proposed order consents to publication	62
The scope of orders	63
Orders under the <i>Court Suppression and Non-publication Orders Act</i> cannot address “the world at large”	63
An order can contain exceptions and conditions	64
Duration and geographic limits of an order	65
Procedures for making orders	67
By application or court motion	67
When an order can be made	67
Who can appear and be heard in an application for an order	67
Service and notice requirements	68
Costs in proceedings	69
The public interest in open justice	70
Should the principle of open justice be embedded in other statutes that empower the making of suppression and non-publication orders?	72
Is the principle as currently worded effective and appropriate?	72
Grounds for making orders	73
The “necessary” test in the <i>Court Suppression and Non-publication Orders Act</i>	73
Grounds for making orders under the <i>Court Suppression and Non-publication Orders Act</i>	75
It is necessary to prevent prejudice to the proper administration of justice	75

It is necessary for national or international security	76
It is necessary to protect the safety of a person	76
It is necessary to avoid undue distress or embarrassment to a party or witness in sexual offence proceedings	77
It is otherwise necessary in the public interest	79
Grounds for making orders in other statutes	80
A requirement to give reasons for decisions	81
Interim orders	81
Review and appeal of orders	83
Appeal and review procedures under the Court Suppression and Non-publication Orders Act	83
Review of orders	83
Appeal of orders	83
Challenges in framing effective orders	85
The interaction between statutes that contain overlapping powers to make suppression and non-publication orders	86
Interaction between the Court Suppression and Non-publication Orders Act and other statutes that permit orders	87
Interaction between the Court Suppression and Non-publication Orders Act and statutory prohibitions	88
Consolidation or standardisation of powers	89

- 4.1 A wide range of laws empower courts to make orders that limit publishing, disclosing and broadcasting information. In this Chapter, we consider these powers and seek your views on what, if anything, should change about them.
- 4.2 The *Court Suppression and Non-publication Orders Act 2010* (NSW) (“*CSNPO Act*”) is the main statute governing such orders. It establishes a consolidated regime for making, reviewing, appealing and enforcing suppression orders and non-publication orders. It applies to all proceedings conducted in the Supreme Court, Land and Environment Court, District Court, Local Court and Children’s Court and any other forum prescribed by the regulations.¹
- 4.3 At least twenty other statutes contain powers to make similar orders. Most of these set out powers that are specific to certain types of evidence, or certain forums.

1. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 3 definition of “court”.

- 4.4 The powers we discuss in this Chapter are discretionary powers. This means the court can decide whether to make an order (and, in some cases, what the order should contain and how and when it should apply). Discretionary powers are different from automatic prohibitions, which require specified types of information not to be published or disclosed. We consider automatic prohibitions in Chapter 3.
- 4.5 Some submissions indicate support for the *CSNPO Act* and consider it appropriately balances competing interests, while others disagree. Some report that the number of orders made by NSW courts each year has increased substantially since the *CSNPO Act* came into force.² We have not been able to access data on the number of orders currently made by NSW courts. Estimates vary from around 150 to 250 orders per year.³ This has led to concern that “rather than just consolidating existing powers, the Act has sparked both a surge in applications for suppression orders and an increase in the amount of orders granted”.⁴
- 4.6 One submission argues that the Local and District Courts, in particular, have become more permissive in making orders since the *CSNPO Act* came into force, and that it is vital this is addressed:

If it is not addressed, powerful litigants with significant resources may have the potential to receive greater protection than what is enjoyed by ordinary parties.⁵

A variety of powers to make orders

- 4.7 The powers to make orders limiting the publication or disclosure of information can be broadly divided into three groups:
- general powers to make orders (for example, the powers in the *CSNPO Act*)
 - powers to make orders about certain types of evidence (for example, terrorism evidence),⁶ and

2. R Hannan, *Preliminary Submission PCI19* [1.2]; P Bateman, “The Rise and Rise of Suppression Orders”, *Gazette of Law and Journalism* (14 March 2013); K Duggan, *Preliminary Submission PCI20* [2.6]–[2.7].

3. R Hannan, *Preliminary Submission PCI19*, 2; K Duggan, *Preliminary Submission PCI20* [2.6]–[2.7]; R Ackland, “Australia: A Brief History of Recent Court Suppression Orders”, *Gazette of Law and Journalism* (30 December 2018).

4. P Bateman, “The Rise and Rise of Suppression Orders”, *Gazette of Law and Journalism* (14 March 2013).

5. K Duggan, *Preliminary Submission PCI20* [2.11] citing *John Fairfax Group Pty Ltd v Local Court (NSW)* (1991) 26 NSWLR 131, 143.

- powers limited to certain courts or tribunals (for example, the Mental Health Review Tribunal).⁷
- 4.8 The way the powers are framed varies significantly. Notably, the *CSNPO Act* sets out a considerably more detailed and comprehensive procedure for making orders than other statutes do. For example, the Act details who can appear before a court in an application for an order, and the procedures for interim orders. Most other statutes are silent on such matters.
- 4.9 Given the range of powers to make suppression and non-publication orders in NSW, a key question is how these powers interact with each other. We consider this question at the end of this Chapter.⁸

Types of action an order may prohibit or require

- 4.10 The *CSNPO Act* empowers a court to make suppression and non-publication orders. Under the Act:

- a suppression order is “an order that prohibits or restricts the disclosure of information (by publication or otherwise)”, and
- a non-publication order is “an order that prohibits or restricts the publication of information (but that does not otherwise prohibit or restrict the disclosure of information)”.⁹

A suppression order is therefore broader than a non-publication order.

- 4.11 To publish means to “disseminate or provide access to the public or a section of the public by any means, including by”:

- (a) publication in a book, newspaper, magazine or other written publication,
or
- (b) broadcast by radio or television, or
- (c) public exhibition, or
- (d) broadcast by publication by means of the Internet.¹⁰

6. See, eg, *Terrorism (High Risk Offenders) Act 2017* (NSW) s 59F; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30N.

7. *Mental Health Act 2007* (NSW) s 151(4).

8. See [4.123]–[4.138].

9. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 3 definition of “suppression order” and “non-publication order”.

- 4.12 The definitions of these terms do not apply to other statutes. While other statutes may provide for a power to make a “suppression order” or “non-publication order”, these terms may have different meanings and applications. Some laws also go further than the *CSNPO Act*, by empowering a court to make an order to prohibit, for example, the broadcast of information,¹¹ or to require the redaction or anonymisation of information.¹²

Question 4.1: Actions targeted by an order

- (1) Are the existing definitions of “suppression order” and “non-publication order” in the *Court Suppression and Non-publication Orders Act 2010* (NSW) appropriate? Why or why not?
- (2) What changes, if any, should be made to these definitions?
- (3) What other statutes should these definitions (with or without amendment) apply to?
- (4) What other changes (if any) should be made to these statutes in relation to the types of action an order may prevent?

Types of information that may be subject to orders

- 4.13 NSW statutes give courts powers to make orders in relation to a wide range of information. Powers might be broad (for example, to make orders regarding “any report of proceedings”),¹³ or specific (for example, to make orders regarding information about an adopted person).¹⁴
- 4.14 Powers generally relate to one of the following types of information:
- a report of proceedings¹⁵
 - evidence given in proceedings¹⁶
 - documents and files lodged in connection with proceedings¹⁷

10. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 3 definition of “publish”.

11. See, eg, *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 45(2); *Civil and Administrative Tribunal Act 2013* (NSW) s 64(1)(b); *Industrial Relations Act 1996* (NSW) s 164A(1)(b).

12. See, eg, Supreme Court of NSW, *Identity Theft Prevention and Anonymisation Policy* (2010).

13. See, eg, *Drug and Alcohol Treatment Act 2007* (NSW) s 37(4)(b); *Terrorism (Police Powers) Act 2002* (NSW) s 26P(3); *Coroners Act 2009* (NSW) s 75(1)–(2).

14. *Adoption Act 2000* (NSW) s 186(1).

15. See, eg, *Drug and Alcohol Treatment Act 2007* (NSW) s 37(4)(b); *Terrorism (Police Powers) Act 2002* (NSW) s 26P(3); District Court of NSW, *Practice Note (Crime) No 8: Removal of Judgments from the Internet* (2008).

16. See, eg, *Mental Health Act 2007* (NSW) s 151(4)(c); *Industrial Relations Act 1996* (NSW) s 164A(1)(c)–(d); *Independent Commission Against Corruption Act 1988* (NSW) s 112(1)(a).

- information identifying parties, witnesses, and other people,¹⁸ or
 - other specific types of evidence relating to the statutory scheme from which the power comes.¹⁹
- 4.15 Section 7 of the *CSNPO Act* provides that a court may make a suppression or non-publication order about two types of information, namely:
- a person’s identity (specifically, “information tending to reveal the identity of or otherwise concerning any party to or witness in proceedings before the court or any person who is related to or otherwise associated with any party to or witness in proceedings before the court”), and
 - evidence (specifically, “information that comprises evidence, or information about evidence, given in proceedings before the court”).
- 4.16 An order made under the *CSNPO Act* must specify the information to which it applies with “sufficient particularity” to ensure it is limited to achieving its purpose.²⁰

Question 4.2: Types of information that may be subject to an order

(1) Are the current provisions that identify the types of information that may be the subject of a suppression or non-publication order, adequate? Why or why not?

(2) What changes, if any, should be made to these provisions?

When the subject of the proposed order consents to publication

- 4.17 Some submissions suggest the *CSNPO Act* could be amended to prevent a court from making an order if the subject of the order consents to their identity being published.²¹ This might be appropriate, for example, in cases where a victim of a sexual or family violence offence wishes to speak publicly about their experience.²² Cases where it

17. See, eg, *Crime Commission Act 2012* (NSW) s 45(1)(b); *Royal Commissions Act 1923* (NSW) s 12B(1); *Drug and Alcohol Treatment Act 2007* (NSW) s 37(4)(c).

18. See, eg, *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 45; *Law Enforcement (Controlled Operations) Act 1997* (NSW) s 28(1)–(2); *Law Enforcement and National Security (Assumed Identities) Act 2010* (NSW) s 34(1)–(2).

19. See, eg, *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30N(1)–(2); *Lie Detectors Act 1983* (NSW) s 6(3); *Law Enforcement Conduct Commission Act 2016* (NSW) s 176(1).

20. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 9(5).

21. Banki Haddock Fiora, *Preliminary Submission PCI27*, 4; Women’s Domestic Violence Court Advocacy Service NSW, *Preliminary Submission PCI30*, 2–3; No to Violence, *Preliminary Submission PCI38*, 2.

22. Women’s Domestic Violence Court Advocacy Service NSW, *Preliminary Submission PCI30*, 2–3; No to Violence, *Preliminary Submission PCI38*, 2.

might not be appropriate include where other victims of the same offender will be identified but do not wish to be, and where national security is the ground for the order.

- 4.18 In Victoria, a court or tribunal reviewing an order must revoke it if a victim of a sexual offence or family violence offence (who is 18 or over) gives permission for the information to be disclosed, and the court or tribunal decides this is otherwise appropriate. However, the court or tribunal cannot revoke the order if this would disclose the identity of any other victims, and they did not give permission or are under 18.²³

Question 4.3: Consent to publication or disclosure

What provision, if any, should be made about making an order where a person consents to the publication of information that would reveal their identity?

The scope of orders

Orders under the Court Suppression and Non-publication Orders Act cannot address “the world at large”

- 4.19 Australian states and territories cannot create laws that:
- could make internet content hosts legally liable for material they host but are unaware of, or
 - require internet content hosts to “monitor, make inquiries about, or keep records of” content they host.²⁴
- 4.20 These rules are set out in a Commonwealth law. Commonwealth laws override state and territory laws.²⁵
- 4.21 In a 2012 case, the NSW Court of Criminal Appeal (“CCA”) considered an order made under the *CSNPO Act* in criminal proceedings before the District Court. The order prohibited the “disclosure, dissemination or provision of access to” any material referring to other criminal proceedings or alleged unlawful conduct involving the alleged offenders.²⁶
- 4.22 The CCA described this order as being “generic in effect, refer[ring] to no specific material, nor to any identified web site or controller”. It could apply to internet content

23. *Open Courts Act 2013* (Vic) s 15(1B), s 15(1C).

24. *Broadcasting Services Act 1992* (Cth) sch 5 cl 91(1)(b).

25. *Australian Constitution* s 109.

26. *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125, 83 NSWLR 52, [11].

hosts who were not aware they were hosting material subject to the order. It therefore breached the Commonwealth law and was invalid.²⁷

4.23 The CCA commented that an order would not breach the Commonwealth law if specific material had been identified, and the parties had already contacted the internet host and attempted to remove it. In such a case, if the host didn't remove the material in a reasonable amount of time, a court could make an order under the *CSNPO Act*. However, a court cannot make a broad, pre-emptive order "addressed to the world at large".²⁸

4.24 It has been suggested this decision provides important clarity on the operation of the *CSNPO Act*. One submission argues that placing the onus first on the parties to the case to monitor the internet

should be seen as a model approach to reforming suppression and non-publication orders for the modern age, and a more efficient way of dealing with the issue of masses of potentially prejudicial media and information.²⁹

4.25 Some commentators have argued this is a "reasonable" and a "measured approach", because "not all publications or all types of discussion in the vast online environment are likely to influence jury deliberations".³⁰

An order can contain exceptions and conditions

4.26 Section 9(4) of the *CSNPO Act* provides that an order may be subject to exceptions and conditions as the court thinks fit. Laws elsewhere in Australia have similar provisions.³¹ Courts have used this section to add a variety of exceptions and conditions to orders, such as exceptions:

- allowing the information to be published on legal websites, for use by legal practitioners³²

27. *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125, 83 NSWLR 52, [101]–[103].

28. *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125, 83 NSWLR 52, [94]–[95].

29. L Patey, *Preliminary Submission PCI22*, 7.

30. B Fitzgerald and C Foong, "Suppression Orders after *Fairfax v Ibrahim*: Implications for Internet Communications" (2013) 37 *Australian Bar Review* 175, 188–189.

31. *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 111(3); *Evidence Act 1929* (SA) s 69A(4); *Open Courts Act 2013* (Vic) s 19(5).

32. See, eg, *R v Simmons (No 5)* [2015] NSWSC 333 [45]; *Commissioner of Australian Federal Police v Agius* [2017] NSWSC 1764 [51]; *R v Qaumi (No 8)* [2016] NSWSC 1730 [32].

- allowing general details of proceedings to be published, but not specific identifying information,³³ and
- providing the order does not apply to media outlets that have already published the restricted information.³⁴

Duration and geographic limits of an order

- 4.27 Very few statutes that set out powers to make orders contain specific provisions about their duration or geographic limits.
- 4.28 Some statutes relating to criminal or coronial proceedings provide that an order has effect while proceedings are current, but ceases to be in force once the proceedings have ended.³⁵
- 4.29 The *CSNPO Act* states that an order applies only to the disclosure or publication of information in a place where the order applies, as specified in the order. An order is not limited to applying in NSW and can be made to apply anywhere in Australia.³⁶ However, an order is not to be made to apply outside NSW unless the court is satisfied this is “necessary for achieving the purpose for which the order is made”.³⁷
- 4.30 An order operates for the period the court specifies in the order. A court must ensure that an order operates “for no longer than is reasonably necessary to achieve the purpose for which it is made”.³⁸
- 4.31 Case law demonstrates that courts specify the duration of orders in a variety of ways. These include:
- until a specific date³⁹
 - for a period of twelve months,⁴⁰ 25 years, or 50 years⁴¹
 - until the conclusion of a trial⁴²

33. See, eg, *R v NK (No 2)* [2015] NSWSC 1282 [3].

34. *R v Qaumi (No 8)* [2016] NSWSC 1730 [31].

35. See, eg, *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 45(1)–(2); *Coroners Act 2009* (NSW) s 75(2)(a), s 75(4)–(5).

36. See, eg, *R v Dirani (No 23)* [2018] NSWSC 1200, *Commissioner of Police v Luke Sparos (No 3)* [2018] NSWSC 307, *Metlife Insurance Ltd v MX* [2019] NSWCCA 228 [14].

37. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 11(3).

38. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 12(2).

39. *D1 v P1* [2012] NSWCA 314 [85]–[86].

40. *R v Qaumi (No 8)* [2016] NSWSC 1730 [29].

41. *R v Khayat (No 15)* [2020] NSWSC 1451 [9].

- for the duration of the plaintiff's life⁴³
- without a limit,⁴⁴ and
- until further order.⁴⁵

- 4.32 The NSW Attorney General's Department *Report on Access to Court Information* recommended that orders should cease to have effect after 75 years in relation to criminal, adoption and care proceedings, and after 30 years in relation to civil proceedings.⁴⁶ The government adopted the current provisions in the *CSNPO Act* as a more flexible formulation, after consultations highlighted that, while orders should not be open ended, "fixed duration periods may not fit the circumstances of each case or be consistent with similar legislation".⁴⁷
- 4.33 In Victoria, a court may specify that an order operates until a future event occurs. However, the order must also specify a time when the order expires (unless it is revoked earlier). This must not be more than five years from when the order is made.⁴⁸ Further, unless a court orders otherwise, a suppression order expires when any appeal period relating to the proceedings also expires, or when there is an appeal and it is determined.⁴⁹
- 4.34 One submission suggests that the *CSNPO Act* could be amended to require a court to specify the duration and revocation date of an order. The submission also suggests the legislation could prohibit orders being made "until further order".⁵⁰

Question 4.4: Limits to orders

- (1) Are the existing provisions relating to the scope of suppression and non-publication orders appropriate? Why or why not?
- (2) What changes, if any, should be made to existing provisions in relation to:
 - (a) the exceptions and conditions that apply

42. *R v Qaumi (No 15)* [2016] NSWSC 318 [99].

43. *SG v NSW Crime Commission* [2015] NSWSC 881 [10]–[12].

44. *CLD v Children's Guardian* [2017] NSWSC 936 [24].

45. *Antoun v Russo* [2018] NSWSC 1658 [10]; *Re FAL Healthy Beverages Pty Ltd* [2017] NSWSC 630 [16]; *McGinn v Cranbrook School (No 2)* [2015] NSWSC 1485 [9]; *R v Simmons* [2015] NSWSC 73 [6].

46. NSW, Attorney General's Department, *Report on Access to Court Information* (2008) rec 6(f).

47. NSW, *Parliamentary Debates*, Legislative Assembly, Agreement in Principle Speech, 29 October 2010, 27198.

48. *Open Courts Act 2013* (Vic) s 12(3).

49. *Open Courts Act 2013* (Vic) s 12(3A).

50. Banki Haddock Fiora, *Preliminary Submission PCI127*, 5. See also Australia's Right to Know Media Coalition, *Preliminary Submission PCI13*, 3.

- (b) the geographic limits of such orders
- (c) the duration of such orders, and
- (d) any other aspects of the scope of such orders?

Procedures for making orders

4.35 Aside from the *CSNPO Act*, most statutes containing powers to make suppression or non-publication orders do not detail the procedure for making these orders. Almost all statutes simply state words to the effect that a court “may make an order”.⁵¹

By application or court motion

4.36 Under the *CSNPO Act*, a court can make an order:

- on its own initiative
- on the application of a party to the proceedings, or
- on the application of “any other person considered by the court to have a sufficient interest in the making of the order”.⁵²

4.37 Some other statutes provide that a court may make an order on its own motion or on the application of another person (usually, a party to the proceedings).⁵³ A small number of statutes only permit a court to make an order when a party applies.⁵⁴

When an order can be made

4.38 Section 9(3) of the *CSNPO Act* provides that an order may be made at any time during proceedings or after proceedings have concluded. Many other statutes do not specify when an order can be made.⁵⁵

Who can appear and be heard in an application for an order

4.39 The *CSNPO Act* lists the people entitled to appear and be heard in an application for an order. These are:

- the applicant for the order

51. See, eg *Adoption Act 2000* (NSW) s 186(2).

52. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 9(1).

53. See, eg, *Drug and Alcohol Treatment Act 2007* (NSW) s 37(4); *Conveyancers Licensing Act 2003* (NSW) s 107(2); *Civil and Administrative Tribunal Act 2013* (NSW) s 64(1).

54. See, eg, *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30N(1)–(2).

55. See, eg *Adoption Act 2000* (NSW) s 186(2).

- a party to the proceedings concerned
- the government of the Commonwealth or of a state or territory (or a government agency)
- a news media organisation, and
- “any other person who, in the court’s opinion, has a sufficient interest in the question of whether a suppression order or non-publication order should be made”.⁵⁶

4.40 We discuss the definition of “news media organisation” in Chapter 10.⁵⁷

4.41 One submission suggests the list of categories should be removed, and there should instead be “open standing” for anybody who wishes to appear in an application. The submission argues this would support the open justice principle. It notes that open standing has been a feature of consumer litigation for many years “without any evidence that this practice has opened a floodgate of meritless claims”.⁵⁸

Service and notice requirements

4.42 Under the *Uniform Civil Procedure Rules*, a party to proceedings is generally only required to serve applications and files related to those proceedings on the other party.⁵⁹ However, applications for suppression and non-publication orders often involve the public interest. This means there may be particular value in the media, academics, or the general public at least receiving notice of these proceedings.

4.43 It has been suggested news media organisations rarely exercise the right to appear and be heard. Typically, they do not receive notice of applications and are usually only informed about successful applications if the court’s media liaison advises them.⁶⁰ One commentator has observed that a court reporter covering proceedings is often the only representative from a news media organisation in court and they are typically not aware of their organisation’s standing or may be unwilling to advocate for open justice in the proceedings, adding:

56. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 9(2).

57. See [10.125]–[10.126], [10.133]–[10.136], [10.140]–[10.141].

58. J Johnston, P Keyzer, A Wallace and M Pearson, *Preliminary Submission PCI26*, 5–6.

59. See *Uniform Civil Procedure Rules 2005* (NSW) pt 10.

60. L Mullins, “Open Justice Versus Suppression Orders: A Battle of Attrition” (2014) 33(3) *Communications Law Bulletin* 7, 8.

In even the most fortuitous circumstances (such as an application being stood over for the luncheon adjournment), the organisation’s lawyers may have less than an hour to obtain instructions and get to the court.⁶¹

- 4.44 One submission suggests the *CSNPO Act* should include a requirement for service on “affected parties” before applications can be heard.⁶² Another submission suggests the *CSNPO Act* could require some form of prior notice to the media.⁶³
- 4.45 In Victoria, a court or tribunal that receives notice of an application is required to “take reasonable steps to ensure any relevant news media organisation is notified of the application”.⁶⁴

Question 4.5: Service and notice requirements

- (1) Are the existing procedures (under the *Court Suppression and Non-publication Orders Act 2010* (NSW), or any other statute) for making suppression and non-publication orders adequate? Why or why not?
- (2) What changes, if any, should be made to existing procedures in relation to:
 - (a) who may make an application for an order
 - (b) when an order can be made
 - (c) who can appear and be heard in an application for an order
 - (d) the service and notice requirements for an order, or
 - (e) any other matter?

Costs in proceedings

- 4.46 Some submissions raise concerns about the awarding of costs in proceedings for non-publication and suppression orders.⁶⁵
- 4.47 Generally, orders for costs are not made in criminal proceedings.⁶⁶ This includes proceedings for suppression and non-publication orders which arise in the context of criminal proceedings.⁶⁷

61. L Mullins, “Open Justice Versus Suppression Orders: A Battle of Attrition” (2014) 33(3) *Communications Law Bulletin* 7, 8.

62. Banki Haddock Fiora, *Preliminary Submission PCI27*, 5.

63. Australia’s Right to Know Media Coalition, *Preliminary Submission PCI13*, 3.

64. *Open Courts Act 2013* (Vic) s 11(1).

65. J Johnston, P Keyzer, A Wallace and M Pearson, *Preliminary Submission PCI26*, 6; Banki Haddock Fiora, *Preliminary Submission PCI27*, 4–5.

66. Judicial Commission of NSW, *Local Court Bench Book*, (retrieved 6 November 2020) [5-600].

- 4.48 However, in civil proceedings, where costs orders are made, a party may be able to recover costs for proceedings for suppression and non-publication orders which arise out of those proceedings.⁶⁸ This means that, even though the same statute is being applied, a party's entitlement to costs may differ depending on whether the underlying proceedings are civil or criminal.
- 4.49 One submission argues that all parties in proceedings under the *CSNPO Act* should bear their own costs unless a court rules that a party's submissions are without foundation or merit. The submission argues that the prospect of having a costs order made against a person may be "used by governments to stifle debate and intimidate impoverished or public interest litigants from seeking access to justice".⁶⁹
- 4.50 Another submission recommends the *CSNPO Act* should specifically entitle parties to recover costs in frivolous, vexatious or oppressive non-publication or suppression order applications, or those that are brought, maintained or contested without a proper basis.⁷⁰ This could also apply to other statutes that entitle courts to make suppression or non-publication orders.
- 4.51 One submission suggests that the powers as to costs should be expressly stated in the *CSNPO Act*.⁷¹

Question 4.6: Costs in proceedings for orders

What provision, if any, should be made for costs orders in relation to applications for suppression or non-publication orders?

The public interest in open justice

- 4.52 The public interest in open justice is a key consideration in the exercise of any power to suppress the publication, disclosure or broadcast of information relating to legal proceedings. However, only the *CSNPO Act* contains a statement to this effect. Section 6 provides:

67. *Australian Broadcasting Corporation v Local Court of NSW (No 2)* [2014] NSWSC 515 [18]–[21]; *R v Martinez (No 7)* [2020] NSWSC 361 [34]; Judicial Commission of NSW, *Criminal Trial Courts Bench Book*, (retrieved 6 November 2020) [1-349].

68. *Australian Broadcasting Corporation v Local Court of NSW (No 2)* [2014] NSWSC 515 [18]–[21].

69. J Johnston, P Keyzer, A Wallace and M Pearson, *Preliminary Submission PCI26*, 5–6.

70. Banki Haddock Fiora, *Preliminary Submission PCI27*, 4–5.

71. Australia's Right to Know Media Coalition, *Preliminary Submission PCI13*, 3–4.

In deciding whether to make a suppression order or non-publication order, a court must take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice.⁷²

4.53 In introducing the *CSNPO Act* to Parliament, the Parliamentary Secretary for Justice said the Government’s clear policy intention was to

[p]romote access to court information to the public, including the media. Our intention is to promote transparency and a greater understanding of the justice system. However, at the same time we must ensure that the fair conduct of court proceedings, the administration of justice and the privacy and safety of participants in court proceedings are not unduly compromised.⁷³

4.54 Previous provisions that were repealed by the *CSNPO Act* did not contain “policy” or “objectives” statements. Courts applying the *CSNPO Act* have emphasised the difference between s 6 of the Act and previous laws.⁷⁴

4.55 Like the *CSNPO Act*, the equivalent statutes elsewhere in Australia have “objectives” or “policy” provisions. For example, in South Australia (“SA”), a court:

- must recognise that a “primary objective” in the administration of justice is to safeguard the public interest in open justice and the “consequential right” of the news media to publish information relating to court proceedings, and
- may only make a suppression order if satisfied that special circumstances exist giving rise to a “sufficiently serious threat of prejudice to the proper administration of justice, or undue hardship”, to justify the making of the order in the particular case.⁷⁵

4.56 In Victoria, a court or tribunal:

- is to have regard to the primacy of the principle of open justice and the free communication and disclosure of information in determining whether to make a suppression order, and
- is only to make a suppression order if satisfied the specific circumstances of a case make it necessary to “override or displace” the principle of open justice and the free communication and disclosure of information.⁷⁶

72. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 6.

73. NSW, *Parliamentary Debates*, Legislative Assembly, Agreement in Principle Speech, 29 October 2010, 27197.

74. *Ashton v Pratt* [2011] NSWSC 1092 [8].

75. *Evidence Act 1929* (SA) s 69A(2).

76. *Open Courts Act 2013* (Vic) s 4.

Should the principle of open justice be embedded in other statutes that empower the making of suppression and non-publication orders?

- 4.57 The other NSW statutory powers to make orders we consider in this Chapter, do not contain an “objective” or “policy” provision highlighting the importance of open justice. This may mean courts are not giving due consideration to the principle.

Is the principle as currently worded effective and appropriate?

- 4.58 We have heard a range of views about the open justice objective in the *CSNPO Act*. Some support it and believe it fulfils its intention.⁷⁷ Others argue it does not go far enough to protect and uphold the principle of open justice.⁷⁸ One submission suggests that the section should be amended to state

that open justice is the primary objective of the Act and may only be departed from in exceptional cases, and only if the facts of the case demonstrate a clear necessity to suppress information in order to achieve justice.⁷⁹

- 4.59 Others disagree that the principle of open justice should be the central concern. One submission suggests the *CSNPO Act* should be amended to add the principle of free communication of information, a presumption in favour of disclosure of information, and a recognition of the consequential right of the news media to publish information relating to court proceedings.⁸⁰ Another suggests that the section could require courts to undergo a “balancing exercise between the public interest in open justice” and “competing interests sought to be protected by the order”.⁸¹

Question 4.7: The public interest in open justice

- (1) Does the *Court Suppression and Non-publication Orders Act 2010* (NSW) deal with the consideration of the public interest in open justice appropriately? Why or why not?
- (2) What changes, if any, should be made to the existing provision?
- (3) What provision, if any, should be made in other statutes that grant power to make suppression or non-publication orders for recognising the public interest in open justice?
- (4) What other considerations should be taken into account before an order is made?

77. NSW Young Lawyers Criminal Law Committee, *Preliminary Submission PCI37*, 3.

78. K Duggan, *Preliminary Submission PCI20*, 3–4; Australia’s Right to Know Media Coalition, *Preliminary Submission PCI13*, 3; See also L Mullins, “Open Justice Versus Suppression Orders: A Battle of Attrition” (2014) 33(3) *Communications Law Bulletin* 7, 8.

79. K Duggan, *Preliminary Submission PCI20*, 3–4 (emphasis in original).

80. Australia’s Right to Know Media Coalition, *Preliminary Submission PCI13*, 3.

81. Banki Haddock Fiora, *Preliminary Submission PCI27*, 4.

Grounds for making orders

- 4.60 Most statutes that set out powers to make non-publication and suppression orders do not set out conditions (or reasons) that must be satisfied before the power can be exercised. These statutes simply permit the court to make the order.⁸²
- 4.61 The *CSNPO Act* has the most extensive and detailed list of grounds upon which an order can be made. The *Coroners Act 2009* (NSW) also has a detailed list of grounds.⁸³
- 4.62 Grounds tend to be framed in terms of whether the order is “necessary”. This is a requirement for all five grounds in the *CSNPO Act*. Therefore, before we discuss the grounds themselves under the various statutes, we explain the “necessary” test.

The “necessary” test in the Court Suppression and Non-publication Orders Act

- 4.63 The “necessary” test was part of the common law test for making suppression orders.⁸⁴ At common law, necessity arose only in “wholly exceptional” circumstances,⁸⁵ and was applied with a “high level of strictness”.⁸⁶
- 4.64 In 2003, the NSW Law Reform Commission recommended codifying the “necessary” test.⁸⁷ The test is also used elsewhere.⁸⁸
- 4.65 The NSW Court of Appeal has found orders under the *CSNPO Act* “should only be made in exceptional circumstances”, similar to the common law.⁸⁹ In one case, the Court said:

an order is not “necessary” if it appears to the court “to be convenient, reasonable or sensible, or to serve some notion of the public interest, still less

82. See, eg *Adoption Act 2000* (NSW) s 186(2).

83. *Coroners Act 2009* (NSW) s 74(2).

84. R Hannan, *Preliminary Submission PCI19*, 2.

85. *John Fairfax Publications Pty Ltd v Ryde Local Court* [2005] NSWCA 101, 62 NSWLR 512 [45] (Spigelman CJ); *R v Simmons* (No 5) [2015] NSWSC 333 [27].

86. *O’Shane v Burwood Local Court* (NSW) [2007] NSWSC 1300 [34]; *John Fairfax Publications Pty Ltd v Ryde Local Court* [2005] NSWCA 101, 62 NSWLR 512 [40]–[45].

87. NSW Law Reform Commission, *Contempt by Publication*, Report 100 (2003) [10.20]; see also NSW Law Reform Commission, *Contempt by Publication*, Discussion Paper 43 (2000) ch 10.

88. See, eg, *Federal Court of Australia Act 1976* (Cth) s 37AG; *Contempt of Court Act 1981* (UK) s 4(2), s 11.

89. *Rinehart v Welker* [2011] NSWCA 403, 93 NSWLR 311 [27].

that, as the result of some ‘balancing exercise’, the order appears to have one or more of those characteristics”.⁹⁰

- 4.66 In a later case, the Court confirmed that “necessary”, for the purposes of the *CSNPO Act*, means more than “reasonably required or legally ancillary”.⁹¹ However, it does not mean that the order must be “essential”, as this would put the threshold too high.⁹²
- 4.67 In an earlier CCA case, Justice Basten said the meaning of “necessary” may differ between the grounds. It “may not take the same place on the variable scale of meaning in each case” and “[has] a colour which will depend upon the circumstances”.⁹³
- 4.68 Courts have also said the following about applying the “necessary” test:
- in deciding whether a non-publication order is necessary to prevent a jury from being prejudiced, a court must consider whether a jury is likely to abide by a direction not to research the case themselves⁹⁴
 - the fact that the information which the order intends to suppress has already been reported does not mean that the order should not be made⁹⁵
 - the party seeking an order does not need to prove they have attempted to mitigate any harms associated with the information being disclosed or published,⁹⁶ and
 - orders purporting to restrict public access to internet materials will not be considered “necessary” unless the parties can show that they have already requested that the materials be taken down, and this request has not been complied with.⁹⁷
- 4.69 In one case, the CCA considered orders which purported to restrict access, across Australia, to a wide range of information on the internet. The court found the fact that the orders needed to be so broad in scope demonstrated that they would be ineffective. It held that to be effective, the orders would have to bind numerous parties whose

90. *Rinehart v Welker* [2011] NSWCA 403, 93 NSWLR 311 [30], citing *Hogan v Australian Crime Commission* [2010] HCA 21, 240 CLR 651 [31]. See also *Brown v R (No 2)* [2019] NSWCCA 69 [25]–[26]; *D1 v P1* [2012] NSWCA 314 [48].

91. *R v AB (No 1)* [2018] NSWCCA 113, 97 NSWLR 1015 [73]–[75].

92. *R v AB (No 1)* [2018] NSWCCA 113, 97 NSWLR 1015 [75], [78]–[79].

93. *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125, 83 NSWLR 52 [45]–[46].

94. *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125, 83 NSWLR 52 [77].

95. *AB v R (No 3)* [2019] NSWCCA 46 [116]–[117].

96. *AB v R (No 3)* [2019] NSWCCA 46 [111].

97. *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125, 83 NSWLR 52 [98].

identity was impossible to know; and that enforcement against a party who was not in NSW would be “impracticable, if not impossible”.⁹⁸

- 4.70 Because the orders were deemed to be ineffective in actually restricting access to information, the court found that they could not be considered “necessary”.⁹⁹ This case therefore has important implications for the application of the *CSNPO Act* in the case of internet materials, particularly where such materials are widely published and available.
- 4.71 One submission suggests “necessity” could be expressly defined in the *CSNPO Act*. It suggests such a definition could include principles developed in case law.¹⁰⁰

Question 4.8: The “necessary” test for making orders

- (1) What changes, if any, should be made to the “necessary” test?
- (2) Should a definition of “necessary” be included in the *Court Suppression and Non-publication Orders Act 2010* (NSW) or any other statute? If so, what should it be?

Grounds for making orders under the Court Suppression and Non-publication Orders Act

- 4.72 The *CSNPO Act* sets out five grounds on which courts may make a suppression order or non-publication order. These vary and expand the common law.¹⁰¹ As we note above, all five grounds are prefaced with a requirement that the order is “necessary”.¹⁰²
- 4.73 Under the *CSNPO Act*, an order must specify the ground or grounds on which it is made. None of the Acts which entitle the making of suppression or non-publication orders require this.

It is necessary to prevent prejudice to the proper administration of justice

- 4.74 The *CSNPO Act* provides that an order may be made if it is necessary to prevent prejudice to the proper administration of justice.¹⁰³ This ground may be engaged when, for example, it is necessary to prohibit the disclosure of certain evidence in one trial, so that it does not prejudice related trials.¹⁰⁴

98. *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125, 83 NSWLR 52 [73]–[74], [78].

99. *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125, 83 NSWLR 52 [78]–[80].

100. Banki Haddock Fiora, *Preliminary Submission PCI127*, 5.

101. E Cunliffe, “Open Justice: Concepts and Judicial Approaches” (2012) 40 *Federal Law Review* 385, 397; R Hannan, *Preliminary Submission PCI19*, 2.

102. See [4.62].

103. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 8(1)(a).

104. *R v Dirani (No 23)* [2018] NSWSC 1200 [18]–[24].

4.75 In a CCA case, Justice Basten observed that, while the primary purpose of the other grounds is to permit a court to protect witnesses and parties from the disclosure of information about them to the general public, only this ground “appears to extend to the protection of the jury from inflammatory or irrelevant material while the proceedings are on foot”.¹⁰⁵

4.76 An order will not meet this ground just because not making it may cause embarrassment and reputational damage to a party. This includes if, without an order, certain allegations against a party were public, but the party’s response was not.¹⁰⁶

It is the price of open justice that allegations about individuals are aired in open court. Such individuals, particularly if they are parties, can make their response to such allegations public in the same forum.¹⁰⁷

4.77 Legislation in some other Australian states includes a similar ground for making an order.¹⁰⁸ For example, in Victoria, a “proceeding suppression order” may be granted if “the order is necessary to prevent a real and substantial risk of prejudice to the proper administration of justice that cannot be prevented by other reasonably available means”.¹⁰⁹

It is necessary for national or international security

4.78 An order may be made if it is necessary to prevent prejudice to the interests of the Commonwealth or a state or territory in relation to national or international security.¹¹⁰

It is necessary to protect the safety of a person

4.79 An order may be made if it is necessary to protect the safety of any person. “Safety” includes psychological safety, including avoiding aggravation of a pre-existing mental condition, and avoiding an increased risk of suicide or other self-harm.¹¹¹

4.80 The CCA has confirmed that the correct way to interpret this ground is the “calculus of risk” approach. This approach

105. *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125, 83 NSWLR 52 [36].

106. *Rinehart v Welker* [2011] NSWCA 403, 93 NSWLR 311 [53]–[55].

107. *Rinehart v Welker* [2011] NSWCA 403, 93 NSWLR 311 [54].

108. See, eg, *Evidence Act 1929* (SA) s 69A(1)(a); *Open Courts Act 2013* (Vic) s 18(1)(a), s 26(1)(a).

109. *Open Courts Act 2013* (Vic) s 18(1)(a).

110. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 8(1)(b); *Roberts-Smith v Fairfax Media Publications Pty Ltd* [2018] FCA 1943 [28]–[38].

111. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 8(1)(c), *AB v R (No 3)* [2019] NSWCCA 46, 97 NSWLR 1046 [59].

requires the court to consider the nature, imminence and degree of likelihood of harm occurring to the relevant person. If the prospective harm is very severe, it may be more readily concluded that the order is necessary even if the risk does not rise beyond a mere possibility.¹¹²

It is necessary to avoid undue distress or embarrassment to a party or witness in sexual offence proceedings

4.81 An order may be made if it is “necessary to avoid causing undue distress or embarrassment to a party to or witness in criminal proceedings involving an offence of a sexual nature”.¹¹³

4.82 In one case, the CCA refused to grant an order suppressing the identity of such a witness because there was “limited evidence” about them in the trial.¹¹⁴ The Court said:

Even if, due to inaccurate reporting, there was some scope for embarrassment to the applicant, or unpalatable untruths being reported, it is not in the interests of the public for courts to impose limits on media reporting of criminal proceedings in an attempt to obviate that prospect, in circumstances where embarrassment could not be significant, or reach the heights of anything more than discomfort. Minor [discomfort] is not what the legislation operates to prevent.¹¹⁵

4.83 Some submissions argue that the ground as currently expressed sets too high a bar for an order to be granted. They submit the ground should provide stronger protection for victims of sexual offences.¹¹⁶ One submission argues this is necessary because:

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.¹¹⁷

4.84 Submissions note that, in some cases, complainants may wish to be identified but their names are suppressed automatically, without being consulted.¹¹⁸ While courts

112. *AB v R (No 3)* [2019] NSWCCA 46, 97 NSWLR 1046 [56]–[58]. See also *Brown v R (No 2)* [2019] NSWCCA 69 [26]–[27], [36]–[38].

113. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 8(1)(d).

114. *Liu v Fairfax Media Publications Pty Ltd* [2018] NSWCCA 159 [45]–[47].

115. *Liu v Fairfax Media Publications Pty Ltd* [2018] NSWCCA 159 [47].

116. H Brown, *Preliminary Submission PCI10*, 3–4; Victims of Crime Assistance League Inc NSW, *Preliminary Submission PCI32*, 3; knowmore, *Preliminary Submission PCI35*, 6; Rape and Domestic Violence Services Australia, *Preliminary Submission PCI36*, 8; Office of the Director of Public Prosecutions, *Preliminary Submission PCI12*, 7.

117. Victims of Crime Assistance League Inc NSW, *Preliminary Submission PCI32*, 3.

sometimes do consult complainants, there is no express power or requirement to do so.¹¹⁹ Some say there should be.¹²⁰

4.85 Unlike the Victorian provision,¹²¹ the *CSNPO Act* allows orders to be made where necessary to avoid causing undue distress or embarrassment to a defendant in sexual offence proceedings. However, this is qualified by a proviso that a court may only make an order in respect of a defendant “if there are exceptional circumstances”.¹²²

4.86 In introducing the amendment in 2018,¹²³ the government justified the proviso by stating that a sexual offence defendant “should not be able to have their name suppressed merely to avoid distress and embarrassment”.¹²⁴

4.87 Some submissions argue that, despite the proviso, this ground sets too low a threshold in the case of defendants in sexual proceedings.¹²⁵ One submission suggests that the ground could be amended to require “a sound evidentiary basis for finding that exceptional circumstances apply, which are unrelated to the nature or severity of the accused’s alleged offending”.¹²⁶

4.88 Another submission recommends that orders should not be available to defendants at all. It argues:

All criminal offences have an element of embarrassment, but, if the purposes of sentencing are truly meant to reflect community denunciation, hiding behind anonymity because of embarrassment subverts the sentencing process, especially when the concept of rehabilitation is a fundamental precept of sentencing.¹²⁷

4.89 Accommodating these views may require separating this ground so there are different tests for an order made with respect to a sexual offence complainant or witness, on one hand, and a defendant, on the other hand. Another possible approach is to require orders in respect of defendants to lapse upon conviction.

118. See, eg, H Brown, *Preliminary Submission PCI10*, 4; Victims of Crime Assistance League Inc NSW, *Preliminary Submission PCI32*, 3–4; knowmore, *Preliminary Submissions PCI35*, 3–4.

119. H Brown, *Preliminary Submission PCI10*, 4.

120. Public Defenders, *Preliminary Submission PCI33*, 5.

121. *Open Courts Act 2013* (Vic) s 18(1)(d).

122. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 8(3).

123. *Justice Legislation Amendment Bill Act (No 2) 2018* (NSW) sch 1 cl 1.3[1].

124. NSW, *Parliamentary Debates*, Legislative Council, Second Reading Speech, 23 May 2018, 259.

125. Banki Haddock Fiora, *Preliminary Submission PCI27*, 5; H Brown, *Preliminary Submission PCI10*, 4.

126. Banki Haddock Fiora, *Preliminary Submission PCI27*, 5.

127. H Brown, *Preliminary Submission PCI10*, 4.

It is otherwise necessary in the public interest

- 4.90 An order may be made if it is “otherwise necessary in the public interest” and the public interest “significantly outweighs the public interest in open justice”.¹²⁸
- 4.91 This ground was included in the 2010 model legislation published by the Standing Committee of Attorneys-General.¹²⁹ However, as several submissions highlight,¹³⁰ it was not included in the *Open Courts Act 2013* (Vic) (“*Open Courts Act*”), nor various Commonwealth statutes that were amended in response to the model legislation.¹³¹ The Victorian Attorney-General specifically chose to exclude this ground, describing it as “open-ended and poorly defined”.¹³²
- 4.92 In a case involving a dispute over guardianship arrangements for the applicant’s elderly mother, the applicant wanted to publicise the case to criticise the Public Guardian (the respondent). The Public Guardian sought a pseudonym order to prevent this, relying on the “otherwise necessary in the public interest” ground. The Court refused to make the order, finding:
- The fact that a party may wish to give publicity to proceedings is scarcely a novelty and certainly not a reason to mask the identity of a party to proceedings through the employment of a pseudonym ... the importance of open justice and the dictates of s 8(1) of the [*CSNPO Act*] require both a cogent and non-speculative basis, supported by evidence, for such an order.¹³³
- 4.93 Some submissions are critical of this ground and want it removed altogether, because it is too wide and allows too much judicial discretion.¹³⁴ One submission suggests that this would reduce the number of unnecessary orders granted in NSW.¹³⁵

128. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 8(1)(e).

129. Australia, Standing Committee of Attorneys-General, *Court Suppression and Non-publication Orders Bill 2010*, Draft Model Bill (2010) cl 8(1)(e). See Chapter 1 for a brief history of the model legislation.

130. L Patey, *Preliminary Submission PCI22*, 2–3; R Hannan, *Preliminary Submission PCI19*, 3; K Duggan, *Preliminary Submission PCI20* [2.15].

131. See *Access to Justice (Federal Jurisdiction) Amendment Act 2012* (Cth) sch 2.

132. Victoria, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 27 June 2013, 2418.

133. *Misrachi v Public Guardian* [2019] NSWCA 67 [10].

134. R Hannan, *Preliminary Submission PCI19*, 3; K Duggan, *Preliminary Submission PCI20*, [2.14]–[2.18]; L Patey, *Preliminary Submission PCI22*, 1–3.

135. R Hannan, *Preliminary Submission PCI19*, 3.

Grounds for making orders in other statutes

- 4.94 Statutes other than the *CSNPO Act* require certain grounds to be met before an order can be made. These grounds can be broadly grouped as follows:
- the order is necessary or appropriate in the court’s view (generally)¹³⁶
 - making the order is necessary to secure relevant statutory objects¹³⁷
 - making the order is in the interests of justice¹³⁸
 - making the order is in the public interest¹³⁹
 - making (or not making) the order would be procedurally unfair to an accused person (or otherwise affect their right to a fair trial),¹⁴⁰ and
 - making the order is necessary for a person’s safety and/or welfare.¹⁴¹
- 4.95 Some grounds not reflected in NSW statutes but that exist elsewhere in Australia include:
- publishing the evidence “is likely to offend against public decency”,¹⁴² and
 - making the order will prevent undue hardship to a victim, witness or child.¹⁴³

Question 4.9: Grounds for making orders

- (1) Are the grounds for making suppression and non-publication orders under the *Court Suppression and Non-publication Orders Act 2010* (NSW) and other NSW statutes appropriate? Why or why not?
- (2) What changes, if any, should be made to them?

136. See, eg, *Minors (Property and Contracts) Act 1970* (NSW) s 43(5); *Terrorism (High Risk Offenders) Act 2017* (NSW) s 59F(1); *Civil and Administrative Tribunal Act 2013* (NSW) s 64(1).

137. See, eg, *Terrorism (Police Powers) Act 2002* (NSW) s 26P(3).

138. See, eg, *Law Enforcement (Controlled Operations) Act 1997* (NSW) s 28(1); *Law Enforcement and National Security (Assumed Identities) Act 2010* (NSW) s 34(1); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30N(1)–(2).

139. See, eg, *Coroners Act 2009* (NSW) s 74(1)–(2).

140. See, eg, *Crime Commission Act 2012* (NSW) s 45(1)–(2); *Coroners Act 2009* (NSW) s 74(2)(b); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30N(2).

141. See, eg, *Drug and Alcohol Treatment Act 2007* (NSW) s 37(4)(b)–(d); *Evidence Act 1995* (NSW) s 126E(b); *Crime Commission Act 2012* (NSW) s 45(1)–(2).

142. *Evidence Act 1939* (NT) s 57(1)(a).

143. *Evidence Act 1929* (SA) s 69A(1).

A requirement to give reasons for decisions

- 4.96 As already noted, the *CSNPO Act* provides that an order must specify the ground or grounds on which it is made. While grounds must be stated, courts are not required to give reasons for an order.
- 4.97 One submission argues that in practice, courts already articulate their reasons when they state the ground upon which an order is made.¹⁴⁴ Others disagree, and say that the *CSNPO Act* should explicitly require a court to give reasons for its decision, including when it decides *not* to make an order. In cases when an order is made, the court should give reasons in addition to stating the grounds for an order.¹⁴⁵ A lack of such a requirement “leads to a culture of these orders being the norm when an application for one is made, thus detrimentally impacting the principle of open justice”.¹⁴⁶
- 4.98 In Victoria, the *Open Courts Act* requires a court or tribunal that makes a suppression order to give reasons. This must include the reasons for the terms, duration, grounds and scope of the order. However, this requirement does not apply to an interim order, an order varying or revoking a suppression order, or if doing so would make the order ineffective. A failure to give reasons does not make the order invalid.¹⁴⁷
- 4.99 In SA, a court that makes a suppression order must forward a report to the Attorney-General within 30 days setting out the terms and details of the order, including full particulars of the reasons for which the order was made.¹⁴⁸

Question 4.10: A requirement to give reasons

- (1) Should courts be required to give reasons for a decision to make or refuse to make a suppression or non-publication order in some or all circumstances? Why or why not? In what circumstances should this requirement apply?
- (2) If there was to be a requirement, how should it be expressed?

Interim orders

- 4.100 The *CSNPO Act* empowers a court to make an interim order before deciding the merits of an application. An interim order applies until the application is decided. Once an interim order is made, the court must decide the application as a matter of urgency.¹⁴⁹

144. NSW, Public Defenders, *Preliminary Submission PCI33*, 3.

145. University of Sydney Policy Reform Project, *Preliminary Submission PCI11* [2.4], [9.1], [10.1]; Banki Haddock Fiora, *Preliminary Submission PCI27*, 5.

146. University of Sydney Policy Reform Project, *Preliminary Submission PCI11* [2.4].

147. *Open Courts Act 2013* (Vic) s 14A.

148. *Evidence Act 1929* (SA) s 69A(8)(b).

- 4.101 Victoria and SA also have statutory powers to make interim orders.¹⁵⁰ Besides the *CSNPO Act*, no other NSW statute that sets out powers to make such orders contains procedures for interim orders.
- 4.102 In the 2003 report on contempt by publication, the NSW Law Reform Commission recommended that courts should be empowered to make interim suppression orders.¹⁵¹ The Standing Committee of Attorneys-General working group also recommended this, saying it was “a practical necessity to ensure that the regime worked effectively”.¹⁵²
- 4.103 In one case, the NSW Court of Appeal considered whether an order made by the Children’s Court was an interim order. The order in question was titled “Interim Order”. Despite this, the Court found the order was made under s 7 of the *CSNPO Act* and not under the interim order provisions. This is because it was made “following a determination of the merits of making such an order” (which is characteristic of an order made under s 7), and not made “at the outset of an application for a suppression or non-publication order” (which is characteristic of an interim order).¹⁵³ This case demonstrates that the context in which an order is made, and the processes leading to it, are the key distinguishing features between an interim and “final” order.
- 4.104 One submission recommends that interim orders should be renamed “postponement orders”, arguing, “this term is more neutral and descriptive of the reasons behind the order. The term also has the effect of clearly anticipating when the order will cease”.¹⁵⁴

Question 4.11: Interim orders

- (1) Is the current provision in the *Court Suppression and Non-publication Orders Act 2010* (NSW) for interim orders appropriate and effective? Why or why not?
- (2) What changes, if any, should be made to the existing provision?
- (3) What provision, if any, should be made for interim orders in other statutes that grant powers to make suppression or non-publication orders?

149. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 10(1)–10(2).

150. *Evidence Act 1929* (SA) s 69A(3); *Open Courts Act 2013* (Vic) s 20.

151. NSW Law Reform Commission, *Contempt by Publication*, Report 100 (2003) rec 22.

152. NSW, *Parliamentary Debates*, Legislative Assembly, Agreement in Principle Speech, 29 October 2010, 27198.

153. *Burton v Office of the Director of Public Prosecutions* [2019] NSWCA 245, 100 NSWLR 734 [111]–[113].

154. NSW, Office of the Director of Public Prosecutions, *Preliminary Submission PCI12*, 5.

Review and appeal of orders

- 4.105 Most statutes that empower courts to make suppression or non-publication orders do not set out procedures for the review or appeal of orders. The few exceptions include statutes that provide for a court to “vary or revoke” an order on its own motion.¹⁵⁵
- 4.106 Apart from in the *CSNPO Act*, there are generally no procedures for a party to proceedings (or anybody else, such as a media entity) to seek review or appeal of an order. This is one of the key ways in which the *CSNPO Act* differs from other statutes.

Appeal and review procedures under the Court Suppression and Non-publication Orders Act

- 4.107 Sections 13 and 14 of the *CSNPO Act* set out the procedures for review and appeal. A review is conducted by the original court which granted the order, whereas an appeal is to an appellate court, either in respect of the original order or a reviewed order.¹⁵⁶

Review of orders

- 4.108 A court that makes an order may review it on its own initiative or on the application of a person entitled to apply for the review. The people entitled to apply are the same as those who are entitled to apply for an order. On review, a court may confirm, vary or revoke the order. The court may also make another order under the *CSNPO Act*.¹⁵⁷
- 4.109 In SA, orders made during criminal proceedings must be reviewed when the proceedings conclude (for example, if the defendant is convicted or acquitted, or the charge is withdrawn).¹⁵⁸ There is no equivalent for orders made during civil proceedings.

Appeal of orders

- 4.110 An appellate court can, with leave, hear an appeal against a decision of a court to make or not make an order, or to review or not review an order.¹⁵⁹
- 4.111 The same people who are entitled to apply for an order are entitled to appear and be heard in an appeal. On appeal, an appellate court may confirm, vary or revoke the

155. See, eg, *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 45(7); *Civil and Administrative Tribunal Act 2013* (NSW) s 64(3); *Industrial Relations Act 1996* (NSW) s 164A(4).

156. *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125, 83 NSWLR 52 [5].

157. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 13.

158. *Evidence Act 1929* (SA) s 69AB(1)(a).

159. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 14(1).

original court's order or decision. It may also make any order or decision under the *CSNPO Act* that the original court could have made.¹⁶⁰

4.112 The appellate court for an appeal is the court to which appeals lie against judgments of the original court. If there is no such court, the appellate court is the Supreme Court.¹⁶¹

4.113 Case law has confirmed that:

- appeals from the Children's Court are to the District Court¹⁶²
- appeals from the Coroners Court are to the Supreme Court¹⁶³
- appeals from the Local Court are to the Supreme Court,¹⁶⁴ and
- appeals from the District Court exercising criminal jurisdiction are to the CCA.¹⁶⁵

4.114 An appeal is by way of a rehearing, and fresh evidence may be given.¹⁶⁶ Two submissions criticise this.¹⁶⁷ One argues that allowing fresh evidence is time-consuming and inefficient, and therefore inconsistent with the overriding purpose of just, quick and cheap resolution of proceedings.¹⁶⁸

4.115 Another submission suggests "[t]ightening the circumstances in which leave to appeal may be granted, by way of conditional appeals", so that the process is more efficient and economical.¹⁶⁹

160. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 14(3)–(4).

161. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 14(2).

162. *TR v Constable Cox* [2020] NSWSC 389 [110].

163. *Bissett v Deputy State Coroner* [2011] NSWSC 1182, 83 NSWLR 144 [14].

164. *Australian Broadcasting Corporation v Local Court of NSW (No 2)* [2014] NSWSC 515 [19].

165. *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125, 83 NSWLR 52 [15]. See also *R v AB (No 1)* [2018] NSWCCA 113, 97 NSWLR 1015 [25]; *Nationwide News Pty Ltd v Qaumi* [2016] NSWCCA 97, 93 NSWLR 384 [14]; *Fairfax Digital Australia and New Zealand Pty Ltd v District Court of NSW* [2012] NSWCA 172 [7]. But see *R v AB (No 1)* [2018] NSWCCA 113, 97 NSWLR 1015 [66]–[70] (Rothman J).

166. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 14(5). See also *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125, 83 NSWLR 52 [21]; *D1 v P1* [2012] NSWCA 314 [43]; *Liu v Fairfax Media Publications Pty Ltd* [2018] NSWCCA 159 [25]; *R v AB (No 1)* [2018] NSWCCA 113, 97 NSWLR 1015 [6].

167. R Hannan, *Preliminary Submission PCI19*, 5–7; K Duggan, *Preliminary Submission PCI20* [3.1]–[3.4].

168. R Hannan, *Preliminary Submission PCI19*, 5–7.

169. K Duggan, *Preliminary Submission PCI20* [3.4].

Question 4.12: Review and appeal of orders

- (1) Are the existing provisions relating to the review and appeal of suppression and non-publication orders appropriate? Why or why not?
- (2) What changes, if any, should be made to these provisions?
- (3) To what extent should review and appeal provisions be available for suppression and non-publication orders that are not covered by the *Court Suppression and Non-publication Orders Act 2010* (NSW)?

Challenges in framing effective orders

- 4.116 If orders are not framed properly, they could be ineffective.
- 4.117 Orders are sometimes expressed in a way that does not give the person or organisation bound by the order enough information to adhere to it. One submission observes:
- it is far too common an occurrence for an order to refer to a Court document (such as “the person identified in paragraph [x] of the affidavit of [person y]”), a document that is likely not available for inspection by the media. This reflects a misunderstanding of what constitutes “publication” under the [CSNPO Act] and leads to the ... situation where the media is bound by an order, the subject and effect of which they have no way of knowing.¹⁷⁰
- 4.118 The way an order to protect a person’s identity is framed might not achieve the intended protection.¹⁷¹ Sometimes the media reports specific details of time, location, cultural and religious affiliations, criminal acts, and other particulars that can be enough to identify the protected person.¹⁷²
- 4.119 Problems can also arise when orders are misinterpreted. Some submissions mention cases where identifying information was disclosed due to administrative error, despite the existence of an order.¹⁷³
- 4.120 Under the *CSNPO Act*, an order may be made about “information tending to reveal the identity of or otherwise concerning” a person.¹⁷⁴ Some other statutes are more specific

170. Banki Haddock Fiora, *Preliminary Submission PCI27*, 4. See also 9News, *Preliminary Consultation PCI09*.

171. No to Violence, *Preliminary Submission PCI38*, 2; NSW, Office of the Director of Public Prosecutions, *Preliminary Submission PCI12*, 7.

172. No to Violence, *Preliminary Submission PCI38*, 2.

173. Sex Workers Outreach Project, *Preliminary Submission PCI16*, 5; Women’s Domestic Violence Court Advocacy Service NSW, *Preliminary Submission PCI30*, 4; Victims of Crime Assistance League Inc NSW, *Preliminary Submission PCI32*, 2.

174. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 7(a).

in defining identifying information. For example, the *Civil and Administrative Tribunal Act 2013* (NSW) states that “a reference to the name of a person includes a reference to any information, picture or other material that identifies the person or is likely to lead to the identification of the person”.¹⁷⁵

- 4.121 In the Australian Capital Territory, a person’s name is taken to have been published if a reference or allusion to the person is published, and the person’s identity might reasonably be worked out from the reference or allusion.¹⁷⁶ There is a similar provision in the Northern Territory.¹⁷⁷
- 4.122 While unlikely to solve all of the issues referred to above, amending the language of the *CSNPO Act* might encourage courts to frame orders more effectively.

Question 4.13: Framing effective orders

How could the *Court Suppression and Non-publication Orders Act 2010* (NSW) provisions be amended to assist courts in framing more effective orders?

The interaction between statutes that contain overlapping powers to make suppression and non-publication orders

- 4.123 Given the range of powers to make suppression and non-publication orders in NSW, it is worth considering how these powers interact.
- 4.124 The *CSNPO Act* is not intended to limit or otherwise affect a court’s inherent jurisdiction or any other powers it has.¹⁷⁸ Nor is it intended to affect suppression or non-publication provisions in other statutes or any automatic prohibitions.¹⁷⁹ The second reading speech when the *CSNPO Act* was introduced emphasised that “the Government has been very careful not to dilute any current protections afforded to vulnerable persons in particular”.¹⁸⁰

175. *Civil and Administrative Tribunal Act 2013* (NSW) s 64(4).

176. *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 111(5).

177. *Evidence Act 1939* (NT) s 57(2).

178. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 4. For example, the Supreme Court can give interlocutory relief by way of an injunction that prohibits publication of information to prevent a threatened contempt of court: see, eg, *Y and Z v W* [2007] NSWCA 329, 70 NSWLR 377 [35], [88].

179. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 5.

180. NSW, *Parliamentary Debates*, Legislative Assembly, Agreement in Principle Speech, 29 October 2010, 27197.

- 4.125 It appears the *CSNPO Act* can operate harmoniously with other restrictions on the publication and disclosure of information. While these other restrictions generally apply to specific types of cases, the *CSNPO Act* can also potentially apply to the specific case types as well as cover situations that fall outside these other statutes. The courts have outlined some principles relevant to the interactions between such powers, which we consider below.¹⁸¹
- 4.126 The position in Victoria is different. The *Open Courts Act*, like the *CSNPO Act*, states that it does not limit or otherwise affect other restrictions on open justice in other statutes. However, it also says that if an order can be made under another statute, the court or tribunal must not make that order under the *Open Courts Act*. Further, a court or tribunal must not make an order under the *Open Courts Act* prohibiting the publication or disclosure of information, if this is already automatically prohibited by another statute.¹⁸²
- 4.127 The *CSNPO Act* does not have an equivalent provision. On one view, such a provision could provide useful guidance on when to apply the *CSNPO Act* and could avoid overlap between different legislative provisions. On the other hand, it could limit the use of the *CSNPO Act* in situations where it may be preferable to apply it.
- 4.128 We have heard of courts making suppression and non-publication orders about information already the subject of an automatic prohibition. This could be unnecessary and confusing.¹⁸³

Interaction between the Court Suppression and Non-publication Orders Act and other statutes that permit orders

- 4.129 A recent CCA case considered the interaction between the *CSNPO Act* and other statutes that permit suppression and non-publication orders.¹⁸⁴ In this case, a defendant in criminal proceedings had been examined by the NSW Crime Commission (“Crime Commission”). The Crime Commission had made an order, under the *Crime Commission Act 2012 (NSW)* (“*Crime Commission Act*”), prohibiting the publication of evidence about the defendant’s examination.¹⁸⁵ The defendant applied for an order under the *CSNPO Act* to suppress information about the proceedings, which fell outside of the direction given by the Crime Commission. He argued that without an order

181. See [4.129]–[4.135].

182. *Open Courts Act 2013 (Vic)* s 8(1A).

183. 9News, *Preliminary Consultation PCI09*.

184. *Medich v R (No 2)* [2015] NSWCCA 331.

185. The order was made under s 13(9) of the *Crime Commission Act 1985 (NSW)*. This Act has now been repealed but that section has been re-enacted in s 45 of the *Crime Commission Act 2012 (NSW)*.

covering the other information, the Crime Commission's direction would be ineffective, as he could still be identified.¹⁸⁶

- 4.130 The CCA granted the order under the *CSNPO Act*.¹⁸⁷ In discussing the interaction between the two powers, the court accepted that, since the defendant was protected under both the *Crime Commission Act* and the *CSNPO Act*, the two statutes should be applied consistently. It held that any court order under the *CSNPO Act* should not conflict with a direction under the *Crime Commission Act*.¹⁸⁸
- 4.131 This judgment indicates that it is possible to make concurrent orders under different statutes, where necessary and appropriate. However, courts must be careful to ensure that orders under the *CSNPO Act* do not conflict with orders made under other statutes.

Interaction between the Court Suppression and Non-publication Orders Act and statutory prohibitions

- 4.132 A recent CCA cases considered the interaction between the *CSNPO Act* and an automatic statutory prohibition.¹⁸⁹ A person had been convicted of historical sex offences committed when he was a child. Under the *Children (Criminal Proceedings) Act 1987* (NSW) ("*Children (Criminal Proceedings) Act*"), the name of a person cannot be published or broadcast in a way that connects them to criminal proceedings if the proceedings relate to offences committed while they were a child.¹⁹⁰ This means there was already a statutory prohibition on publication of the offender's name (in relation to the offences).
- 4.133 Despite this, the offender's name and other identifying details were published widely on mainstream and social media. He therefore applied for, and was granted, an order under the *CSNPO Act*. The CCA set aside the order, finding that he could not show the order was necessary for any of the grounds listed in the *CSNPO Act*. In relation to the ground in that the order is necessary to prevent prejudice to the proper administration of justice, the court held that the appropriate remedy for breaching the prohibition is to bring proceedings against the person who published the information. The Court said that the *Children (Criminal Proceedings) 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 [under the *CSNPO Act*] which carry with them the prospect of contempt proceedings

186. *Medich v R (No 2)* [2015] NSWCCA 331 [26].

187. *Medich v R (No 2)* [2015] NSWCCA 331 [28].

188. *Medich v R (No 2)* [2015] NSWCCA 331 [25].

189. *R v AB (No 1)* [2018] NSWCCA 113, 97 NSWLR 1015; *AB v R (No 3)* [2019] NSWCCA 46, 97 NSWLR 1046.

190. *Children (Criminal Proceedings) Act 1987* (NSW) s 15A(1)(a).

of a character parallel to any proceedings for a contravention of [the automatic prohibition].¹⁹¹

- 4.134 The offender tried unsuccessfully to appeal this decision in the High Court, and again applied to the District Court for an order under the *CSNPO Act*. He appealed the District Court's refusal to grant an order, relying on different grounds under the *CSNPO Act* (that the order was necessary to protect a person's safety) to show that the order was necessary. This appeal was successful, and the CCA made the order.¹⁹²
- 4.135 This decision demonstrates that even where information is subject to a prohibition under another statute, a court may still make a suppression or non-publication order under the *CSNPO Act*. However, the existence of the other prohibition may make it more difficult, depending on the grounds relied on, for a person to prove that an order under the *CSNPO Act* is necessary.

Consolidation or standardisation of powers

- 4.136 Some submissions criticise the range of statutes that impose limits on open justice, arguing it is confusing and inconsistent. One says "[t]he interaction of these various pieces of legislation has the potential, to complicate and confuse the court, parties, the media and members of the public". It says "[s]ome consolidation and simplification of the legislation would be of benefit".¹⁹³ Another submission "supports identifying opportunities to simplify legislation in NSW which relate to open justice".¹⁹⁴
- 4.137 The sheer number of statutes that establish powers to make suppression or non-publication orders may make it difficult to apply them. There is also a risk, for example, that some powers may be overlooked.
- 4.138 On the other hand, a diversity of provisions may be necessary given the diversity of circumstances in which these provisions apply. It may be appropriate to have specific statutes dealing with specific situations (particularly where there is a higher risk attached to the disclosure or publication of information), with the *CSNPO Act* acting as a "catch-all" regime for information outside these cases. It may also be appropriate that statutes set out different thresholds or tests, depending on the nature of the information and the context.

191. *R v AB (No 1)* [2018] NSWCCA 113, 97 NSWLR 1015 [38].

192. *R v AB (No 2)* [2018] NSWCCA 148, 97 NSWLR 1031; *AB v R (No 3)* [2019] NSWCCA 46, 97 NSWLR 1046.

193. Chief Magistrate, Local Court of NSW, *Preliminary Submission PCI40*, 1.

194. Legal Aid NSW, *Preliminary Submission PCI39*, 3.

Question 4.14: Interaction between the *Court Suppression and Non-publication Orders Act 2010* (NSW) and other statutes

- (1) Should the *Court Suppression and Non-publication Orders Act 2010* (NSW) only apply to situations that are not subject to other automatic prohibitions or provisions that allow suppression and non-publication orders to be made? Why or why not?
- (2) Which provisions for suppression and non-publication, if any, should be consolidated or standardised?

5. Monitoring and enforcing prohibitions on publication and disclosure

In Brief

In this Chapter, we consider the ways in which prohibitions on publishing or disclosing information are monitored and enforced. We review statutory offences and consider the differences between them. We also discuss the law of contempt. Finally, we consider some of the contemporary challenges in enforcing breaches of these prohibitions.

Sources of sanctions for breaches of prohibitions on publication and disclosure	92
Statutory offences	93
Elements of the offences	93
Exceptions	95
Maximum penalties	96
Contempt of court	97
Enforcement of contempt	98
How often are prohibitions breached?	100
Outcomes of court appearances for these offences	101
The lack of publicly accessible data	102
Who is responsible for monitoring and enforcing prohibitions?	102
Enforcing breaches of prohibitions on publication and disclosure	104
Informal enforcement: take down notices and orders	104
Formal enforcement: criminal proceedings	106
Challenges in enforcing prohibitions on publication or disclosure	107
Identifying and contacting offenders can be difficult	107
Breaches of NSW orders in other Australian states and territories are hard to enforce	108
Breaches of orders that occur overseas are hard to enforce	108
Widespread breaches of prohibitions are hard to enforce	110
Agencies may be reluctant to prosecute breaches	111
The time limit to commence prosecutions is short	112
It can be difficult to prove the alleged offender was aware of the order	112
Some defendants are wilfully non-compliant with prohibitions	113

- 5.1 Prohibitions on the publication and disclosure of court information (that is, automatic prohibitions created by statute, or those created by court or tribunal orders) are monitored and enforced in a variety of ways.
- 5.2 By “monitoring”, we mean the way in which courts and other justice agencies ensure that prohibitions are being complied with. By “enforcement”, we mean the way in which breaches of prohibitions are dealt with or punished.
- 5.3 There is no single body responsible for monitoring prohibitions on the publication and disclosure of information.
- 5.4 Breaches of prohibitions may be enforced by informal or formal proceedings. Take down notices and orders are an informal way to ensure that a publisher “takes down”, or removes from publication, material that allegedly breaches a prohibition. Where these are ineffective, alleged breaches can be enforced formally in one of two ways:
- by charging the person who has committed the breach with a statutory offence (where there is one), or
 - by instituting proceedings for contempt against them.
- 5.5 Submissions and case law demonstrate there are significant challenges in monitoring and enforcing prohibitions on publishing and disclosing information. This is particularly so since the internet has been in wide use. We discuss these challenges in detail in Chapter 12.¹

Sources of sanctions for breaches of prohibitions on publication and disclosure

- 5.6 When a person contravenes a prohibition on the publication and disclosure of information (either an automatic prohibition created by statute, or one created by a court or tribunal order), this may be formally enforced using one of two mechanisms.
- 5.7 The first is a statutory offence. Many of the statutes which set out a prohibition on publication or disclosure also contain an offence for breaching it. The second way is through the law of contempt of court. Some statutes that set out a prohibition on publication or disclosure provide that a breach constitutes contempt.

1. See [12.44]–[12.54].

- 5.8 Other statutes do not set out if, and how, a breach can be punished.² In these cases, a breach still may be enforced as contempt of court. This is because, at common law, contempt applies to all court proceedings regardless of whether a statute specifically states that a breach constitutes contempt.
- 5.9 Some statutes provide that a breach of a prohibition may be punished either as a statutory offence or as contempt.³ However, a person may not be punished for the same conduct twice.⁴

Statutory offences

- 5.10 Statutes that provide it is an offence to breach a prohibition typically specify:
- the elements of the offence (that is, what a person must do to commit the offence)
 - exceptions (if applicable), and
 - the maximum penalty for the offence.

Elements of the offences

- 5.11 All criminal offences have a physical element (“actus reus”). Some also have a mental element (“mens rea”). Criminal offences that do not have a mental element are known as either strict or absolute liability offences.
- 5.12 Most statutory offences for the breach of prohibitions on publication and disclosure are briefly defined. Very few expressly state whether there is a mental element, and what it is. Of the offences that *do* state whether there is a mental element, these include:
- that the offence is done “knowingly”⁵
 - that the offence is done “intentionally” or “wilfully”⁶
 - that the offence is done “recklessly”,⁷ and

2. See, eg, *Uniform Civil Procedure Rules 2005* (NSW) r 4.15; *Minors (Property and Contracts) Act 1970* (NSW) s 43(5); *Evidence Act 1995* (NSW) s 126E; *Conveyancers Licensing Act 2003* (NSW) s 107; *Property and Stock Agents Act 2002* (NSW) s 140; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30N.

3. See, eg, *Industrial Relations Act 1996* (NSW) s 164A, s 180, s 355D; *Court Suppression and Non-publication Orders Act 2010* (NSW) s 16(2).

4. See, eg, *Industrial Relations Act 1996* (NSW) s 355D(5); *Court Suppression and Non-publication Orders Act 2010* (NSW) s 16(4).

5. See, eg, *Terrorism (Police Powers) Act 2002* (NSW) s 26P(4).

6. See, eg, *Crimes (Forensic Procedures) Act 2000* (NSW) s 43(1); *Jury Act 1977* (NSW) s 68(1).

- that the offence is one of strict liability.⁸
- 5.13 One submission asks whether more offences should be expressly described as strict liability offences “in the interests of consistency and clarity”.⁹
- 5.14 Statutory offences of this kind have a variety of physical elements, depending on the nature of the prohibition. Most specify either that the person must not “publish”,¹⁰ “broadcast”,¹¹ or “disclose”¹² the protected information. In others, the physical element is that the person “contravenes”¹³ or “fails to obey”¹⁴ an order or direction.
- 5.15 The offences vary in how they define the relevant acts that a person must do to commit the offence. For example, many offences refer to a person “publishing” information, but what constitutes “publishing” or “publication” varies. The common law offence of contempt, which we discuss below, also relies on a particular meaning of “publish”.¹⁵
- 5.16 Under the *Court Suppression and Non-publication Orders Act 2010* (NSW) (“CSNPO Act”), “publish”:

means disseminate or provide access to the public or a section of the public by any means, including by—

- (a) publication in a book, newspaper, magazine or other written publication, or
- (b) broadcast by radio or television, or
- (c) public exhibition, or

7. See, eg, *Crimes (Forensic Procedures) Act 2000* (NSW) s 43(1); *Court Suppression and Non-publication Orders Act 2010* (NSW) s 16(1).
8. See, eg, *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 45(1)–(3); *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 105(2).
9. NSW, Office of the Director of Public Prosecutions, *Preliminary Submission PCI12*, 8.
10. See, eg, *Law Enforcement (Controlled Operations) Act 1997* (NSW) s 28(3); *Crime Commission Act 2012* (NSW) s 45(3); *Independent Commission Against Corruption Act 1988* (NSW) s 112(2).
11. See, eg, *Bail Act 2013* (NSW) s 89(1); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 100H(1); *Drug and Alcohol Treatment Act 2007* (NSW) s 41(1).
12. See, eg, *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 29(1)(f), s 254(1); *Crimes (Administration of Sentences Act) 1999* (NSW) s 257(1); *Mental Health Act 2007* (NSW) s 189(1).
13. See, eg, *Health Practitioner Regulation National Law* (NSW) sch 5D cl 7(5); *Lie Detectors Act 1983* (NSW) s 6(3)–(4), s 7(1); *Royal Commissions Act 1923* (NSW) s 12B, s 23B; *Court Suppression and Non-publication Orders Act 2010* (NSW) s 16(1).
14. See, eg, *Mental Health Act 2007* (NSW) s 151(4), s 161; *Drug and Alcohol Treatment Act 2007* (NSW) s 37(4), s 44.
15. See [5.30].

(d) broadcast or publication by means of the Internet.¹⁶

5.17 In contrast, under the *Crime Commission Act 2012* (NSW), “publish” is defined to include:

- disclosing to a person, and
- in relation to evidence or a record of evidence, disclosing any information directly contained in or implied from that evidence or record (except where the information could be obtained elsewhere).¹⁷

5.18 Under the *Mental Health (Forensic Provisions) Regulation 2017* (NSW), “publish” means “disseminate or provide access to 1 or more persons by means of the internet, radio, television or other media”.¹⁸

5.19 Some statutes do not define the relevant conduct at all, so the question of whether a person has committed the offence can depend on a court’s interpretation.

Exceptions

5.20 Many of the statutory offences contain exceptions. If one of these applies, a person has not committed the offence.

5.21 The exceptions cover a broad range of categories, with some being general in nature and others applying specifically to facts relevant to the statutory scheme in question. They can be broadly grouped into the following categories:

- the conduct is an official report of proceedings¹⁹
- the conduct is for a medical purpose²⁰
- the conduct is for the purposes of complying with law enforcement or legal proceedings, or for providing legal advice²¹

16. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 3 definition of “publish”.

17. *Crime Commission Act 2012* (NSW) s 45(7).

18. *Mental Health (Forensic Provisions) Regulation 2017* (NSW) cl 13F(3) definition of “publish”.

19. See, eg, *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 45(4)(a); *Drug and Alcohol Treatment Act 2007* (NSW) s 41(2).

20. See, eg, *Crime Commission Act 2012* (NSW) s 45(6A); *Independent Commission Against Corruption Act 1988* (NSW) s 112(3), s 114(3)(d); *Law Enforcement Conduct Commission Act 2016* (NSW) s 176(3)(a).

21. See, eg, *Crime Commission Act 2012* (NSW) s 45(4)–(5); *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW) s 18(3)(c).

- the conduct is necessary for the administration or enforcement of the statute or any other law²²
 - the conduct is for the purpose of research²³
 - the defendant can prove they had a (lawful) excuse for the conduct,²⁴ and
 - the court gives permission for the conduct to occur.²⁵
- 5.22 Some offences list one or two exceptions, while others list many. Some offences have no exceptions at all.²⁶

Maximum penalties

- 5.23 The maximum penalties for statutory offences vary considerably. For some, fines are the only penalty, while others also carry a penalty of imprisonment.
- 5.24 In a 2003 report on contempt by publication, the NSW Law Reform Commission recommended that the upper limit for a custodial sentence that may be imposed on a person convicted of criminal contempt should be five years.²⁷ The highest maximum penalty among the statutory offences is substantially above this, being set at seven years' imprisonment, under the *Terrorism (High Risk Offenders) Act 2017* (NSW).²⁸
- 5.25 Of the remaining statutory offences, the maximum penalties for an individual range from a fine of \$1,100 (10 penalty units)²⁹ to \$110,000 (1000 penalty units),³⁰ and/or imprisonment for six months³¹ to two years.³²

22. See, eg, *Mental Health Act 2007* (NSW) s 189(1)(b); *Crimes (Administration of Sentences Act) 1999* (NSW) s 257(1)(b)–(b1); *Child Protection (Offenders Prohibition Orders) Regulation 2018* (NSW) cl 9(g).

23. See, eg, *Mental Health Act 2007* (NSW) s 189(1)(d1); *Jury Act 1977* (NSW) s 68(5).

24. See, eg, *Evidence (Audio and Audio Visual Links) Act 1998* (NSW) s 16; *Civil and Administrative Tribunal Act 2013* (NSW) s 72; *Mental Health Act 2007* (NSW) s 189(1)(e).

25. See, eg, *Coroners Act 2009* (NSW) s 76; *Crimes (Appeal and Review) Act 2001* (NSW) s 111(2)–(4); *Adoption Act 2000* (NSW) s 180(3)(a), s 180A(1); *Evidence Act 1995* (NSW) s 195; *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 105(3)(b)(i).

26. See, eg, *Adoption Act 2000* (NSW) s 186(1); *Drug and Alcohol Treatment Act 2007* (NSW) s 37(4); *Terrorism (High Risk Offenders) Act 2017* (NSW) s 59F(2)–(3).

27. NSW Law Reform Commission, *Contempt by Publication*, Report 100 (2003) rec 29.

28. *Terrorism (High Risk Offenders) Act 2017* (NSW) s 59F(3).

29. See, eg, *Mental Health (Forensic Provisions) Regulation 2017* (NSW) cl 13F; *Bail Act 2013* (NSW) s 89(1); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 100H(1).

30. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 16(1).

31. See, eg, *Coroners Act 2009* (NSW) s 74(3); *Industrial Relations Act 1996* (NSW) s 180(1); *Crimes Act 1900* (NSW) s 578A(2).

- 5.26 Some offences also set separate penalties if the offence is committed by a body other than an individual (for example, a corporation). The only penalty available in these cases is a fine. These are generally higher than if the offence is committed by an individual. Of the offences that set a separate penalty, the maximum fines range from \$5,500 (50 penalty units)³³ to \$550,000 (5,000 penalty units).³⁴
- 5.27 In NSW, offences with a maximum penalty of two years' imprisonment or less are generally dealt with "summarily".³⁵ The Local Court generally deals with summary offences.³⁶ Only two offences that we consider in this Chapter have a maximum penalty of over two years: one of these is indictable and must be dealt with by a higher court;³⁷ the other is an indictable offence that may be dealt with summarily unless the prosecutor elects otherwise.³⁸ There is also one offence that the Supreme Court can deal with in its summary jurisdiction.³⁹ The Local Court, therefore, deals with the vast majority of these statutory offences.

Contempt of court

- 5.28 In some cases, breaching a prohibition on publishing or disclosing information – either an automatic prohibition imposed by statute or one imposed by a court order – will give rise to contempt of court proceedings.⁴⁰
- 5.29 There are two types of contempt relevant to prohibitions on publication or disclosure. First, a person may be in contempt if they fail to obey a court order, for example, by disclosing information that a court has ordered is not to be disclosed.⁴¹ This is sometimes called "disobedience contempt".⁴² Second, there is contempt by publication (also known as *sub judice* contempt). The purpose of contempt by publication is to

32. See, eg, *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 105(2); *Crimes (Administration of Sentences Act) 1999* (NSW) s 257(1); *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW) s 18(1).

33. See, eg, *Coroners Act 2009* (NSW) s 74; *Lie Detectors Act 1983* (NSW) s 7(1)(a).

34. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 16(1).

35. *Criminal Procedure Act 1986* (NSW) s 6(1)(c).

36. *Criminal Procedure Act 1986* (NSW) s 7(1).

37. *Terrorism (Police Powers) Act 2002* (NSW) s 26P(4).

38. *Terrorism (High Risk Offenders) Act 2017* (NSW) s 59F(3); *Criminal Procedure Act 1986* (NSW) sch 1 table 2 pt 6 item 10H.

39. *Crimes Act 1900* (NSW) s 578A(7).

40. See, eg, *Evidence (Audio and Audio Visual Links) Act 1998* (NSW) s 16; *Law Enforcement Conduct Commission Act 2016* (NSW) s 91(3)–(4); *Crimes (Appeal and Review) Act 2001* (NSW) s 108(6), s 111(7).

41. N Adams and B Baker, "Sentencing for Contempt of Court" (Paper presented at 2020 Sentencing Conference, Canberra, 29 February – 1 March 2020) [30], [38].

42. Victorian Law Reform Commission, *Contempt of Court*, Consultation Paper (2019) [6.1].

maintain a fair trial by ensuring that jurors are not exposed to prejudicial information.⁴³ It is committed when:

- a person publishes information about ongoing court proceedings, and
- the publication has a “real and definite” tendency to interfere with the course of justice in the proceedings.⁴⁴

5.30 To be “published”, the information must be made available to the public, or to a section of the public likely to include those connected with a case (for example, witnesses and jurors).⁴⁵ This may be difficult to determine when the information is published online, as it can be impossible to know who has realistic access to, or has actually accessed, such information.⁴⁶

5.31 Conduct will only constitute contempt if it can be demonstrated that the risk of prejudice to the administration of justice outweighs the public interest in freedom of discussion on matters of public concern.⁴⁷

5.32 In all cases of contempt, there is no requirement that the person intended to interfere with the administration of justice.⁴⁸ What needs to be established is an intention to do an act that has a clear objective tendency to interfere with the administration of justice.⁴⁹

Enforcement of contempt

5.33 Contempt is a unique offence that has both criminal and civil features. Liability must be proved to the criminal standard of “beyond reasonable doubt”.⁵⁰ However, contempt is dealt with as a form of civil proceeding. It is dealt with summarily, without a jury.⁵¹ Appeals from convictions for contempt are heard by the Court of Appeal, not the Court of Criminal Appeal (“CCA”).⁵²

43. Victorian Law Reform Commission, *Contempt of Court*, Consultation Paper (2019) [7.3]–[7.4].

44. *John Fairfax and Sons Pty Ltd v McRae* (1955) 93 CLR 351, 372; *Hinch v AG (Vic)* (1987) 164 CLR 15, 34.

45. Victorian Law Reform Commission, *Contempt of Court*, Consultation Paper (2019) [10.42].

46. Victorian Law Reform Commission, *Contempt of Court*, Consultation Paper (2019) [10.44]–[10.45].

47. *Re Truth and Sportsman Ltd; Ex parte Bread Manufacturers Ltd* (1937) 37 SR (NSW) 242, 249–250; *Hinch v AG (Vic)* (1987) 164 CLR 15, 27, 43, 51–52; *AG (NSW) v X* [2000] NSWCA 199, 49 NSWLR 653.

48. *John Fairfax and Sons Pty Ltd v McRae* (1955) 93 CLR 351, 371; *Harkianakis v Skalkos* (1997) 42 NSWLR 22, 28.

49. *Supreme Court of NSW v Katelaris* [2001] NSWSC 506 [23].

50. NSW Law Reform Commission, *Contempt by Publication*, Report 100 (2003) [12.1].

51. NSW Law Reform Commission, *Contempt by Publication*, Report 100 (2003) [12.2], [12.61].

52. NSW Law Reform Commission, *Contempt by Publication*, Report 100 (2003) [12.2].

- 5.34 Proceedings for contempt may be brought by the Attorney General or by a court on its own motion. The power of courts to bring proceedings of their own motion has been described as “an exceptional power, to be invoked sparingly and only in clear cases”.⁵³ The Supreme, District and Local Courts all have jurisdiction to bring contempt proceedings against a person. The power of the Supreme Court comes from its inherent jurisdiction,⁵⁴ while the powers of the District and Local Courts come from statute.⁵⁵
- 5.35 The Attorney General is primarily responsible for instituting contempt proceedings.⁵⁶ The Attorney General’s power to bring proceedings for contempt derives from the *Criminal Procedure Act 1986* (NSW).⁵⁷ Prosecutions are often brought by the Attorney General after a referral by the trial judge.⁵⁸
- 5.36 Contempt proceedings are usually held in the court conducting the proceedings to which the contempt relates. However, both the Local Court and the District Court may refer contempt charges to the Supreme Court.⁵⁹ Proceedings may be referred to avoid a court appearing to act as “both prosecutor and judge”.⁶⁰
- 5.37 Because contempt is a common law offence, there is no maximum penalty if a person is proceeded against in the Supreme Court.⁶¹ If a person is proceeded against for contempt in the Local Court or District Court, there are statutory limits to the penalties that may be imposed. In both cases, a person cannot be sentenced to more than 28 days’ imprisonment and/or a fine of 20 penalty units (\$2,200).⁶²
- 5.38 The general law of sentencing, including the provisions of the *Crimes (Sentencing Procedure) Act 1999* (NSW), applies to an offender who is sentenced to imprisonment for contempt.⁶³ The *Fines Act 1996* (NSW) also applies to an offender who is fined.⁶⁴

53. NSW Law Reform Commission, *Contempt by Publication*, Report 100 (2003) [12.42]. See also Judicial Commission of NSW, *Criminal Trial Courts Bench Book* [1-270] (retrieved 4 December 2020).

54. *R v Metal Trades Employers’ Association* (1951) 82 CLR 208, 241–243.

55. *District Court Act 1973* (NSW) s 199; *Local Court Act 2007* (NSW) s 24.

56. NSW Law Reform Commission, *Contempt by Publication*, Report 100 (2003) [12.6].

57. *Criminal Procedure Act 1986* (NSW) s 316, sch 3 pt 1(1).

58. Judicial Commission of NSW, *Criminal Trial Courts Bench Book* [1-250] (retrieved 4 December 2020).

59. *District Court Act 1973* (NSW) s 203; *Local Court Act 2007* (NSW) s 24(4)–(5).

60. Judicial Commission of NSW, *Criminal Trial Courts Bench Book* [1-270] (retrieved 4 December 2020).

61. *Wood v Galea* (1997) 92 A Crim R 287, 290.

62. *District Court Act 1973* (NSW) s 199(7); *Local Court Act 2007* (NSW) s 24(1).

63. *Supreme Court of NSW v Jando* [2001] NSWSC 969, 53 NSWLR 527 [38]–[45].

64. *Fines Act 1996* (NSW) s 4(1)(a1).

Question 5.1: Sources of sanctions for breaches of prohibitions

- (1) Is the current regime, in which some breaches of prohibitions on publication or disclosure of information are enforced through statutory offences and others are enforced by contempt proceedings, satisfactory? Why or why not?
- (2) What changes, if any, should be made to the existing arrangements? To what extent should there be greater consistency in the statutory offences?
- (3) In particular, what changes, if any, should be made in relation to:
 - (a) a mental element for any offence
 - (b) the definition of terms used for publication or disclosure
 - (c) exceptions to any of the statutory offences, or
 - (d) the current maximum penalties for any statutory offences?
- (4) What changes, if any, should be made to the current arrangements for enforcing contempt of court in relation to breaches of prohibitions on publication or disclosure?

How often are prohibitions breached?

- 5.39 It is difficult to know precisely how often prohibitions on disclosure and publication of information are breached. Crime data indicates that people are very rarely charged and prosecuted for offences involving breaches of prohibitions. This is unlikely to indicate that such offences are rarely committed. It is more likely, and certainly anecdotal evidence suggests, that offences are being committed, but not being reported, investigated or prosecuted. It appears this is partly due to the challenges in enforcing these offences, which we consider in the final part of this Chapter.⁶⁵
- 5.40 In some cases, a breach is too insubstantial or inconsequential to warrant prosecution. A further reason is that informal management of breaches is generally successful, so prosecution is unnecessary.⁶⁶
- 5.41 There are approximately 75 NSW statutory offences for breaching prohibitions on the publication and disclosure of information. Almost two-thirds are offences for breaching automatic prohibitions, one-third are offences for breaching orders, and a handful are statutory offences for conduct which would constitute contempt.
- 5.42 Between 1 January 2010 and 31 December 2019, there were 22 criminal incidents in which at least one person was proceeded against for one of these offences. Ten

65. See [5.67]–[5.99].

66. Child Protection Law Unit, NSW Department of Communities and Justice, *Preliminary Consultation PCI17*.

incidents related to offences for breaching automatic prohibitions, and 12 to offences for breaching orders.⁶⁷

5.43 As a result of these incidents, between 2010 and 2019:

- 10 defendants were charged with a total of 18 charges for offences involving breaches of automatic prohibitions, and
- 9 defendants were charged with a total of 23 charges for offences involving breaches of orders.⁶⁸

Outcomes of court appearances for these offences

5.44 Of the 19 defendants who were charged with offences involving breaches of automatic prohibitions or orders between 2010 and 2019:

- 11 pleaded guilty
- two were found guilty
- two were found not guilty, and
- four had all their charges withdrawn by the prosecution.⁶⁹

5.45 Of the 13 defendants who either pleaded or were found guilty, the relevant offence was the “principal offence” in 9 cases. Out of these 9 defendants:

- two received penalties of imprisonment
- three received suspended sentences
- one received an intensive correction order
- one received a fine
- one did not have a conviction recorded, and
- one received another penalty.⁷⁰

67. NSW Bureau of Crime Statistics and Research, reference 20-19445.

68. NSW Bureau of Crime Statistics and Research, reference 20-19445.

69. NSW Bureau of Crime Statistics and Research, reference 20-19445.

70. NSW Bureau of Crime Statistics and Research, reference 20-19445.

The lack of publicly accessible data

- 5.46 Data about offences involving breaches of prohibitions on publication or disclosure of information is not generally publicly accessible. To obtain the data set out above, we made a request to the NSW Bureau of Crime Statistics and Research. Although this option is available to the general public, it requires system knowledge and time and, in some cases, cost.⁷¹
- 5.47 When considered alongside the lack of information about the number of suppression and non-publication orders made in NSW,⁷² this suggests that there may be a lack of transparency in the way in which the prohibitions operate and are enforced in NSW.

Who is responsible for monitoring and enforcing prohibitions?

- 5.48 In NSW, no single agency is responsible for monitoring whether prohibitions on publication or disclosure of information are being complied with, and for taking action if they are not. It is not always clear which agencies perform which functions.⁷³ This lack of clarity may discourage people from reporting alleged breaches.⁷⁴
- 5.49 Instead of a single agency, several NSW organisations carry out some functions in monitoring and enforcing the prohibitions. These include the NSW Office of the Director of Public Prosecutions (“ODPP”), and various branches of the NSW Department of Communities and Justice.
- 5.50 The ODPP plays the primary monitoring role in cases it is involved with. It comments:

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 sites and blogs to take down material that either contravenes legislation, breaches a suppression order or is prejudicial to a matter currently before the court ... We are finding this increasingly an onerous task that falls outside what might be traditionally considered the role of a prosecuting agency ... The ODPP certainly has a role in drawing any

71. NSW Bureau of Crime Statistics and Research, *Information Service Policy* (2019).

72. See [4.5], [13.10].

73. Children’s Court of NSW, *Preliminary Consultation PCI08*; Mental Health Review Tribunal, *Preliminary Submission PCI23*, 2; Mental Health Review Tribunal, *Preliminary Consultation PCI10*.

74. Children’s Court of NSW, *Preliminary Consultation PCI08*.

such matters to the attention of the court but should not be responsible for sending out notices requesting that offending material be removed.⁷⁵

- 5.51 Various branches of the NSW Department of Communities and Justice also monitor and enforce prohibitions on publication or disclosure of information. Some breaches, particularly those arising from tribunal matters, are referred to and dealt with by its Office of the General Counsel, although these are rare.⁷⁶ The Digital, Media and Events unit also takes action in some cases.⁷⁷ The Child Protection Law Unit manages breaches relating to prohibitions on publishing information about care and protection matters.⁷⁸
- 5.52 Legal Aid NSW reports that they regularly take actions where they suspect a suppression or non-publication order has been breached.⁷⁹ It is likely that parties to proceedings and other legal representatives also monitor prohibitions relating to matters they are involved in.
- 5.53 In Victoria, as in NSW, no single body is responsible for monitoring whether people are complying with publication prohibitions.⁸⁰ Instead, the responsibility largely lies with interested parties themselves (including victims, the Victorian Office of the Director of Public Prosecutions and the courts) to monitor the media, and report any breaches to Victoria Police.⁸¹
- 5.54 The recent Victorian Law Reform Commission (“VLRC”) review of contempt found this system of informal monitoring was appropriate, and recommended against establishing a more formal independent monitoring body.⁸² However, the VLRC recommended that victims should be given more support and information about protections available to them and how to report a suspected breach.⁸³
- 5.55 A 2008 report by the NSW Legislative Council Standing Committee on Law and Justice into the prohibition on publishing names of children involved in criminal proceedings

75. NSW, Office of the Director of Public Prosecutions, *Preliminary Submission PCI12*, 9–10.

76. Mental Health Review Tribunal, *Preliminary Consultation PCI10*; NSW Civil and Administrative Tribunal, *Preliminary Consultation PCI13*; Office of the General Counsel, NSW Department of Communities and Justice, *Preliminary Consultation PCI15*.

77. Office of the General Counsel, NSW Department of Communities and Justice, *Preliminary Consultation PCI15*.

78. Child Protection Law Unit, NSW Department of Communities and Justice, *Preliminary Consultation PCI17*.

79. Legal Aid NSW, *Preliminary Submission PCI39*, 9.

80. Victorian Law Reform Commission, *Contempt of Court*, Report (2020) [16.49].

81. Victorian Law Reform Commission, *Contempt of Court*, Report (2020) [16.49]–[16.52].

82. Victorian Law Reform Commission, *Contempt of Court*, Report (2020) [16.63]–[16.65].

83. Victorian Law Reform Commission, *Contempt of Court*, Report (2020) rec 130 [16.66]–[16.67].

(“Standing Committee Report”) found several problems with enforcement of these prohibitions. These included:

- no particular government agency had responsibility for enforcement⁸⁴
- avenues to report breaches were not widely known,⁸⁵ and
- police may have a conflict of interest if they are required to investigate a breach of a restriction suppressing the identity of an accused person.⁸⁶

5.56 The Standing Committee Report recommended that an existing office within the NSW Police Force, such as its Office of the General Counsel, be identified as the primary recipient of all complaints relating to breaches of the prohibitions on publishing the names of children involved in criminal proceedings.⁸⁷ The NSW Government supported this recommendation.⁸⁸ Another option might be to create a role to deal with all suspected breaches of prohibitions on disclosure and publication of information, and not just those relating to the names of children involved in criminal proceedings.

Question 5.2: Monitoring prohibitions on publication and disclosure

- (1) How should prohibitions on publication and disclosure of information be monitored?
- (2) Is public transparency about the number of people who are proceeded against for offences involving breaches of the prohibitions necessary or desirable? Why or why not? How could public transparency about these numbers be improved?

Enforcing breaches of prohibitions on publication and disclosure

Informal enforcement: take down notices and orders

5.57 If material on the internet is alleged to breach a prohibition on disclosure or publication of information, normal procedure is to issue a take down notice. This is a notice to the

84. NSW, Legislative Council Standing Committee on Law and Justice, *The Prohibition on the Publication of Names of Children Involved in Criminal Proceedings*, Report 35 (2008) [6.11].

85. NSW, Legislative Council Standing Committee on Law and Justice, *The Prohibition on the Publication of Names of Children Involved in Criminal Proceedings*, Report 35 (2008) [6.28].

86. NSW, Legislative Council Standing Committee on Law and Justice, *The Prohibition on the Publication of Names of Children Involved in Criminal Proceedings*, Report 35 (2008) [6.31]–[6.34].

87. NSW, Legislative Council Standing Committee on Law and Justice, *The Prohibition on the Publication of Names of Children Involved in Criminal Proceedings*, Report 35 (2008) [6.46] rec 2–3.

88. NSW Government, *Government Response to Report No 35 of the Legislative Council Standing Committee on Law and Justice entitled "The Prohibition on the Publication of Names of Children Involved in Criminal Proceedings" dated 21 April 2008* (2008) 2, rec 2.

person responsible for the material, requesting them to remove it. If the person responsible does not act within a reasonable time, the legal representatives may seek an order from the court for the removal of the material.

- 5.58 The ODPP reports that their requests “meet with varying success” and that “in many cases the request is refused, and we are told to get a court order”.⁸⁹ The Office of the General Counsel in the Department of Communities and Justice reports that notices are generally, but not always, complied with.⁹⁰ Similarly, the Department’s Child Protection Law Unit reports that most notices it sends are complied with.⁹¹
- 5.59 Take down notices and orders are an accepted means of regulating online material. They are currently used in relation to copyright infringement and objectionable online material.⁹²
- 5.60 The CCA has endorsed take down notices as the preferred way for dealing with specific material that allegedly breaches a suppression or non-publication order.⁹³ Under this approach, interested parties and the ODPP have primary responsibility to monitor publications. Internet content hosts do not have a general obligation to make themselves aware of suppression orders, and only have to act once they receive a take down notice.⁹⁴
- 5.61 Some commentators support take down notices or orders as a way to monitor prohibitions on disclosure and publication, on the grounds that the procedure:

distributes responsibility to prevent prejudice to the administration of justice among the various parties.

In addition, the procedure requires the parties to explore their options and take steps to resolve the matter before going to the court to seek an order. It ensures the necessity of resorting to a court order and is a sensible approach

89. NSW, Office of the Director of Public Prosecutions, *Preliminary Submission PCI12*, 10.

90. Office of the General Counsel, NSW Department of Communities and Justice, *Preliminary Consultation PCI15*.

91. Child Protection Law Unit, NSW Department of Communities and Justice, *Preliminary Consultation PCI17*.

92. B Fitzgerald and C Foong, “Suppression Orders after *Fairfax v Ibrahim*: Implications for Internet Communications” (2013) 37 *Australian Bar Review* 175, 188–189.

93. *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125, 83 NSWLR 52 [94]. See also B Fitzgerald and C Foong, “Suppression Orders after *Fairfax v Ibrahim*: Implications for Internet Communications” (2013) 37 *Australian Bar Review* 175, 189.

94. B Fitzgerald and C Foong, “Suppression Orders after *Fairfax v Ibrahim*: Implications for Internet Communications” (2013) 37 *Australian Bar Review* 175, 189.

which provides certainty for parties in criminal proceedings, internet users and internet intermediaries.⁹⁵

- 5.62 However, take down notices and orders addressed to internet content hosts (Google or Facebook, for example) are only effective if the content host agrees to comply. This is not always the case, particularly when the host is based overseas and therefore not subject to Australian law.⁹⁶ We consider this issue in the last part of this Chapter.⁹⁷

Formal enforcement: criminal proceedings

- 5.63 If a publisher does not comply with a take down notice or order, then they may have committed one of the statutory offences of publishing or disclosing information in breach of a prohibition (a court order or automatic prohibition). The next step in enforcing the prohibition is to initiate criminal proceedings against the publisher (that is, charge them with an offence).
- 5.64 It appears that this occurs rarely. As discussed, very few defendants have been proceeded against for these offences over the last decade. Our consultations also suggest that formal criminal proceedings in this area are unusual.⁹⁸
- 5.65 The process of bringing criminal proceedings depends on the nature of the prohibition that has been breached, and what steps have already been taken (and by whom) to enforce the order. The NSW Crown Solicitor's Office carries out some prosecutions, on instruction from the NSW Department of Communities and Justice.⁹⁹ Others are conducted by the ODPP.¹⁰⁰
- 5.66 As we discuss above, because most offences have a maximum penalty of less than two years' imprisonment, prosecutions will generally occur in the NSW Local Court.¹⁰¹

95. B Fitzgerald and C Foong, "Suppression Orders after *Fairfax v Ibrahim*: Implications for Internet Communications" (2013) 37 *Australian Bar Review* 175, 189–190.

96. Office of the General Counsel, Department of Justice, *Preliminary Submission PCI15*, 3; Law Society of NSW, *Preliminary Submission PCI31*, 4.

97. See [5.74]–[5.80].

98. NSW Office of the Director of Public Prosecutions, *Witness Assistance Service*, *Preliminary Consultation PCI14*; Office of the General Counsel, NSW Department of Communities and Justice, *Preliminary Consultation PCI15*.

99. Office of the General Counsel, NSW Department of Communities and Justice, *Preliminary Consultation PCI15*.

100. Child Protection Law Unit, NSW Department of Communities and Justice, *Preliminary Consultation PCI17*.

101. See [5.27].

Question 5.3: Enforcing prohibitions on publication and disclosure

- (2) Are the existing arrangements for managing breaches of prohibitions on publication and disclosure of information effective? Why or why not?
- (3) If not, what changes should be made?

Challenges in enforcing prohibitions on publication or disclosure

- 5.67 Submissions and case law suggest there are significant challenges in enforcing breaches of prohibitions on publication and disclosure of information.¹⁰²

Identifying and contacting offenders can be difficult

- 5.68 When an alleged breach of a prohibition on publication or disclosure of information occurs online, it is not always possible for an enforcement agency to identify the person responsible for the breach. It can also be difficult to persuade a social media website to take down material. We have heard that requests are often ignored or not complied with.¹⁰³
- 5.69 Challenges in identifying the alleged perpetrator and proving they are liable for the breach include:
- accessing a person's legal name, given that bloggers and social media users often use pseudonyms¹⁰⁴
 - attributing liability where multiple people post, comment on, or share content¹⁰⁵
 - identifying a person's legal address in order to serve notice of legal proceedings¹⁰⁶
 - proving that a person linked to a website or account that breached the prohibition was actually using it at the time of the breach,¹⁰⁷ and

102. See, eg, Mental Health Review Tribunal, *Preliminary Submission PCI23*, 2; NSW, Office of the Director of Public Prosecutions, *Preliminary Submission PCI12*, 8; Office of the General Counsel, Department of Justice, *Preliminary Submission PCI15*, 2–3.

103. Child Protection Law Unit, NSW Department of Communities and Justice, *Preliminary Consultation PCI17*.

104. Victorian Law Reform Commission, *Contempt of Court*, Consultation Paper (2019) [10.76]; T Griffith, "Twitter, Suppression and the Courts" (2011 July) *PAE-Bulletin*, 8.

105. A Wallace and others, "Courts and Social Media: Opportunities and Challenges?" (2013) *Brief* 36, 37; Office of the General Counsel, NSW Department of Communities and Justice, *Preliminary Consultation PCI15*.

106. *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125, 83 NSWLR 52 [70].

107. Office of the General Counsel, Department of Justice, *Preliminary Submission PCI15*, 2; Mental Health Review Tribunal, *Preliminary Submission PCI23*, 2.

- cooperating with internet service providers, especially those located outside of Australia.¹⁰⁸

Breaches of NSW orders in other Australian states and territories are hard to enforce

- 5.70 Under the *CSNPO Act*, a NSW court may direct that an order is to apply anywhere in Australia.¹⁰⁹ Breaching that order in another state or territory means the person has broken NSW law.
- 5.71 In Australia, a judgment made by a court in one state or territory can be enforced in another state or territory under the *Service and Execution of Process Act 1992* (Cth). If a person wishes to enforce a judgment in another state or territory, they must follow the procedure set out in the Act, which involves registering a sealed copy of the judgment in the court of the other state or territory.¹¹⁰ Once a judgment is registered there, it has the same force and effect, and may give rise to the same enforcement proceedings, as if it had been made there.¹¹¹
- 5.72 While this provides a process to enforce orders in other states and territories, it places a significant onus on parties to register orders quickly, if they think there is a risk of breach elsewhere.
- 5.73 A potential solution to this problem is to establish a system of automatic mutual recognition and enforcement of suppression and non-publication orders across all states and territories. This has been raised by various past reviews,¹¹² and is currently being considered by the Council of Attorneys-General.¹¹³ Some submissions also support measures to improve recognition and enforcement of orders made across Australia.¹¹⁴

Breaches of orders that occur overseas are hard to enforce

- 5.74 Breaches of orders that occur overseas pose particular challenges. The nature of the internet means that anybody, anywhere in the world, can publish information that is

108. Office of the General Counsel, Department of Justice, *Preliminary Submission PCI15*, 2–3.

109. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 11(2).

110. *Service and Execution of Process Act 1992* (Cth) s 105. See also Judicial Commission of NSW, *Civil Trials Bench Book* [9-0700]–[9-0730] (retrieved 5 December 2020).

111. *Service and Execution of Process Act 1992* (Cth) s 105(2).

112. F Vincent, *Open Courts Act Review* (2017) [451] rec 5; Victorian Law Reform Commission, *Contempt of Court*, Consultation Paper (2019) [10.80]–[10.83].

113. Australia, Council of Attorneys-General, “Communiqué” (Adelaide, 29 November 2019).

114. NSW, Office of the Director of Public Prosecutions, *Preliminary Submission PCI12*, 5; University of Sydney Policy Reform Project, *Preliminary Submission PCI11* [9.4].

subject to a suppression or non-publication order and make that information accessible to people in Australia.

- 5.75 However, NSW laws generally cannot be enforced against people who are outside Australia. In practice, this means that, with few exceptions, it is virtually impossible for NSW courts to enforce their orders internationally.¹¹⁵
- 5.76 The *Pell* case, which we discuss in Chapter 12,¹¹⁶ is an example where international media was not bound to comply with an order of an Australian court.¹¹⁷ Another example is the case involving the murder of Grace Millane in New Zealand. The name of the person convicted of the murder was widely published in British media despite a suppression order issued by a New Zealand court.¹¹⁸
- 5.77 It is possible for Australia to assert that Australian laws apply overseas, and for Australian authorities to attempt to enforce breaches of them.¹¹⁹ However, the extra-territorial application of criminal law is a highly complex and controversial area.¹²⁰
- 5.78 If an international entity has an Australian distributor or representative, proceedings may be brought against them, but this will not be possible in many cases.¹²¹
- 5.79 Similar to the issue of interstate enforcement of orders, a potential solution is an international system of mutual recognition and enforcement of orders. This possibility is currently on the agenda of the Commonwealth Law Ministers' meeting.¹²²

115. Victorian Law Reform Commission, *Contempt of Court*, Consultation Paper (2019) [10.66]; J Bosland and M Douglas "We Knew George Pell was Guilty of Child Sex Abuse. Why couldn't we say it until now?" *The Conversation* (online, 26 February 2019) <findanexpert.unimelb.edu.au/news/3115-we-knew-george-pell-was-guilty-of-child-sex-abuse.-why-couldn%27t-we-say-it-until-now%3F> (retrieved 5 December 2020); Office of the General Counsel, Department of Justice, *Preliminary Submission PCI15*, 3.

116. See [12.48]–[12.51], [12.56].

117. J Bosland and M Douglas "We Knew George Pell was Guilty of Child Sex Abuse. Why couldn't we say it until now?" *The Conversation* (online, 26 February 2019) <findanexpert.unimelb.edu.au/news/3115-we-knew-george-pell-was-guilty-of-child-sex-abuse.-why-couldn%27t-we-say-it-until-now%3F> (retrieved 5 December 2020); F Kunc, "Victorian Suppression Orders and the International Media" (2019) 93 *Australian Law Journal* 79, 80.

118. C Owen, "British Press Breaches NZ Suppression Order by Naming Grace Millane Murderer", *Stuff.co.nz* (online, 23 November 2019) <www.stuff.co.nz/national/crime/117654922/british-press-breaches-nz-suppression-order-by-naming-grace-millane-murderer> (retrieved 5 December 2020).

119. Victorian Law Reform Commission, *Contempt of Court*, Consultation Paper (2019) [10.78]–[10.79]. See *Crimes (Overseas) Act 1964* (Cth).

120. See generally D Ireland-Piper, "Extraterritorial Criminal Jurisdiction: Does the Long Arm of the Law Undermine the Rule of Law?" (2012) 13 *Melbourne Journal of International Law* 122.

121. Victorian Law Reform Commission, *Contempt of Court*, Consultation Paper (2019) [10.75]–[10.76].

5.80 However, establishing and enforcing such a system would be a substantial undertaking with significant logistical complexities.¹²³

Widespread breaches of prohibitions are hard to enforce

5.81 A further enforcement challenge is where a prohibition is breached so many times that enforcement is effectively impossible. Questions then arise about:

- whether the prohibition should continue to be in force
- whether such breaches should be prosecuted, and
- if so, which breaches should be prosecuted (particularly where prosecuting some, but not all, breaches may give the impression of discrimination).¹²⁴

5.82 There is also the question of whether an order that is likely to be widely breached should even be made in the first place.

5.83 Recent cases have illustrated this problem. For example, in the 2015 trial of Adrian Bayley for assaults committed between 2000 and 2012, the County Court of Victoria made a suppression order which, among other things, prevented Bayley from being described as a murderer or rapist. This order was breached multiple times by the media, leading to numerous delays in the trial.¹²⁵

5.84 Another example is the identity of “Lawyer X”, a police informer whose identity was suppressed by the Court of Appeal in Victoria. The lawyer’s name was described as an “open secret” and “arguably the worst kept secret in Melbourne” before the order was finally lifted.¹²⁶

122. Meeting of Commonwealth Law Ministers and Senior Officials, “Outcome Statement” (Colombo, Sri Lanka, 4–7 November 2019) [20]–[21].

123. Victorian Law Reform Commission, *Contempt of Court*, Consultation Paper (2019) [10.86].

124. T Griffith, “Twitter, Suppression and the Courts” (2011 July) *P A E-Bulletin*, 8.

125. See F Vincent, *Open Courts Act Review* (2017) [448]–[449]; M Pearson, “You Wouldn’t Read about it: Adrian Bayley Rape Trials Expose Flaw in Suppression Orders”, *The Conversation* (online, 27 March 2015) <theconversation.com/you-wouldnt-read-about-it-adrian-bayley-rape-trials-expose-flaw-in-suppression-orders-39375> (retrieved 5 December 2020); M Robin, “Why the Media Breached Bayley’s Suppression Order”, *Crikey.com.au* (online, 27 March 2015) <www.crikey.com.au/2015/03/27/why-the-media-breached-bayleys-suppression-order/#:~:text=They%20were%20delayed%20because%20of,as%20a%20rapist%20or%20killer> (retrieved 5 December 2020).

126. E Pearson and T Mills, “Nicola Gobbo Named as Informer 3838 after Court Lifts Gag”, *The Age* (online, 1 March 2019) <www.theage.com.au/national/victoria/nicola-gobbo-named-as-informer-3838-after-court-lifts-gag-20190208-p50wh5.html> (retrieved 5 December 2020); S Farnsworth, “Lawyer X Identified as Nicola Gobbo after Court Lifts Suppression Order on Informer 3838”, *ABC News* (online,

5.85 In an English case, a court ordered an injunction suppressing the identity of a footballer who was alleged to have had an affair. The mainstream media complied with the injunction, but the footballer's name was widely disseminated on the internet and over social media.¹²⁷ Nobody was ever charged with breaching the injunction.¹²⁸

Agencies may be reluctant to prosecute breaches

- 5.86 The low number of convictions for offences relating to prohibitions on publication or disclosure of information may, in part, reflect a reluctance among criminal justice agencies to investigate and prosecute these offences.
- 5.87 In Victoria, a 2017 review of the *Open Courts Act 2017* (Vic) noted concerns about a "seeming reluctance to prosecute breaches", which may encourage the media to breach orders, as they see there will be no consequences for doing so.¹²⁹ One commentator also notes a similar decline in the willingness of Victorian authorities to prosecute contempt by publication.¹³⁰
- 5.88 In NSW, the Standing Committee Report also observed what appeared to be a failure, in some cases, to investigate and prosecute breaches of prohibitions contained in the *Children (Criminal Proceedings) Act 1987* (NSW).¹³¹
- 5.89 On the other hand, it could be because breaches are rarely reported, rather than because of uncertainty or reluctance to commence prosecutions. The VLRC review of contempt made this observation when discussing the low number of prosecutions in Victoria.¹³²

1 March 2019) <www.abc.net.au/news/2019-03-01/lawyer-x-informer-3838-identity-revealed-nicola-gobbo/10826958> (retrieved 5 December 2020).

127. T Griffith, "Twitter, Suppression and the Courts" (2011 July) *P A E-Bulletin*, 8, 9.

128. M Cooper, "Social Media Users Could be Charged for Sharing Wikileaks Story", *The Sydney Morning Herald* (online, 30 July 2014) <www.smh.com.au/national/social-media-users-could-be-charged-for-sharing-wikileaks-story-20140730-zye0b.html> (retrieved 5 December 2020).

129. F Vincent, *Open Courts Act Review* (2017) [266], [447]. See also Victorian Law Reform Commission, *Contempt of Court*, Consultation Paper (2019) [10.123]–[10.125].

130. J Bosland, "Restraining 'Extraneous' Prejudicial Publicity: Victoria and New South Wales Compared" (2018) 41 *UNSW Law Journal* 1263, 1266.

131. NSW, Legislative Council Standing Committee on Law and Justice, *The Prohibition on the Publication of Names of Children Involved in Criminal Proceedings*, Report 35 (2008) [6.19]–[6.25].

132. Victorian Law Reform Commission, *Contempt of Court*, Report (2020) [16.70], [16.74].

The time limit to commence prosecutions is short

- 5.90 In NSW, proceedings for summary offences must be commenced within six months of the offence occurring.¹³³ As we discuss above, most offences we consider in this Chapter are summary offences.¹³⁴
- 5.91 The ODPP argues that investigations for offences take “significant time” and may not be completed within this limit. The submission suggests extending the time period to two years.¹³⁵

It can be difficult to prove the alleged offender was aware of the order

- 5.92 As we discuss above, most offences of breaching orders require the prosecution to prove the alleged offender knew they were breaching the order or was reckless about this fact, or that their behavior was intentional or willful.¹³⁶
- 5.93 In NSW, orders are typically not accessible to the general public. This means that unless an order is personally provided to the defendant, it can be hard to prove they were aware of it.¹³⁷
- 5.94 One potential solution is for all orders to be placed on a publicly accessible database or register. There could be a rebuttable presumption that if an order is on the register, a person is aware of it. This could make it easier to prosecute breaches of orders. We discuss this option further in Chapter 13.¹³⁸
- 5.95 Another potential solution is to establish a notification system. Parties who are interested in a matter could register with the court, which would notify them if an order is made in the matter.¹³⁹ We have heard that NSW courts currently notify media reporters when suppression and non-publication orders are made.¹⁴⁰
- 5.96 While this would make it easier to prove a defendant knew of an order if they had registered, it would not assist where a defendant did not register with the court.¹⁴¹ There are also risks if there are delays or errors in the notification system.¹⁴²

133. *Criminal Procedure Act 1986* (NSW) s 179(1).

134. See [5.27].

135. NSW, Office of the Director of Public Prosecutions, *Preliminary Submission PCI12*, 8.

136. See [5.12].

137. F Vincent, *Open Courts Act Review* (2017) [267]; Victorian Law Reform Commission, *Contempt of Court*, Consultation Paper (2019) [10.93].

138. See [13.5]–[13.12].

139. Victorian Law Reform Commission, *Contempt of Court*, Consultation Paper (2019) [10.90]–[10.91].

140. 9News, *Preliminary Consultation PCI09*; Supreme Court of NSW, *Preliminary Consultation PCI11*.

141. Victorian Law Reform Commission, *Contempt of Court*, Consultation Paper (2019) [10.93].

Some defendants are wilfully non-complaint with prohibitions

5.97 Anecdotally, prohibitions on publication or disclosure of information appear to be usually breached for one of two reasons:

- the offender was completely unaware of the order, or
- the offender deliberately breached the order because of a personal, ideological or political reason.

This makes enforcement of such offences particularly challenging.

5.98 Enforcement proceedings are less likely to deter offenders who are driven to offend by ideological reasons.¹⁴³ One submission suggests

the threat of sanctions following a breach of a non-publication order does not act as a deterrent and may even incentivise some to act in defiance to achieve a level of notoriety and become a ‘martyr’ to their cause.¹⁴⁴

5.99 This may demonstrate the need for more effective enforcement procedures or stronger (or alternative) punishments.

Question 5.4: Challenges in enforcing prohibitions on publication or disclosure

- (1) What changes, if any, could make it easier for justice agencies to identify and prosecute people who breach prohibitions on publication or disclosure of information?
- (2) Should there be a scheme for mutual recognition and enforcement of suppression and non-publication orders across Australia? If so, what would the scheme entail?
- (3) How should the law and/or justice agencies deal with situations where prohibitions on the publication or disclosure of information under NSW law are breached outside Australia?
- (4) Should the time limits for enforcing the statutory offences considered in this Chapter be extended? Why or why not?

142. Victorian Law Reform Commission, *Contempt of Court*, Consultation Paper (2019) [10.92]–[10.94].

143. Office of the General Counsel, Department of Justice, *Preliminary Submission PCI15*, 2–3.

144. Office of the General Counsel, Department of Justice, *Preliminary Submission PCI15*, 2–3.

6. Access to information

In Brief

Access to information held by courts is an essential aspect of open justice. However, the regimes in NSW governing access are complex, inconsistent and not always easy to locate. There may be some opportunities to improve access to information in NSW, such as consolidating regimes or improving their features.

The need for open access to court information	117
Current access regimes in NSW	118
Should NSW consolidate its access regimes?	118
A single, consolidated regime.....	119
Partial consolidation.....	120
Features of an access regime	121
How much discretion should decision-makers have?.....	121
What principles or considerations should apply in the exercise of discretion?.....	123
What types of information should be made available?.....	129
When should access to information be prohibited?.....	136
Who should be able access information?.....	138
How should the access regime protect privacy?.....	141
Procedures for accessing information.....	145
How should access be provided?.....	148
Should applicants be charged a fee?.....	151
Other options for improving access to information	154
A national access regime.....	154
Greater public availability of judgments and decisions.....	155

6.1 Access to court information is increasingly recognised as essential to open justice.¹ As we discuss in Chapter 1, the open court principle means that people can usually attend

1. See, eg, L McNamara and J Quilter, *Preliminary Submission PCI14*, 1; NSW, Attorney General's Department, *Report on Access to Court Information* (2008) 4; New Zealand Law Commission, *Access to Court Records*, Report 93 (2006) [2.102].

and observe proceedings in person.² For some decades, there has been a shift in the traditional reliance on oral evidence and argument. Documentary evidence and written submissions are relied on in all types of cases more and more, and not just in complex proceedings.

- 6.2 This has been driven by technological developments, initially in the production and distribution of written material in print form, but more recently by the ready availability of digital written and audio-visual material. This means that, without access to the materials referred to in court, it can be difficult for the public and media to understand what goes on in proceedings and the basis for decisions.³
- 6.3 A decade ago, NSW made efforts to consolidate the regimes governing access to court information. In 2010, Parliament enacted the *Court Information Act 2010* (NSW) ("*Court Information Act*"), which created a statutory framework for accessing information held by NSW courts in connection with criminal and civil proceedings.⁴
- 6.4 The *Court Information Act* was intended to work in concert with the *Court Suppression and Non-publication Orders Act 2010* (NSW) ("*CSNPO Act*"), which we discuss in Chapter 4. However, concerns about its practical operation, and in particular the question of who should be responsible for redacting personal information in court documents, meant that the *Court Information Act* never commenced.⁵
- 6.5 As a result, there are several different regimes governing access to court information, which are not always consistent, clear or easy to locate. They also tend to give courts significant discretion as to whether to grant access.
- 6.6 In this Chapter, 10 years after the passing of the uncommenced *Court Information Act*, we ask whether another attempt should be made to consolidate the regimes governing access to information. The consolidation could draw from the provisions of the original legislation and improve on them, taking into account the realities of registries in 2020, or a different approach to consolidation could be taken.
- 6.7 Another possibility is that, due to the differences in the way different courts and registries operate, a consolidated regime is unworkable. It may be best to leave the current regimes in place and improve their features.

2. See [1.20]–[1.22].

3. NSW, *Parliamentary Debates*, Legislative Council, Second Reading Speech, 18 May 2010, 22800.

4. NSW, *Parliamentary Debates*, Legislative Council, Second Reading Speech, 18 May 2010, 22800.

5. See, eg, S Dawson and F Roughley, "Suppression and Non-Party Access Part II: The How, When and Where of Non-Party Access" (2013 Autumn) *Bar News* 49, 51, citing S Moran, "*Court Information Act* Verges on Farce as Horse Chases the Cart", *The Australian* (4 November 2011) 37; D Butler and S Rodrick, *Australian Media Law* (Thomson Reuters, 5th ed, 2015) [5.700]; N Shaver, "How Privacy Hobbles Push for Open Justice," *The Australian*, 3 June 2011, 3.

6.8 For this reason, we consider the specific features of the current regimes. This includes the different rules that apply to different types of applicants, the types of information that an applicant can access, the amount of discretion decision-makers have in permitting or denying access, the principles or considerations relevant to the decision-making process, and the fees that can be imposed. We compare these features with regimes elsewhere in Australia and seek your views on what, if anything, should change.

The need for open access to court information

6.9 Traditionally, courts have maintained that the principle of open justice applies only to the judicial process itself. Documents filed in a court registry are not, by virtue of that fact alone, part of the judicial process.⁶ Such documents may not emerge in open court for many reasons, including because:

- the case settles before trial
- documents that form part of the pleadings are amended or struck out
- affidavits (sworn statements of a witness' evidence) are objected to or ruled inadmissible, either in part or in full, or
- the parties choose not to rely on them.⁷

6.10 As a result, courts have decided that public access to court documents “is not, in absolute terms, a proposition flowing from the principle of open justice”.⁸

6.11 Increasingly, however, access to court documents and other information is recognised as necessary to give effect to the principle of open justice.⁹ It allows the public to understand what takes place in the courtroom, and the basis on which judicial officers make their decisions.

6. See, eg, *Smith v Harris* [1996] 2 VR 335, 341–343.

7. D Butler and S Rodrick, *Australian Media Law* (Thomson Reuters, 5th ed, 2015) [5.670].

8. *ASIC v Rich* [2001] NSWSC 496, 51 NSWLR 643 [23].

9. See, eg, L McNamara and J Quilter, *Preliminary Submission PCI14*, 1; NSW, Attorney General's Department, *Report on Access to Court Information* (2008) 4; New Zealand Law Commission, *Access to Court Records*, Report 93 (2006) [2.102].

Current access regimes in NSW

- 6.12 People who are not parties to the proceeding (including the media) have no common law right to inspect documents on a court file.¹⁰ Such documents include pleadings, subpoenas, interlocutory applications, affidavits and transcripts of the proceedings.¹¹
- 6.13 However, a court may allow a person to access documents by exercising its inherent jurisdiction or using its implied powers.¹²
- 6.14 Access to information held by courts is largely governed by statutory provisions, court rules, practice notes and policies. Some of these regimes give non-parties entitlements that they would not otherwise have under a strict common law approach.
- 6.15 Whether a person can access information can depend on factors such as the type of forum, proceeding and information being sought. The application procedures and fees, and the methods by which access may be provided, also vary.
- 6.16 Submissions criticise the current access regimes as complex, confusing, inconsistent and inapt.¹³ One submission argues that the current system

seems designed (at worst) to limit access to any court file to the immediate parties to any proceedings and (at best) to privilege other applicants who can afford legal representation, and have the time and resources to devote to pursuing an application.¹⁴

Should NSW consolidate its access regimes?

- 6.17 A key question for this review is whether NSW should consolidate its access regimes. In the 2008 *Report on Access to Court Information*, the NSW Attorney General's Department observed that the existing regimes lacked cohesion, contained gaps and applied different tests. The same can be said of them today. The Department

10. See, eg, *Rinehart v Welker* [2011] NSWCA 403; 93 NSWLR 311 [137].

11. See, eg, *Idoport Pty Ltd v National Australia Bank Ltd* [2000] NSWSC 769 [5]–[6].

12. See, eg, *ASIC v Rich* [2002] NSWSC 198; *John Fairfax Publications Pty Ltd v Ryde Local Court* [2001] NSWCA 101, 62 NSWLR 512.

13. See, eg, L McNamara, and J Quilter, *Preliminary Submission PCI14*, 1–2, citing T Dick, “Open Justice and Closed Courts: Media Access in Criminal Proceedings in NSW” (Childrens Legal Service, C2017); UTS Faculty of Law, *Preliminary Submission PCI25*, 3–4, citing A Genovese, T Luker and K Rubenstein (ed), *The Court as Archive* (ANU Press, 2019); Banki Haddock Fiora, *Preliminary Submission PCI27*, 2, 3; Legal Aid NSW, *Submission PCI39*, 6–7.

14. J Johnston, P Keyzer, A Wallace and M Pearson, *Preliminary Submission PCI26*, 9.

recommended a consolidated statutory framework for access to court information, which led to the introduction of the *Court Information Act*.¹⁵

- 6.18 The uncommenced *Court Information Act* would regulate access to documents and other court information held by all NSW courts in relation to both criminal and civil proceedings.¹⁶ The Act would not apply to tribunals or commissions.
- 6.19 A key objective of the *Court Information Act* would be to promote consistency in access to court information across NSW courts.¹⁷ If commenced, the Act would repeal certain regimes for accessing information in criminal proceedings, civil proceedings and certain Local Court proceedings.¹⁸
- 6.20 Some submissions support greater consistency between, and consolidation of, the current access regimes.¹⁹ Some specifically support the commencement of the *Court Information Act*.²⁰

A single, consolidated regime

- 6.21 An entirely consolidated access regime in NSW may offer several advantages, such as:
- ensuring consistency between different forums and types of proceedings
 - improving accessibility of information, by reducing confusion about when and how a person can access it, and
 - ensuring that important countervailing interests, such as privacy, are consistently and effectively protected.
- 6.22 To deal with the different nature and functions of different forums, the regime could allow certain rules to be tailored to particular forums. For example, statutory provisions outlining general principles could be supported by regulations or rules adapted to the nature and functions of that forum or jurisdiction.

15. See NSW, Attorney General's Department, *Report on Access to Court Information* (2008) 11; NSW, *Parliamentary Debates*, Legislative Council, Second Reading Speech, 18 May 2010, 22800–22801.

16. NSW, *Parliamentary Debates*, Legislative Council, Second Reading Speech, 18 May 2010, 22800.

17. *Court Information Act 2010* (NSW) s 3(a).

18. *Court Information Act 2010* (NSW) sch 2; *Criminal Procedure Act 1986* (NSW) s 314; *Local Court Rules 2009* (NSW) r 8.10; *Uniform Civil Procedure Rules 2005* (NSW) r 36.12(2).

19. Legal Aid NSW, *Preliminary Submission PCI39*, 6; Chief Magistrate, Local Court of NSW, *Preliminary Submission PCI40*, 1.

20. J Johnston, P Keyzer, A Wallace and M Pearson, *Preliminary Submission PCI26*, 8; NSW Council for Civil Liberties, *Preliminary Submission PCI29*, 4.

Partial consolidation

- 6.23 Another option is partial consolidation. For example, there could be separate statutory access regimes for information in civil and criminal proceedings to take account of relevant differences,²¹ such as:
- the greater proportion of serious criminal trials that are heard before a jury, who could be prejudiced by the release of certain information
 - the fact that criminal trials are more likely to attract media attention, and
 - the need to protect victims of crime.
- 6.24 In NSW, like in several other Australian states and territories,²² access regimes differ for criminal and civil proceedings.²³ Elsewhere, the rules are the same for both.²⁴
- 6.25 The access rules under the uncommenced *Court Information Act* would apply to both civil and criminal proceedings. The Act would categorise all court information as either “open access information” or “restricted access information”.²⁵ Different rules would apply to these categories,²⁶ which we outline below.²⁷
- 6.26 While the access rules would be the same, the Act would include different definitions of “open access information” for criminal and civil proceedings.²⁸ There would, however, be considerable overlap in the types of information included in these definitions.²⁹

21. NSW, Attorney General's Department, *Report on Access to Court Information* (2008) rec 1(a), 11.

22. See, eg, *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 28.05; *County Court Civil Procedure Rules 2018* (Vic) r 28.05; *Supreme Court (Criminal Procedure) Rules 2017* (Vic) r 1.11(4); *County Court Criminal Procedure Rules 2019* (Vic) r 1.08.1; *Uniform Civil Procedure Rules 1999* (Qld) r 980, r 981; *Criminal Practice Rules 1999* (Qld) r 56A, r 56, r 57; *Supreme Court Rules 1987* (NT) r 28.05, r 81A.09, r 81A.39; *Local Court Act 2015* (NT) s 28, s 29, s 30; *Rules of the Supreme Court 1971* (WA) ord 67B; *Criminal Procedure Rules 2005* (WA) r 43, r 51.

23. See, eg, *Criminal Procedure Act 1986* (NSW) s 314; *Uniform Civil Procedure Rules 2005* (NSW) r 36.12.

24. See, eg, *Court Procedures Rules 2006* (ACT) r 2903, r 4053; *Supreme Court Act 1935* (SA) s 131; *District Court Act 1991* (SA) s 54; *Magistrates Court Act 1991* (SA) s 51; *Supreme Court Rules 2000* (Tas) r 33.

25. *Court Information Act 2010* (NSW) s 5, s 6.

26. *Court Information Act 2010* (NSW) s 8, s 9.

27. See [6.33]–[6.35], [6.99].

28. *Court Information Act 2010* (NSW) s 5.

29. See [6.67]–[6.71].

Question 6.1: Consolidating the court information access regimes in NSW

- (1) Should the regimes governing access to court information be consolidated? Why or why not?
- (2) If so, how should the regimes be consolidated?
- (3) What principles and rules should underpin a consolidated regime?

Features of an access regime

6.27 In this section, we consider the features of the various NSW access regimes, and whether, and how, the regimes could be improved.

How much discretion should decision-makers have?

6.28 Those who deal with requests or applications for access to information include court registrars, judges and magistrates. Limiting the discretion that these decision-makers have to permit or deny access to information may ensure more consistency in decision-making, and greater certainty about access rights. Removing individual decision-making processes may also reduce the time it takes for courts to release information.³⁰

6.29 On the other hand, some level of discretion may be necessary to ensure flexibility, as an access regime may not be able to anticipate all possible contingencies.³¹

Discretion under the common law

6.30 Currently, courts may allow access to information in exercise of their inherent jurisdiction (if they are a superior court) or implied powers (if they are an inferior or lower court). This gives them significant discretion in deciding whether to allow access.

6.31 The courts do not adopt “a simple bright-line rule that access should *always* be allowed – or indeed *never*”.³² Applications for access are assessed on a case by case basis.

Discretion under the current access regimes in NSW

6.32 The current access regimes for court information – for example, the rules set by statutory provisions, regulations or court practice notes – similarly confer significant discretion to permit or deny access. In many instances, courts and registrars play a “gatekeeper” role,³³ in that non-parties need their permission to access information.³⁴

30. See, eg, NSW, Attorney General’s Department, *Review of the Policy on Access to Court Information* (2006) 14, 44.

31. See, eg, NSW, Attorney General’s Department, *Report on Access to Court Information* (2008) 19.

32. *Eisa Ltd v Brady* [2000] NSWSC 929 [36] (emphasis in original).

33. NSW, Attorney General’s Department, *Report on Access to Court Information* (2008) 44.

Discretion under the Court Information Act

- 6.33 The amount of discretion courts would have under the uncommenced *Court Information Act* depends on the class of information. The Act would establish two such classes:
- “open access information”, which includes, for example, written submissions made by parties, transcripts of proceedings in open court and records of any judgments given,³⁵ and
 - “restricted access information”, which includes, for example, personal identification information and information contained in an affidavit, pleading or statement that has not been admitted.³⁶
- 6.34 A person would be able to access “open access information” as of right unless the court orders otherwise.³⁷ This has been described as “a direct reversal of the common law position”, which does not recognise a right to access court documents.³⁸ The court would retain the discretion to impose conditions on the way access to “open access information” is provided, or restrict the disclosure or use of the information.³⁹
- 6.35 A person would only be able to access “restricted access information” with leave of the court, or if permitted by regulations. A court would also be able to impose conditions on such access.⁴⁰

Discretion under other Australian access regimes

- 6.36 Some Australian access regimes allow non-parties to access certain documents only with leave or permission of the court or registrar.⁴¹ This is similar to many of the current

34. See, eg, Supreme Court of NSW, *Practice Note SC Gen 2: Access to Court Files* (2019) [5]; District Court of NSW, *Practice Note DC (Civil) No 11: Access to Court Files by Non-Parties* (2005) [1]; *District Court Rules 1973* (NSW) pt 52 r 3(2); *Local Court Rules 2009* (NSW) r 8.10(3); *Coroners Act 2009* (NSW) s 65(2)(a); *Civil and Administrative Tribunal Rules 2014* (NSW) r 42(2); *Industrial Relations Commission Rules 2009* (NSW) r 2.7(1).

35. *Court Information Act 2010* (NSW) s 5.

36. *Court Information Act 2010* (NSW) s 6.

37. *Court Information Act 2010* (NSW) s 8(1).

38. S Dawson and F Roughley, “Suppression and Non-Party Access Part II: The How, When and Where of Non-Party Access” (2013 Autumn) *Bar News* 49, 51.

39. *Court Information Act 2010* (NSW) s 8(2).

40. *Court Information Act 2010* (NSW) s 9(1), s 9(3).

41. See, eg, *Federal Court Rules 2011* (Cth) r 2.32(3)–(4); *Court Procedures Rules 2006* (ACT) r 2903(2), r 4053(2); *Supreme Court (Criminal Procedure) Rules 2017* (Vic) r 1.11(4); *County Court Criminal Procedure Rules 2019* (Vic) r 1.08.1; *Supreme Court Act 1935* (SA) s 131(2)–(3); *District Court Act 1991* (SA) s 54(2)–(3); *Magistrates Court Act 1991* (SA) s 51(2)–(3); *Local Court Act 2015* (NT) s 28, s 29(2), s 30(1), s 31(2); *Supreme Court Rules 2000* (Tas) r 33(4); *Magistrates Court (Civil Division) Rules 1998* (Tas) r 155(4).

NSW access regimes, and would be the approach under the uncommenced *Court Information Act* in relation to “restricted access information”.

- 6.37 Other regimes permit non-parties to access certain documents (such as originating processes) as of right.⁴² Some go a step further, and permit non-parties to access *all* court documents as of right, except specified documents (such as affidavits and confidential documents).⁴³

Question 6.2: Discretion to permit or deny access to court information

- (1) In what circumstances, if any, should courts have discretion to permit or deny access to court information?
- (2) In what circumstances, if any, should information be available as of right?

What principles or considerations should apply in the exercise of discretion?

- 6.38 There is often limited guidance on how courts should exercise their discretion. While this allows significant flexibility in dealing with applications, it can also give rise to uncertainty and inconsistency.⁴⁴

Common law considerations

- 6.39 While the principle of open justice does not create “a freestanding right” to access information on the court file, courts have recognised that the principle should guide decisions about granting access.⁴⁵ However, the principle does not require a particular decision, since there may be other principles or considerations that have to be taken into account.⁴⁶ A court may, for example, consider the need to protect a person’s privacy.⁴⁷
- 6.40 Justice Austin has outlined certain “qualifying principles” and other considerations in relation to the open justice principle:

42. See, eg, *Federal Court Rules 2011* (Cth) r 2.32(2); *Criminal Practice Rules 1999* (Qld) r 57(1)–(3); *Supreme Court Rules 1987* (NT) r 81A.09, r 81A.39; *Local Court Act 2015* (NT) s 30; *Supreme Court Act 1935* (SA) s 131(1); *District Court Act 1991* (SA) s 54(1); *Magistrates Court Act 1991* (SA) s 51(1); *Magistrates Court (Civil Division) Rules 1998* (Tas) r 155(1); *Rules of the Supreme Court 1971* (WA) ord 67B r 6, r 15, r 16(1)(a)–(d).

43. See, eg, *Court Procedures Rules 2006* (ACT) r 2903(1)–(2), r 4053(1)–(2); *Supreme Court of Victoria (General Civil Procedure Rules) 2015* (Vic) r 28.05; *County Court Civil Procedure Rules 2018* (Vic) r 28.05.

44. NSW, Attorney General’s Department, *Review of the Policy on Access to Court Information* (2006) 5.

45. *John Fairfax Publications Pty Ltd v Ryde Local Court* [2005] NSWCA 101, 62 NSWLR 512 [29]. See also *Eisa Ltd v Brady* [2000] NSWSC 929 [16].

46. *Seven Network Ltd v News Ltd* (No 9) [2005] FCA 1394, 148 FCR 1 [23].

47. *John Fairfax Publications Pty Ltd v Ryde Local Court* [2005] NSWCA 101, 62 NSWLR 512 [77]–[78].

- the principle of “prematurity”: the idea that it would be unfair to a defendant to release material, relied upon by the plaintiff, which has not been answered or tested in the substantive proceedings
- the principle of “trial by media”: the idea that the media might report material before it can be tested in court proceedings
- the possibility of the absolute privilege against defamation for a “fair” report of court proceedings being abused (that is, whether releasing documents containing damaging applications to the media, before they are read in court, could unfairly prejudice those who are the subject of the allegations, who would then have no redress in defamation)
- whether the release of material would satisfy “prurience” and no legitimate public interest
- whether release of material would “surprise” or “ambush” the parties, and undermine a negotiated position
- the risk of misleading reporting by the media
- the use of possible hearsay material, and
- the need to protect commercial confidentiality of the material.⁴⁸

6.41 Whether these considerations prevent the court from releasing information will depend on the circumstances. For example, the “prematurity” principle may generally weigh against release of materials in the pre-trial stage, as these materials may be amended, struck out, objected to or rejected.⁴⁹ However, when a court makes significant orders at the pre-trial stage, in the absence of the parties, it is expected to make the basis of the orders available, so the court is accountable for what it has done.⁵⁰

Considerations under the current access regimes in NSW

6.42 Although courts have recognised that the open justice principle is relevant in the context of access to information, some access regimes in NSW do not make explicit reference

48. *ASIC v Rich* [2001] NSWSC 496, 51 NSWLR 643 [25]–[43]. See also *Eisa Ltd v Brady* [2000] NSWSC 929 [18]–[20].

49. See, eg, *ASIC v Rich* [2001] NSWSC 496, 51 NSWLR 643 [10]; *Eisa Ltd v Brady* [2000] NSWSC 929 [22].

50. *ASIC v Rich* [2001] NSWSC 496, 51 NSWLR 643 [26].

to this principle. They simply provide that the registrar “may” permit a non-party to access certain documents, or that a person must have “leave” for access.⁵¹

6.43 Under the *Uniform Civil Procedure Rules 2005* (NSW) (“*Uniform Civil Procedure Rules*”), the registrar may provide non-parties with a copy of any pleading or other document filed in civil proceedings if they appear to have a “sufficient interest” in it.⁵² There is no definition of “sufficient interest”. In the *Report on Access to Court Information*, the NSW Attorney General’s Department said that the test is an inadequate guide, as it:

- only requires the court to consider the relationship of the person seeking access to the proceedings, and
- does not require the court to consider the extent to which the open justice principle is undermined if access is not granted.⁵³

6.44 Access to materials in Supreme Court proceedings, and civil proceedings in the District Court, is governed by practice notes.⁵⁴ Non-parties must have leave for access, and the practice notes guide the exercise of the judge or registrar’s discretion in deciding whether to grant leave. This guidance largely reflects principles and distinctions made in case law.⁵⁵ Key considerations include:

- whether the material has been used in proceedings, as access will normally be given to documents that record what was said or done in open court, materials that were admitted into evidence, and information that would have been heard or seen by any person present in open court,⁵⁶ and
- the stage of proceedings, as access is not normally given to materials before the conclusion of the proceedings, due to the risk that material that is ultimately not read in open court or admitted into evidence would be seen.⁵⁷

51. See, eg, *Civil and Administrative Tribunal Rules 2014* (NSW) r 42(2); *Industrial Relations Commission Rules 2009* (NSW) r 2.7.

52. *Uniform Civil Procedure Rules 2005* (NSW) r 36.12(2).

53. NSW, Attorney General’s Department, *Report on Access to Court Information* (2008) 23–24.

54. Supreme Court of NSW, *Practice Note SC Gen 2: Access to Court Files* (2019); District Court of NSW, *Practice Note DC (Civil) No 11: Access to Court Files by Non-Parties* (2005).

55. See, eg, *Eisa Ltd v Brady* [2000] NSWSC 929 [15]; *HIH Insurance Ltd (in liq) v General Re Insurance Australia Ltd* [2006] NSWSC 128 [13].

56. Supreme Court of NSW, *Practice Note SC Gen 2: Access to Court Files* (2019) [7]; District Court of NSW, *Practice Note DC (Civil) No 11: Access to Court Files by Non-Parties* (2005) [2].

57. Supreme Court of NSW, *Practice Note SC Gen 2: Access to Court Files* (2019) [15]; District Court of NSW, *Practice Note DC (Civil) No 11: Access to Court Files by Non-Parties* (2005) [4].

- 6.45 The access regimes for certain criminal proceedings in the Local Court, and for the Coroners Court, expressly refer to the open justice principle, alongside other considerations for deciding whether to grant access.
- 6.46 In the Local Court, the Magistrate or registrar may allow non-parties to access certain materials “if of the opinion that it is appropriate to do so in the circumstances”.⁵⁸ In the Coroners Court, the Coroner or Assistant Coroner can grant a person access to the coroner’s file (or a part of the file) if they are “satisfied that it is appropriate”.⁵⁹
- 6.47 In making these decisions, the relevant court must consider:
- the principle that proceedings are generally to be heard in open court
 - the connection that the person requesting access has to the proceedings
 - the reasons access is being sought, and
 - any other matter that the court considers relevant.⁶⁰
- 6.48 In addition to these matters, the Local Court must consider the impact of granting leave on a protected person or victim of a crime, and the Coroners Court must consider the impact of allowing access on the relatives of any deceased person the file relates to.⁶¹
- 6.49 Legal Aid NSW says the Coroners Court regime “strike[s] the right balance between open justice and the protection of information”.⁶² However, it supports an amendment to require the Coroner or Assistant Coroner to consider “the impact on *and the wishes of* the relatives of the deceased person of allowing *or restricting* access”.⁶³ It says families may wish to release information that is in the public interest.⁶⁴

Considerations under the Court Information Act

- 6.50 Under the uncommenced *Court Information Act*, a court, in deciding whether to grant leave to a person to access “restricted access information”, would be able to take particular matters into account. The court would not be *required* to take these matters

58. *Local Court Rules 2009* (NSW) r 8.10(4).

59. *Coroners Act 2009* (NSW) s 65(2)(a).

60. *Local Court Rules 2009* (NSW) r 8.10(5)(a), r 8.10(c)–(e); *Coroners Act 2009* (NSW) s 65(3)(a), s 65(c)–(e).

61. *Local Court Rules 2009* (NSW) r 8.10(5)(b); *Coroners Act 2009* (NSW) s 65(3)(b).

62. Legal Aid NSW, *Preliminary Submission PCI39*, 6.

63. Legal Aid NSW, Submission to NSW Department of Justice, *Statutory Review of the Coroners Act 2009: Draft Proposals for Legislative Change* (September 2016) 16 (emphasis in original).

64. Legal Aid NSW, *Preliminary Submission PCI39*, 6; Legal Aid NSW, Submission to NSW Department of Justice, *Statutory Review of the Coroners Act 2009: Draft Proposals for Legislative Change* (September 2016) 16.

into account but could do so “to the extent to which it considers them relevant”. These matters are:

- the public interest in access to the information being provided
- the extent to which the open justice principle will be adversely affected if access is not provided
- the extent to which an individual’s privacy or safety will be compromised by providing access
- the extent to which providing access will adversely affect the administration of justice
- the extent of the person’s interest or involvement in the proceedings or other matter to which the information relates
- the reasons for which access is sought, and
- such other matters as the court considers relevant in the particular circumstances of the case.⁶⁵

Considerations under other Australian access regimes

- 6.51 Some Australian access regimes do not set out any specific considerations or principles that apply in deciding whether to permit access to information.⁶⁶ For example, the *High Court Rules 2004* (Cth) (“*High Court Rules*”) simply provide that the registrar “may” give a person electronic access to a document issued or filed in the court, upon payment of a fee.⁶⁷
- 6.52 Other access regimes specify some considerations.⁶⁸ For example, in the Australian Capital Territory (“ACT”), a person seeking access to documents in civil or criminal proceedings must demonstrate a “sufficient interest” in the proceedings to the registrar.⁶⁹ This is the same test as in the *Uniform Civil Procedure Rules*.⁷⁰

65. *Court Information Act 2010* (NSW) s 9(2).

66. See, eg, *Supreme Court (Criminal Procedure) Rules 2017* (Vic) r 1.11(4); *County Court Civil Procedure Rules 2018* (Vic) r 28.05(1).

67. *High Court Rules 2004* (Cth) r 4.07.4.

68. See, eg, *Family Law Rules 2004* (Cth) r 24.13; *Rules of the Supreme Court 1971* (WA) ord 67B r 9, r 10.

69. *Court Procedures Rules 2006* (ACT) r 2903(2), r 4053(2).

70. *Uniform Civil Procedure Rules 2005* (NSW) r 36.12(2).

6.53 In relation to the Federal Court of Australia (“Federal Court”), a person must have leave of the court to inspect certain “restricted” documents.⁷¹ A practice note sets out the matters a court will consider, which include:

- the context surrounding, and purpose underpinning, the request
- the nature of the documents sought (for example, whether the documents have been admitted into evidence or read out in open court), and
- whether a request “may result in an undue burden on the Court”.⁷²

Considerations suggested by submissions

6.54 Some submissions suggest particular considerations or principles that could apply in determining access to information requests.⁷³ The Law Society of NSW (“Law Society”) recommends the following guiding principles:

- there is a general public interest in ensuring public access to court information
- legislation must balance the interest of open and unfettered access with other public interests, such as protecting privacy rights of individuals (which means some court information should not be publicly accessible)
- parties may have an interest in restricting access to court information relating to their proceedings, and should be heard before such information is disclosed, and
- individuals’ privacy and personal information should be protected from unwarranted disclosure, and they should be heard prior to disclosure.⁷⁴

6.55 Another submission says that “sensitivity” should be considered.⁷⁵ “Sensitivity” is a concept recognised by other laws and practices dealing with information management.⁷⁶ For example, in NSW, the fact that “information may be of a particularly

71. *Federal Court Rules 2011* (Cth) r 2.32(3)–(4); Federal Court of Australia, *Access to Documents and Transcripts Practice Note (GPN-ACCS)*, 2016 [4.6].

72. Federal Court of Australia, *Access to Documents and Transcripts Practice Note (GPN-ACCS)* (2016) [4.10].

73. See, eg, UTS Faculty of Law, *Preliminary Submission PCI25*, 10–13; Law Society of NSW, *Preliminary Submission PCI31*, 3.

74. Law Society of NSW, *Preliminary Submission PCI31*, 3.

75. UTS Faculty of Law, *Preliminary Submission PCI25*, 10–11.

76. K Biber, “In Crime’s Archive: The Cultural Afterlife of Criminal Evidence” (2013) 53 *British Journal of Criminology* 1033, 1042.

personal or sensitive nature” for certain categories of person is a factor in decision-making about access to health records for research purposes.⁷⁷

- 6.56 Legal Aid NSW suggests specific guidance for accessing materials in the Children’s Court.⁷⁸ Unlike some Australian states,⁷⁹ NSW does not have any specific provisions concerning access to materials in this court. Legal Aid NSW suggests that, in making decisions about access to Children’s Court information, the principle of open justice should be balanced with the safety, welfare, wellbeing, privacy and other interests of children involved in the proceedings.⁸⁰

Question 6.3: Considerations in determining access requests

- (1) What, if any, standard considerations or principles should all (or most) courts apply when determining an access request?
- (2) Are there any circumstances that would warrant different considerations to the standard considerations being applied? If so:
 - (a) what circumstances, and
 - (b) what should the considerations be?

What types of information should be made available?

- 6.57 Access regimes often specify the types of information they apply to, and may apply different rules to different types of information. This recognises that some information is sensitive or potentially prejudicial. In this section, we consider what distinctions are currently made and ask whether they are appropriate.

Information available under the current access regimes

- 6.58 In NSW, different regimes permit access to different types of information. For example, the *Local Court Rules 2009* (NSW) (“*Local Court Rules*”) permit access to copies of the “court record” and transcripts of evidence taken at certain criminal proceedings in the Local Court. The “court record” does not include a video recording of the proceedings.⁸¹

77. NSW, Information and Privacy Commission, *Statutory Guidelines on Research: Health records and Information Privacy Act 2002* (NSW) (2004) guideline 4.4(d).

78. Legal Aid NSW, *Preliminary Submission PCI39*, 6; Legal Aid NSW, Submission to the Children’s Court of NSW, *Review of the Children’s Court Rule 2000* (NSW) (February 2018) 3.

79. See, eg, *Childrens Court Act 1992* (Qld) s 28A; *Children’s Court of Western Australia Act 1988* (WA) s 51A.

80. Legal Aid NSW, Submission to the Children’s Court of NSW, *Review of the Children’s Court Rule 2000* (NSW) (February 2018) 2–3.

81. *Local Court Rules 2009* (NSW) r 8.10(6).

- 6.59 The *Criminal Procedure Act 1986* (NSW) (“*Criminal Procedure Act*”) permits media representatives to inspect specific documents in criminal proceedings, for the purpose of compiling a fair report of the proceedings for publication. These documents are:
- copies of the indictment (that is, the document listing the charges against an accused person), court attendance notice or other document commencing the proceedings
 - witness statements tendered as evidence
 - the brief of evidence (that is, a collection of documents that the police may use as evidence)
 - in the case of a guilty plea, the police fact sheet (that is, the document that tells the version of events according to the police)
 - transcripts of evidence, and
 - any record of a conviction or order.⁸²
- 6.60 The *Civil and Administrative Rules 2014* (NSW) (“*NCAT Rules*”) permit a non-party (with leave of the registrar and payment of any prescribed fee) to inspect “public access documents” relating to a finalised proceeding. These include statements, affidavits and documents admitted into evidence in proceedings held in public.⁸³
- 6.61 Within some access regimes, there are different rules for different types of information. For example, the Supreme Court and District Court practice notes provide that, unless the judge or registrar considers that it should be kept confidential, non-parties will ordinarily be given access to:
- pleadings and judgments in proceedings that have been concluded
 - documents recording what was said or done in open court
 - material that was admitted into evidence, and
 - information that would have been heard or seen by any person present in open court.⁸⁴
- 6.62 However, access to other types of material, such as affidavits and witness statements that were not read in court, will only be granted if the judge or registrar is satisfied that

82. *Criminal Procedure Act 1986* (NSW) s 314.

83. *Civil and Administrative Tribunal Rules 2014* (NSW) r 42(2), r 42(8).

84. Supreme Court of NSW, *Practice Note SC Gen 2: Access to Court Files* (2019) [7]; District Court of NSW, *Practice Note DC (Civil) No 11: Access to Court Files by Non-Parties* (2005) [2].

“exceptional circumstances” exist. Such material may not be read in court for a range of reasons, including because they contain matters that are objected to and rejected, or the proceedings have settled before the hearing. Affidavits or statements may also contain matters that are scandalous, frivolous, vexatious, irrelevant or otherwise oppressive.⁸⁵

- 6.63 A person can access exhibits in certain circumstances. An exhibit is a document or thing provided as evidence in court or referred to in a sworn statement. For example, a bank statement may be produced as an exhibit in civil proceedings.⁸⁶ A recording of an accused person’s interview with police may be produced as an exhibit in criminal proceedings.
- 6.64 The Supreme Court and District Court practice notes provide that “access will normally be granted to non-parties in respect of material that was admitted into evidence”, which can include exhibits.⁸⁷ Under the *District Court Rules 1973* (NSW) (“*District Court Rules*”), a non-party may seek leave to search the “file” kept by the registrar in respect of a proceeding, which could include an exhibit.⁸⁸
- 6.65 For certain criminal proceedings in the Local Court, an exhibit could be part of the “court record”, and a non-party can seek leave to access it under the *Local Court Rules*.⁸⁹

Information available under the Court Information Act

- 6.66 The uncommenced *Court Information Act* would govern access to “court information”, defined as information contained in a “court record”. This, in turn, means a record:
- filed or tendered in the court by a party (including originating processes), or comprising a party’s written submissions
 - of any proceedings before the court
 - of judgment and directions given, or orders made, in proceedings before the court, including in connection with case management and listing of proceedings, and
 - admitted into evidence by the court.⁹⁰

85. Supreme Court of NSW, *Practice Note SC Gen 2: Access to Court Files* (2019) [7], [14].

86. Victoria Law Foundation, *Legal Glossary: A Plain Language Guide to Common Legal Terms* (2015) 14.

87. Supreme Court of NSW, *Practice Note SC Gen 2: Access to Court Files* (2019) [7]; District Court of NSW, *Practice Note DC (Civil) No 11: Access to Court Files by Non-Parties* (2005) [2].

88. *District Court Rules 1973* (NSW) pt 52 r 3(2).

89. *Local Court Rules 2008* (NSW) r 8.10(3); Local Court of NSW, *Preliminary Consultation PCI12*.

90. *Court Information Act 2010* (NSW) s 4 definition of “court record”.

6.67 As we discuss above, the *Court Information Act* would classify all court information as either “open access information” or “restricted access information”.⁹¹ Different rules would apply to each. The following information would constitute “open access information” in relation to both criminal and civil proceedings:

- documents that commence proceedings (such as the court attendance notice in criminal proceedings, and the originating process in civil proceedings)
- a party’s written submissions
- a transcript of proceedings in open court
- statements and affidavits admitted into evidence, including expert reports
- judgments, directions and orders given or made in the proceedings, including a record of conviction in criminal proceedings
- the date on which proceedings have been or are to be heard by the court
- the name of the judge, magistrate, registrar or other court officer who heard or is listed to hear the proceedings, and
- such other records as may be prescribed by regulations.⁹²

6.68 For criminal proceedings, “open access information” would also include the police fact sheet, statement of facts or any similar document summarising the prosecution’s case, except where the proceedings have been set down for trial by jury and have not concluded.⁹³ During this period, this information would be “restricted access information”.⁹⁴ This approach is meant to “protect against trials having to be aborted due to jurors being adversely influenced by publication of unsworn and untested allegations”.⁹⁵

6.69 For civil proceedings, originating processes and pleadings would only constitute “open access information” after:

- the stage in proceedings where the court has an opportunity to consider any objections to the originating process or pleadings, including any cross-claim, or
- the conclusion of the proceedings,

91. See [6.33].

92. *Court Information Act 2010* (NSW) s 5.

93. *Court Information Act 2010* (NSW) s 5(1)(c).

94. See [6.71]

95. NSW, *Parliamentary Debates*, Legislative Council, Second Reading Speech, 18 May 2010, 22802.

whichever happens first.⁹⁶ Before then, this information would constitute “restricted access information”. This approach is meant to

ensure that defendants to civil proceedings are not prejudiced by having documents about them made public before they are served with the pleadings, or before they have had a chance to object to proceedings that may be vexatious, scandalous or otherwise an abuse of the court’s process, or before they have had an opportunity to consider making a cross-claim.⁹⁷

6.70 The definition of “restricted access information” would be the same for civil and criminal proceedings. Any court information not classified as “open access information” would be “restricted access information”.⁹⁸

6.71 In addition, certain information that would otherwise be “open access information” would be classified as “restricted access information”. This would include:

- personal identification information (for example, tax file, Medicare, passport and personal telephone numbers, dates of birth and residential addresses)⁹⁹
- information contained in an affidavit, pleading or statement that has been rejected, struck out or otherwise not admitted
- a police fact sheet, statement of facts or any similar document summarising the prosecution’s case in proceedings set down for a jury trial, once the proceedings have been set down and until the proceedings are concluded
- information contained in a medical, psychiatric, psychological or pre-sentence report, unless it is contained or summarised in a judgment given or orders made in proceedings
- information in a statement of a person’s criminal record, unless it is contained or summarised in a judgment given or orders made in proceedings
- information in a transcript of, and statements and evidence admitted into evidence in, proceedings for an application for a suppression or non-publication order, but only while proceedings are pending, and
- information in a victim impact statement, unless it is contained in a transcript of proceedings in open court, or a record of any judgment given or order made in proceedings.¹⁰⁰

96. *Court Information Act 2010* (NSW) s 5(2)(a).

97. NSW, *Parliamentary Debates*, Legislative Council, Second Reading Speech, 18 May 2010, 22802.

98. *Court Information Act 2010* (NSW) s 6(1).

99. *Court Information Act 2010* (NSW) s 4, s 6(2)(a).

- 6.72 Information classified as “restricted access information” is “of a personal, highly sensitive or confidential nature”. Access to this information would be restricted because
- its release could adversely impact the privacy or safety of any participants in court proceedings, such as by causing identity theft or further traumatising victims of crime, or compromise the fair conduct of the court proceedings or the administration of justice.¹⁰¹
- 6.73 One submission suggests that all material used in sexual offence proceedings should fall into the “restricted access information” category. It argues that the risk of such information being used improperly, and the impact of personal or sensitive information being made available to the public, is “far too great”.¹⁰² The NSW Attorney General’s Department made a similar recommendation in the 2008 report.¹⁰³
- 6.74 The Department also recommended that access to information in the Children’s Court should be restricted.¹⁰⁴ Despite this, such information is not included in the definition of “restricted access information” in the *Court Information Act*.
- 6.75 Documentary and physical exhibits is not included in the definition of “open access information”, which means they would amount to “restricted access information”.¹⁰⁵ In the 2008 report, the Department said documentary exhibits are more likely to contain personal or confidential information that cannot be edited from the document. Photographs may also cause distress or be intimate in nature.¹⁰⁶
- 6.76 The Department identified issues with allowing access to physical exhibits, such as:
- the potential for videotaped records of interview obtained by the media during the committal stage of proceedings to impact potential jurors, if broadcast shortly before a trial, and
 - practical difficulties in accessing exhibits such as weapons and other physical material; including that the material is returned to the prosecution at the end of the case, and it is not possible for the court to facilitate access.¹⁰⁷

100. *Court Information Act 2010* (NSW) s 6(2)(e)–(h).

101. NSW, *Parliamentary Debates*, Legislative Council, Second Reading Speech, 18 May 2010, 22802.

102. Rape and Domestic Violence Services Australia, *Preliminary Submission PCI36*, 7.

103. NSW, Attorney General’s Department, *Report on Access to Court Information* (2008) rec 3(a), 23.

104. NSW, Attorney General’s Department, *Report on Access to Court Information* (2008) rec 3(a).

105. Any court information that is not open access information is restricted access information: *Court Information Act 2010* (NSW) s 6(1).

106. NSW, Attorney General’s Department, *Report on Access to Court Information* (2008) 22.

107. NSW, Attorney General’s Department, *Report on Access to Court Information* (2008) 22–23.

6.77 The Department recommended that the legislative regime permit, but not require, prosecuting agencies to release exhibits to the media, in addition to the court's power to allow access to exhibits.¹⁰⁸ A Note to Part 2 of the *Court Information Act* provides that the Act would “not prevent prosecuting authorities or a party to proceedings from giving access to documentary or physical exhibits returned at the conclusion of proceedings”.¹⁰⁹

Information available under other Australian access regimes

6.78 Some Australian access regimes permit access to all documents filed in court proceedings, except for specified documents.¹¹⁰ These documents might include:

- a document that the court has ordered, or the registrar has decided, should remain confidential¹¹¹
- affidavits or parts of affidavits that have not been read out in court or have been deemed inadmissible,¹¹² and
- unsworn statements of evidence.¹¹³

6.79 Other regimes only permit access to specified documents.¹¹⁴ Within some access regimes, there are different rules for different types of documents.¹¹⁵ For example, in courts in South Australia (“SA”) and Tasmania, some documents are accessible as of right, such as:

- documentary material admitted into evidence
- transcripts of evidence, submissions by counsel and reasons for judgment, and

108. NSW, Attorney General's Department, *Report on Access to Court Information* (2008) rec 4, 30.

109. *Court Information Act 2010* (NSW) pt 2 note.

110. See, eg, *High Court Rules 2004* (Cth) r 4.07.4; *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 28.05; *County Court Civil Procedure Rules 2018* (Vic) r 28.05; *Uniform Civil Procedure Rules 1999* (Qld) r 981; *Supreme Court Rules 1987* (NT) r 28.05; *Court Procedures Rules 2006* (ACT) r 2903(2), r 4053(2).

111. See, eg, *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 28.05(2); *County Court Civil Procedure Rules 2018* (Vic) r 28.05(2); *Supreme Court Rules 1987* (NT) r 28.05(2).

112. *Court Procedures Rules 2006* (ACT) r 2903(2)(b)–(c), r 4053(2)(b)–(c).

113. *Court Procedures Rules 2006* (ACT) r 2903(2)(o), r 4053(2)(o).

114. See, eg, *Criminal Practice Rules 1999* (Qld) r 57(1)–(3); *Supreme Court Rules 1987* (NT) r 81A.09, r 81A.39; *Local Court Act 2015* (NT) s 28–31; *Rules of the Supreme Court 1971* (WA) ord 67B r 6(3)–(4), r 7(2).

115. See, eg, *Federal Court Rules 2011* (Cth) r 2.32; *Court Procedures Rules 2006* (ACT) r 2903, r 4053.

- judgments and orders of the court.¹¹⁶
- 6.80 Other documents can only be accessed with leave of the court, such as:
- affidavits and interrogatories
 - material that was not taken or received in open court, and
 - material suppressed from publication.¹¹⁷
- 6.81 Some Australian access regimes expressly permit access to exhibits.¹¹⁸ In Queensland, for example, exhibits may be inspected on payment of a fee, unless:
- a court officer considers it may risk the exhibit’s security or a person’s safety, or
 - the judge orders that the exhibit not be inspected, or be sealed and not opened without a further court order.¹¹⁹
- 6.82 A person may also apply to the court for permission to copy, for publication, an exhibit tendered at trial. The judge or magistrate hearing the application must consider certain matters, including whether the copying for publication is likely to prejudice the fair trial of an accused person.¹²⁰

Question 6.4: Types of court information available for access

(1) What types of court information should be available for access?

(2) Should different access rules apply to different types of information?

When should access to information be prohibited?

- 6.83 In the previous section, we outline the different access rules that can apply to different types of information. In this section, we consider the circumstances in which access to information is entirely prohibited.
- 6.84 Specifying the circumstances in which access to information is prohibited sets clear parameters for decision-makers but is obviously a far less flexible approach.

116. See, eg, *Supreme Court Act 1935* (SA) s 131(1); *District Court Act 1991* (SA) s 54(1); *Magistrates Court Act 1991* (SA) s 51(1); *Supreme Court Rules 2000* (Tas) r 33(1)–(3); *Magistrates Court (Civil Division) Rules 1998* (Tas) r 155(1).

117. See, eg, *Supreme Court Act 1935* (SA) s 131(2); *District Court Act 1991* (SA) s 54(2); *Magistrates Court Act 1991* (SA) s 51(2); *Supreme Court Rules 2000* (Tas) r 33(4); *Magistrates Court (Civil Division) Rules 1998* (Tas) r 155(4).

118. See, eg, *Criminal Practice Rules 1999* (Qld) r 56(1)–(2), r 56A(1)–(3); *Local Court Act 2015* (NT) s 31.

119. *Criminal Practice Rules 1999* (Qld) r 56(1)–(3).

120. *Criminal Practice Rules 1999* (Qld) r 56A(4)(e).

Current access prohibitions in NSW

- 6.85 Some access regimes in NSW prohibit access to information in certain circumstances. For example, the *NCAT Rules* do not allow access to documents in the Registry related to NSW Civil and Administrative Tribunal (“NCAT”) proceedings where:
- a claim of privilege has been made in relation to the document, but not yet decided by NCAT
 - NCAT has decided that the document contained privileged matters
 - NCAT has ordered that all or part of the document not be disclosed
 - all or part of the document is subject to an automatic prohibition on disclosure, or
 - the document is, or includes, a note or working paper produced by or for a tribunal member in relation to any proceedings.¹²¹
- 6.86 However, the registrar may permit a person to inspect (or be given a copy of) parts of the document that do not contain or included the privileged material, or other material that cannot be disclosed.¹²²
- 6.87 The *Criminal Procedure Act* provides that a registrar must not make documents in criminal proceedings available to the media for inspection if:
- the proceedings are subject to a suppression or non-publication order, or
 - the document is subject to an automatic prohibition on publication or disclosure.¹²³

Access prohibitions under the Court Information Act

- 6.88 Like some other access regimes in NSW, the uncommenced *Court Information Act* would not permit access to court information if it would contravene:
- a suppression or non-publication order, or
 - a statutory prohibition on disclosure or publication of information.¹²⁴

Access prohibitions under other Australian regimes

- 6.89 Elsewhere in Australia, examples of circumstances in which access to court documents is prohibited include where:

121. *Civil and Administrative Tribunal Rules 2014* (NSW) r 42(5).

122. *Civil and Administrative Tribunal Rules 2014* (NSW) r 42(6).

123. *Criminal Procedure Act 1986* (NSW) s 314(4).

124. *Court Information Act 2010* (NSW) s 13.

- the court has ordered that the document remain confidential¹²⁵
- the document contains information that would disclose the identity of a person, where such disclosure is prohibited¹²⁶
- the document contains information to which a suppression or non-publication order applies¹²⁷
- the document has been ordered to be sealed,¹²⁸ and
- making a copy or certified copy of the document available may risk a person's safety or wellbeing, including the person's mental health.¹²⁹

Question 6.5: Prohibiting access to court information

Should access to court information be prohibited in certain circumstances? If so, when?

Who should be able access information?

- 6.90 Both parties to proceedings and non-parties might seek access to court information. Non-parties seeking access commonly include media representatives, public agencies and researchers. Members of the public might also seek access.
- 6.91 Conferring broad access rights promotes open justice. However, it may be necessary to restrict certain people from accessing information where, for example, the information is sensitive or potentially prejudicial. One option is to grant different access rights depending on the type of applicant.

Current access regimes in NSW

- 6.92 The current access regimes often contain different rules for parties to proceedings and non-parties. Some regimes do not require parties to seek leave or permission of the court or a registrar to access information about the proceedings, but require non-parties to do so.¹³⁰

125. *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 28.05(2)(a); *County Court Civil Procedure Rules 2018* (Vic) r 28.05(2)(a); *Supreme Court Rules 1987* (NT) r 28.05(2)(a).

126. *High Court Rules 2004* (Cth) r 4.07.4(b).

127. *High Court Rules 2004* (Cth) r 4.07.4(c).

128. *Criminal Practice Rules 1999* (Qld) r 57(6)(b).

129. *Criminal Practice Rules 1999* (Qld) r 57(9).

130. See, eg, Supreme Court of NSW, *Practice Note SC Gen 2: Access to Court Files* (2019) [6]; District Court of NSW, *Practice Note DC (Civil) No 11: Access to Court Files by Non-Parties* (2005) [1]; *District Court Rules 1973* (NSW) pt 52 r 3(1)–(2); *Local Court Rules 2009* (NSW) r 8.10(2)–(3); *Civil and Administrative Tribunal Rules 2014* (NSW) r 42(1)–(2).

- 6.93 Some regimes permit parties to access a broader range of information than non-parties. For example, the *NCAT Rules* allow parties to access all documents relating to the NCAT proceedings, on payment of a prescribed fee (if there is one). However, non-parties may only inspect “public access documents” relating to finalised proceedings, with leave of the registrar and payment of any prescribed fee.¹³¹
- 6.94 In addition to the rules applying to non-parties generally, media representatives are entitled to inspect specific documents in criminal proceedings, for the purpose of compiling a fair report of the proceedings for publication.¹³² We discuss this entitlement further in Chapter 10.¹³³
- 6.95 Current access regimes in NSW do not recognise any special right of public sector agencies to access court information. This is despite the fact that many agencies require access to court information for purposes related to their operations.¹³⁴ For example, Legal Aid NSW requires access to certain court information to make determinations about eligibility for legal aid.¹³⁵
- 6.96 As a matter of practice and convenience, courts recognise the necessity of allowing these agencies to access information to facilitate the administration of justice. However, we understand that often agencies must still apply for access in each individual case.¹³⁶
- 6.97 Some NSW government agencies have arrangements with courts to access information for research purposes. Similar arrangements can also be set up under specific legislation.¹³⁷

The access regime under the Court Information Act

- 6.98 Like other access regimes in NSW, the uncommenced *Court Information Act* draws a distinction between parties, non-parties (generally) and the media.
- 6.99 Parties and their legal representatives would be entitled to access *any* court information relating to the proceedings, unless the court orders otherwise.¹³⁸ Non-parties would be able to access:
- “open access information” as of right, unless the court orders otherwise, and

131. *Civil and Administrative Tribunal Rules 2014* (NSW) r 42(1)–(2).

132. *Criminal Procedure Act 1986* (NSW) s 314.

133. See [10.9]–[10.27].

134. See NSW, Attorney General’s Department, *Report on Access to Court Information* (2008) 24–25.

135. Legal Aid NSW, *Preliminary Submission PCI39*, 3–4, 5; NSW, Attorney General’s Department, *Report on Access to Court Information* (2008) 25.

136. NSW, Attorney General’s Department, *Report on Access to Court Information* (2008) 25.

137. See [11.14].

138. *Court Information Act 2010* (NSW) s 11(1).

- “restricted access information”, with leave of the court or if permitted by regulations.¹³⁹
- 6.100 One submission suggests the types of people who can access information in sexual, domestic or family violence proceedings should be limited, due to the sensitive nature of such proceedings.¹⁴⁰
- 6.101 Under the *Court Information Act*, news media organisations would have additional access rights to certain types of “restricted access information”, unless a court orders otherwise.¹⁴¹ This recognises the special role of the media in informing the public about proceedings.¹⁴² We discuss it further in Chapter 10.¹⁴³
- 6.102 Like the current access regimes in NSW, the *Court Information Act* would not recognise any special right of public sector agencies to access information. The 2008 *Report on Access to Court Information* recommended that regulations or court rules prescribe agencies or groups entitled to access “restricted access information”, and the basis for that access.¹⁴⁴

Other Australian access regimes

- 6.103 Like NSW, some other Australian access regimes distinguish between parties and non-parties, and confer broader entitlements on parties.¹⁴⁵ Leaving aside the issue of fees for access, which we discuss below, some have the same rules for parties and non-parties.¹⁴⁶
- 6.104 Some other Australian access regimes have the same rules for non-parties (generally) and the media.¹⁴⁷ For example, in civil and appeal proceedings in the Supreme Court of Western Australia, non-parties and the media can access the same kinds of information, but the access procedures differ.¹⁴⁸

139. *Court Information Act 2010* (NSW) s 8(1), s 9(1).

140. Rape and Domestic Violence Services Australia, *Preliminary Submission PCI36*, rec 3, 7.

141. *Court Information Act 2010* (NSW) s 10(1).

142. NSW, *Parliamentary Debates*, Legislative Council, Second Reading Speech, 18 May 2010, 22803.

143. See [10.69]–[10.72]

144. NSW, Attorney General’s Department, *Report on Access to Court Information* (2008) rec 3(e).

145. See, eg, *Federal Court Rules 2011* (Cth) r 2.32; *Court Procedures Rules 2006* (ACT) r 2903, r 4053.

146. See, eg, *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 28.05(1); *County Court Civil Procedure Rules 2018* (Vic) r 28.05(1); *Uniform Civil Procedure Rules 1999* (Qld) r 980, r 981; *Criminal Practice Rules 1999* (Qld) r 56, r 57; *Supreme Court Rules 1987* (NT) r 28.05(1).

147. See [10.53].

148. See *Rules of the Supreme Court 1971* (WA) ord 67B r 6, r 10, r 11, r 16.

Question 6.6: Who can access court information?

Who should be able to access what types of court information and on what conditions?

How should the access regime protect privacy?

- 6.105 Allowing access to materials containing personal information may lead to it being used for criminal or other improper purposes, such as identity theft,¹⁴⁹ or to humiliate, degrade, stalk or harass a person. Protections may be necessary to prevent this.

Current privacy protections in NSW

- 6.106 There is some uncertainty about how privacy legislation in NSW applies in the context of access to court information.¹⁵⁰
- 6.107 The *Privacy and Personal Information Protection Act 1998* (NSW) (“*PIIP Act*”) regulates the handling of personal information by public sector agencies. The *Health Records and Information Privacy Act 2002* (NSW) (“*HRIP Act*”) regulates the handling of a person’s health information by both public sector agencies and private sector organisations. Courts in NSW fall within the ambit of both Acts, except in relation to their “judicial functions”, meaning the functions that relate to the “hearing or determination of proceedings”.¹⁵¹
- 6.108 It is unclear whether providing access to court information falls within the “judicial functions” exemption, as there has been limited consideration of the exemption in that specific context. In a 2005 case, the NSW Administrative Decisions Tribunal (“ADT”) found the actions of Local Court registry staff in providing access to files fell within the meaning of “judicial functions”, and did not amount to a breach of the *PIIP Act*.¹⁵² This decision was upheld by the ADT Appeal Panel and later by the Supreme Court.¹⁵³
- 6.109 In practice, courts and registrars have generally taken the approach that they are not bound by NSW privacy legislation. However, they will usually consider privacy and

149. NSW, Attorney General’s Department, *Review of the Policy on Access to Court Information* (2006) 31.

150. See, eg, NSW, Attorney General’s Department, *Review of the Policy on Access to Court Information* (2006) 15–16; NSW, Attorney General’s Department, *Report on Access to Court Information* (2008) 32–33.

151. *Privacy and Personal Information Protection Act 1998* (NSW) s 6(1), s 6(3); *Health Records and Information Privacy Act 2002* (NSW) s 13(1), s 13(3).

152. *NZ v Attorney General’s Department* [2005] NSWADT 103 [18]–[19].

153. *NZ v Director General, Attorney General’s Department* [2005] NSWADTAP 62 [3], [8]; *Budd v Director, Attorney Generals Department* [2006] NSWSC 1267 [20].

sensitivity when determining access requests and, on this basis, will generally refuse access to documents such as medical and psychological reports.¹⁵⁴

- 6.110 Some courts and tribunals also have policies for anonymising personal information recorded in transcripts and judgments.¹⁵⁵ For example, the Supreme Court policy says that personal identifiers such as residential addresses, dates of birth, Medicare numbers and tax file numbers are to be omitted.¹⁵⁶
- 6.111 In some circumstances, a court may redact personal or sensitive information from a document, or allow parties to redact such information, before document is made available to a non-party.¹⁵⁷

Privacy protections under the Court Information Act

- 6.112 Under the uncommenced *Court Information Act*, the *PPIP Act* and *HRIP Act* would not apply when providing access to court information under that Act.¹⁵⁸ The NSW Attorney General's Department considered that applying the legislation to the release of court information would be "problematic", as "[m]any of the provisions ... are specific to public sector records and do not address the unique issues relevant to court information".¹⁵⁹
- 6.113 The *Court Information Act* contains other measures that could be used to protect a person's privacy and safety. For example, a court would be able to impose conditions that restrict the disclosure or use of "open access information".¹⁶⁰ This is meant to ensure the information "is not used in a way that has unintended impacts on a person's privacy".¹⁶¹
- 6.114 Courts would also be required to ensure, "to the maximum extent reasonably practicable", that personal identification information is removed from court records classified as "open access".¹⁶² The Act specifies two ways in which court rules could seek to achieve this:

154. NSW, Attorney General's Department, *Review of the Policy on Access to Court Information* (2006) 16.

155. See, eg, Local Court of NSW, *Practice Note No 1 of 2008: Identity Theft Prevention and Anonymisation Policy* (2008); NSW Civil and Administrative Tribunal, *NCAT Policy 4: Access to, and Publication of, Information Derived from Proceedings in the Tribunal* (2019) [14]–[15].

156. Supreme Court of NSW, *Identity Theft Prevention and Anonymisation Policy* (2010).

157. See, eg, *R v Grace* [2012] NSWDC 5 [51], [55], [59], [63], [69]–[70]; *NSW v Bowdidge (No 2)* [2020] NSWSC 159 [33]–[34].

158. *Court Information Act 2010* (NSW) s 16.

159. NSW, Attorney General's Department, *Report on Access to Court Information* (2008) 33.

160. *Court Information Act 2010* (NSW) s 8(2).

161. NSW, Attorney General's Department, *Report on Access to Court Information* (2008) 35.

162. *Court Information Act 2010* (NSW) s 18(1).

- by providing access to a copy of the court record containing open access information, from which personal identification information has been deleted or removed, or
 - by providing for the filing or tendering of court records that have had personal identification information deleted or removed from the record or contained in a separate record.¹⁶³
- 6.115 In other words, “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”.¹⁶⁴ Some submissions raise concerns about these options.¹⁶⁵
- 6.116 The Office of the Director of Public Prosecutions says the underlying assumption is that redacting information from documents, before they are filed or subsequently, “is a relatively easy task, that could be accommodated on current resourcing”. It argues this assumption is flawed for several reasons, including:
- many cases involve a significant volume of material, and court staff would be required to read all of it to check for personal identification information
 - the risk of human error in failing to remove all offending information is extremely high, and
 - the task would be even more onerous when the consequences of a court officer making a mistake could include being prosecuted for an offence.¹⁶⁶
- 6.117 The offence referred to is that of “unauthorised disclosure and use of court information”, which would have a maximum penalty of 100 penalty units or two years’ imprisonment. No offence would be committed if a court officer provides the information in error but believed in “good faith” that they were permitted or required by the legislation to provide it.¹⁶⁷ Even so, if legislation is to require court officers to redact personal information from court materials, it might be worth considering framing an offence that presents fewer risks for officers performing this task.
- 6.118 Regarding any redaction obligations that might be placed on legal practitioners, the Law Society argues that:

163. *Court Information Act 2010* (NSW) s 18(2).

164. NSW, Office of the Director of Public Prosecutions, *Preliminary Submission PCI12*, 11.

165. NSW, Office of the Director of Public Prosecutions, *Preliminary Submission PCI12*, 11; Chief Magistrate, Local Court of NSW, *Preliminary Submission PCI40*, 1–2, Law Society of NSW, *Preliminary Submission PCI31*, 2.

166. NSW, Office of the Director of Public Prosecutions, *Preliminary Submission PCI12*, 11.

167. *Court Information Act 2010* (NSW) s 20(3).

- it would be impractical for a legal practitioner representing a party to redact information, especially where a significant amount of time has passed between the proceedings in which the information was produced and when the redaction must be made, and
 - once a legal practitioner no longer represents a party, they would be unable to seek instructions in relation to the redaction.¹⁶⁸
- 6.119 The Law Society supports courts taking on the role of redacting relevant information. Alternatively, if this role must be undertaken by legal practitioners, it argues that they should be able to charge clients “reasonable fees for the cost of redaction based on current costs principles under the legal profession regulatory framework”.¹⁶⁹
- 6.120 One option to address concerns could be to establish a set of principles and practices for dealing with privacy issues and allow different forums to adopt different approaches within that framework. A forum’s approach could be guided by factors such as the types and volume of matters they deal with and their available resources.

Privacy protections elsewhere in Australia

- 6.121 Some Australian courts have their own methods for protecting the privacy of personal information in court documents.
- 6.122 Since the High Court of Australia publishes written submissions and chronologies online, the *High Court Rules* require these documents to:
- (a) include a certification that the submission and chronology is in a form suitable for publication on the Internet; or
 - (b) be accompanied by a redacted form of the submission and chronology suitable for publication on the Internet.¹⁷⁰
- 6.123 In the Federal Court, documents are initially filed without any redactions.¹⁷¹ Certain “unrestricted” documents are available to inspect in the court registry on request. To access “restricted” documents, however, a person must have the leave of the court.¹⁷²

168. Law Society of NSW, *Preliminary Submission PCI31*, 2.

169. Law Society of NSW, *Preliminary Submission PCI31*, 2. Under s 172 of the *Legal Profession Uniform Law* (NSW), a law practice must charge legal costs that are no more than fair and reasonable in all the circumstances, and that in particular are proportionately and reasonably incurred, and proportionate and reasonable in amount.

170. *High Court Rules 2004* (Cth) r 11.07.1.

171. Federal Court of Australia, *Preliminary Consultation PCI05*.

172. *Federal Court Rules 2011* (Cth) r 2.32(4); Federal Court of Australia, *Access to Documents and Transcripts Practice Note (GPN-ACCS)*, 2016 [4.5]–[4.6].

- 6.124 If leave is not required, the document will be provided to the applicant in full.¹⁷³ Documents that do not require leave for access include originating applications, pleadings and reasons for judgment.¹⁷⁴
- 6.125 If leave of the court is required, the court may seek the views of the parties about whether to release the document.¹⁷⁵ Documents for which leave of the court is required for access include, for example, affidavits, exhibits, unsworn statements of evidence, and documents that the court has ordered to be confidential.¹⁷⁶
- 6.126 If the parties object to the release of personal information, such information may be redacted from the documents. The court may require the parties themselves to redact the information before it releases the documents to the person seeking access.¹⁷⁷ The Federal Court website provides guidance on how to redact documents effectively.¹⁷⁸
- 6.127 Factors that might make this approach possible in a Federal Court context and not possible, for example, in a Local Court context, include the type and volume of matters dealt with in each court, and the likelihood that parties are legally represented.

Question 6.7: Privacy protections for personal information

How should the privacy of personal identification information contained in court information be protected?

Procedures for accessing information

- 6.128 Procedures for accessing information are not always clear, consistent or easy to find. This may deter people with a genuine and proper interest from accessing information.

Current access procedures in NSW

- 6.129 As mentioned above, non-parties must generally seek leave or permission to access court information.¹⁷⁹ However, the specific application requirements vary.

173. Federal Court of Australia, *Preliminary Consultation PCI05*.

174. *Federal Court Rules 2011* (Cth) r 2.32(2); Federal Court of Australia, *Access to Documents and Transcripts Practice Note (GPN-ACCS)* (2016) [4.5].

175. Federal Court of Australia, *Preliminary Consultation PCI05*; Federal Court of Australia, *Access to Documents and Transcripts Practice Note (GPN-ACCS)* (2016) [4.11].

176. Federal Court of Australia, *Access to Documents and Transcripts Practice Note (GPN-ACCS)* (2016) [1.3]; *Federal Court Rules 2011* (Cth) r 2.32(3).

177. Federal Court of Australia, *Preliminary Consultation PCI05*.

178. Federal Court of Australia, "Guide to Redacting Documents in Electronic Form" (February 2019) <www.fedcourt.gov.au/online-services/preparing-documents-for-the-court/guide-to-redacting-documents-in-electronic-form> (retrieved 3 December 2020).

179. See [6.92].

- 6.130 For example, the requirements for accessing documents in Supreme Court proceedings, and in civil proceedings in the District Court, are set out in practice notes. Applicants must use the prescribed forms. They must demonstrate that access should be granted and state the reasons why they desire access. The registry of each Court refers doubtful cases to the Chief Justice or Chief Judge, or to a nominated judge. Interested parties may also be notified.¹⁸⁰
- 6.131 To access materials in criminal proceedings in the Local Court, District Court and Children’s Court, the applicant must specify matters including:
- whether they are seeking to inspect or copy documents (or both)
 - the documents they seek access to, and
 - the reason for requesting the information.¹⁸¹
- 6.132 Some submissions consider that the procedures for accessing documents in NSW are obscure and unclear, and the relevant forms difficult to find.¹⁸² One submission notes that the Supreme Court form states the payable fee and provides an email address for contacts, but does not include instructions about how or where to lodge the form. Nor is there information about the types of documents to which access will normally be granted.¹⁸³
- 6.133 Another submission argues that the “relative invisibility” of the current procedures might deter applicants, and that a clear, simple and publicly available process for accessing all types of documents is required.¹⁸⁴

Access procedures under the Court Information Act

- 6.134 The uncommenced *Court Information Act* does not specify how a person applies to the court to access information. Instead, it would allow regulations to be made under the *Civil Procedure Act 2005* (NSW) (“*Civil Procedure Act*”) that cover matters including application procedures and the relevant forms to be used.¹⁸⁵

180. Supreme Court of NSW, *Practice Note No. SC Gen 2: Access to Court Files* (2019) [17]; District Court of NSW, *Practice Note DC (Civil) No 11: Access to Court Files by Non-Parties* (2005) [6].

181. Local Court of NSW, “Record of Application by a Non-Party for Access to Material held by the Court: Application” (supplied by Local Court of NSW, 24 November 2020).

182. J Johnston, P Keyzer, A Wallace and M Pearson, *Preliminary Submission PCI26*, 8-9; L McNamara and J Quilter, *Preliminary Submission PCI14*, 4.

183. J Johnston, P Keyzer, A Wallace and M Pearson, *Preliminary Submission PCI26*, 9.

184. L McNamara and J Quilter, *Preliminary Submission PCI14*, 4.

185. *Court Information Act 2010* (NSW) s 25.

- 6.135 One submission suggests that, if the *Court Information Act* were to commence, it should be amended to require parties to be:
- notified of any request for access to restricted access information, and
 - given a reasonable opportunity to be heard in relation to the application.¹⁸⁶
- 6.136 Given this approach may increase the formality of applications and the time involved in considering them, an alternative could be to allow courts to notify the parties where warranted.¹⁸⁷

Access procedures under other Australian regimes

- 6.137 The procedures followed elsewhere vary. One submission suggests NSW could consider adopting those of the County Court of Victoria (“County Court”).¹⁸⁸
- 6.138 The County Court has a form for seeking access to documents filed in criminal or appeal cases that can be downloaded from its website.¹⁸⁹ It can be emailed to the Criminal Registry or lodged in person at the Registry counter. No fees apply.¹⁹⁰
- 6.139 Another submission supports the Federal Court’s approach, whose website provides clear information about the types of documents to which access will normally be granted.¹⁹¹ It includes a table listing “unrestricted documents”, which a person is entitled to inspect unless an exception applies, and “restricted documents”, for which a person must seek leave to access.¹⁹²
- 6.140 The website also sets out a “step-by-step” guide for requesting access to court documents. A person is expected to take certain steps before making a request, such as deciding whether the documents could be more easily and cost effectively obtained from an original or other source.¹⁹³

186. Law Society of NSW, *Preliminary Submission PCI31*, 2.

187. New Zealand Law Commission, *Access to Court Records*, Report 93 (2006) [5.61]–[5.63].

188. L McNamara and J Quilter, *Preliminary Submission PCI14*, 4.

189. L McNamara and J Quilter, *Preliminary Submission PCI14*, 4. See “Case information” (2020) *County Court of Victoria* <www.countycourt.vic.gov.au/case-information> (retrieved 4 December 2020).

190. County Court of Victoria, *Policy: Access to Court Record and Information* (2019) [24]–[25].

191. J Johnston, P Keyzer, A Wallace and M Pearson, *Preliminary Submission PCI26*, 9.

192. Federal Court of Australia, “When can a Non-party Access Court Documents?” <www.fedcourt.gov.au/services/access-to-files-and-transcripts/court-documents/non-party-access> (retrieved 24 September 2020).

193. Federal Court of Australia, “How to Make an Access Request to Inspect Court Documents” <www.fedcourt.gov.au/services/access-to-files-and-transcripts/court-documents/how-to-apply> (retrieved 4 December 2020); Federal Court of Australia, *Access to Documents and Transcripts Practice Note (GPN-ACCS)* (2016) [3.5].

- 6.141 Applicants must use the applicable form (which can be downloaded from the Federal Court’s website), depending on whether they are a party to the proceedings or a non-party.¹⁹⁴ The Court’s website provides information about how to complete the request form, lodge it at the applicant’s local registry or send it via email.¹⁹⁵

Question 6.8: Applying for access to court information

- (1) What procedures, if any, should apply when a person seeks access to court information?
- (2) What guidance, if any, should be given in relation to these procedures?

How should access be provided?

- 6.142 Access regimes often specify how a person will be provided with access to information. A person may, for example, be permitted to search or inspect documents at the court or be given copies of them.
- 6.143 The appropriate method of providing access may depend on factors such as the nature and volume of information the person seeks access to, and the purpose for seeking access. To address this, options include:
- giving courts the discretion to choose the method of providing access
 - prescribing different methods of access for different types of materials (for example, allowing the inspection only of materials that are sensitive or potentially prejudicial), or
 - allowing courts to impose conditions on access (for example, conditions limiting the publication or use of material).

Providing access under the current regimes

- 6.144 The way a person may be given access to court materials varies across the different regimes in NSW. For example:
- the *District Court Rules* allow a person to “search the file kept by the registrar in respect of the proceedings”¹⁹⁶

194. Federal Court of Australia, *Access to Documents and Transcripts Practice Note (GPN-ACCS)* (2016) [4.7].

195. Federal Court of Australia, “How to Make an Access Request to Inspect Court Documents” <www.fedcourt.gov.au/services/access-to-files-and-transcripts/court-documents/how-to-apply> (retrieved 3 December 2020).

196. *District Court Rules 1973* (NSW) pt 52 r 3(2).

- the *Criminal Procedure Act* allows media representatives to “inspect” certain documents, for the purpose of compiling a fair report of proceedings for publication¹⁹⁷
- the Supreme Court and District Court practice notes allow a person to make copies of or take extracts from materials¹⁹⁸
- the *Local Court Rules* and the *Coroners Act 2009* (NSW) allow a person to receive a copy of certain materials¹⁹⁹
- the *NCAT Rules* allow a person to “inspect” documents, and receive “a copy of the document instead of access to the original document”,²⁰⁰ and
- the *Industrial Relations Commission Rules 2009* (NSW) provide that a person may be given “access” to a document, but do not specify the method of access.²⁰¹

6.145 Some access regimes enable judges or registrars to impose conditions on access.²⁰² For example, in relation to materials in criminal proceedings in the Local Court, District Court and Children’s Court, access may be granted subject to certain conditions, including that the person:

- may only inspect the documents, or may inspect and copy them
- may access all the documents sought, or may only access specified documents
- must comply with a non-publication order
- must comply with certain statutory prohibitions on publication (such the automatic prohibition on publishing the identity of a complainant in sexual offence proceedings),²⁰³ or
- must comply with another condition.²⁰⁴

Providing access under the Court Information Act

6.146 Under the *Court Information Act* a person would be given access to information by:

197. *Criminal Procedure Act 1986* (NSW) s 314(1).

198. Supreme Court of NSW, *Practice Note No. SC Gen 2: Access to Court Files* (2019) [17]; District Court of NSW, *Practice Note DC (Civil) No 11: Access to Court Files by Non-Parties* (2005) [6].

199. *Local Court Rules 2009* (NSW) r 8.10(2)(b), r 8.10(3)(b); *Coroners Act 2009* (NSW) s 65(2).

200. *Civil and Administrative Tribunal Rules 2014* (NSW) r 42(1)–(3).

201. *Industrial Relations Commission Rules 2009* (NSW) r 2.7.

202. See, eg, *Civil and Administrative Tribunal Rules 2014* (NSW) r 42(4).

203. *Crimes Act 1900* (NSW) s 578A(2).

204. Local Court of NSW, “Record of Application by a Non-Party for Access to Material held by the Court: Application” (supplied by Local Court of NSW, 24 November 2020).

- being given a reasonable opportunity to inspect a court record (or a copy of a court record) that contains the information
 - being provided with a copy of a court record that contains the information
 - any means provided for by the rules, or
 - any other means that the court considers to be appropriate in a particular case.²⁰⁵
- 6.147 In deciding how to provide access to a person, the court would have to consider the person’s preferences.²⁰⁶ The court could also impose “reasonable conditions” on access to ensure the “safe custody and proper preservation” of court records.²⁰⁷ It could refuse to provide access to court information in cases where providing access would require an “unreasonable diversion of the court’s resources”.²⁰⁸
- 6.148 The *Court Information Act* also states that rules can be made under the *Civil Procedure Act* covering the means by which access can be provided.²⁰⁹

Providing access under other Australian regimes

- 6.149 The way a person may be given access to court materials varies across different access regimes in Australia. For example:
- several regimes allow a person to inspect and obtain a copy of certain materials²¹⁰
 - some regimes allow a search to search, inspect or take a copy of certain materials²¹¹
 - some regimes only allow a person to search or inspect court materials,²¹² and
 - one regime provides that a person may be given “electronic access” to certain materials.²¹³

205. *Court Information Act 2010* (NSW) s 14(1).

206. *Court Information Act 2010* (NSW) s 14(2).

207. *Court Information Act 2010* (NSW) s 14(3).

208. *Court Information Act 2010* (NSW) s 14(4)(a).

209. *Court Information Act 2010* (NSW) s 25(1), s 25(2)(c).

210. See, eg, *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 28.05; *County Court Civil Procedure Rules 2018* (Vic) r 28.05; *Supreme Court Rules 1987* (NT) r 28.05; r 81A.09.; *Local Court Act 2015* (NT) s 29(4), s 30(1), s 31(4); *Supreme Court Act 1935* (SA) s 131(1)–(3); *District Court Act 1991* (SA) s 54(1)–(3); *Magistrates Court Act 1991* (SA) s 51(1)–(3).

211. See, eg, *Court Procedures Rules 2006* (ACT) r 2903(1)–(2), r 4053(1)–(2); *Criminal Practice Rules 1999* (Qld) r 57(3).

212. See, eg, *Supreme Court Rules 2000* (Tas) r 33; *Magistrates Court (Civil Division) Rules 1998* (Tas) r 155.

6.150 Some regimes provide that a court may impose conditions on access.²¹⁴ For example, in SA, a court may permit a person to inspect or copy certain materials, subject to:

- a condition that sensitive material is examined under the supervision of the court, at a specified time and place
- a condition limiting the publication or use of the material, and
- any other condition that the court considers appropriate.²¹⁵

Question 6.9: How access to court information should be provided

- (1) By what methods should courts provide a person with access to court information?
- (2) Should the available methods be different depending on the applicant and the situation? If so, how?

Should applicants be charged a fee?

6.151 Due to the costs involved in providing access to and copies of documents, courts may charge applicants a fee to access information. High costs may deter people who have a genuine and proper interest in accessing information and contribute to a system of unequal access, dependent on a person's or organisation's financial situation.

Current fees in NSW

6.152 The access regimes in NSW take different approaches in relation to fees. For example, the *Local Court Rules* provide that a person can obtain a *copy* of the court record or transcript on payment of any prescribed fee, but can *access* these materials without paying a fee.²¹⁶ In some circumstances, the court may charge the prescribed fee for retrieving the court file (for example, if the file has been archived).²¹⁷

6.153 To access a Supreme Court file, the applicant must pay a file retrieval fee. If access to the file is refused by the Registrar, the fee is not refundable.²¹⁸

6.154 The amounts charged also vary. For example, the fee for a copy of a transcript of an Industrial Relations Commission matter is:

213. *High Court Rules 2004* (Cth) r 4.07.4.

214. See, eg, *Local Court Act 2015* (NT) s 29(3), s 30(4), s 31(3).

215. *Supreme Court Act 1935* (SA) s 131(3); *District Court Act 1991* (SA) s 54(3); *Magistrates Court Act 1991* (SA) s 51(3).

216. *Local Court Rules 2009* (NSW) r 8.10(2)–(3).

217. Local Court of NSW, *Preliminary Consultation PCI12*; *Criminal Procedure Regulation 2017* (NSW) sch 2 pt 1 item 9.

218. Supreme Court of NSW, *Application to Access a Court File* (retrieved 25 November 2021) 1.

- \$93, plus an additional \$11 for each page after the first 8 pages, if the matter transcribed is under 3 months old, or
 - \$113, plus an additional \$13 pages for each page after the first 8 pages, if the matter is 3 months old or older.²¹⁹
- 6.155 The fee for a copy of a transcript of a civil or criminal court proceeding is:
- \$94, plus an additional \$11 for each page after the first 8 pages, if the matter transcribed is under 3 months old, or
 - \$115, plus an additional \$13 for each page after the first 8 pages, if the matter transcribed is 3 months old or older.²²⁰
- 6.156 There are also different fees for different types of information. For example, the fee for a copy of a sound recording of evidence in a civil or criminal court proceeding is \$55.²²¹
- 6.157 Some submissions say the cost of accessing information is too expensive.²²² One describes the cost of ordering transcripts as “oppressive”, particularly for an accused person ordering a transcript for their own trial.²²³
- 6.158 Some access regimes enable the registrar of a court to waive, postpone or remit fees.²²⁴ However, this is “entirely a matter of discretion”.²²⁵ One submission argues that, when access to documents is for a non-commercial purpose, “substantive open justice demands that fees should be waived or significantly reduced”.²²⁶

Fees under the Court Information Act

- 6.159 The uncommenced *Court Information Act* would allow courts to charge fees for providing access to information. It would also allow regulations to provide for maximum fees, and the waiver, reduction or refund of fees.²²⁷

219. *Industrial Relations (General) Regulation 2020* (NSW) sch 1 item 7.

220. *Criminal Procedure Regulation 2017* (NSW) sch 2 pt 1 item 11; *Civil Procedure Regulation 2017* (NSW) sch 1 pt 5 item 10.

221. *Criminal Procedure Regulation 2017* (NSW) sch 2 pt 1 item 10; *Civil Procedure Regulation 2017* (NSW) sch 1 pt 5 item 9.

222. See, eg, L McNamara and J Quilter, *Preliminary Submission PCI14*, 3; NSW Bar Association, *Preliminary Submission PCI41*, 2.

223. NSW Bar Association, *Preliminary Submission PCI41*, 2.

224. See, eg, *Criminal Procedure Regulation 2017* (NSW) cl 16; *Civil Procedure Regulation 2017* (NSW) cl 11.

225. L McNamara and J Quilter, *Preliminary Submission PCI14*, 3.

226. L McNamara and J Quilter, *Preliminary Submission PCI14*, 3.

227. *Court Information Act 2010* (NSW) s 15(2).

Fees in other Australian jurisdictions

6.160 The approaches to fees under other Australian access regimes vary. For example:

- some require non-parties to pay any prescribed fee to access certain information²²⁸
- some require parties to pay any prescribed fee to access certain information,²²⁹ whereas others do not²³⁰
- some include different fees depending on the type of applicant (for example, whether they are an individual or a corporation),²³¹ whereas others include the same fees for individuals and corporations²³²
- some include different fees depending on the type of document or information,²³³ whereas others include the same fees for different types of information,²³⁴ and
- some include different fees depending on whether the party is seeking to inspect or copy the document or information.²³⁵

6.161 Some regimes specify when fees for accessing information will be waived. For example, some allow fees for inspecting or copying documents to be waived on grounds of

228. See, eg, *Uniform Civil Procedure Rules 1999* (Qld) r 981; *Criminal Practice Rules 1999* (Qld) r 56A(1), r 56(2), r 57(3); *Criminal Procedure Rules* (WA) r 51(6B).

229. See, eg, *Supreme Court Rules 2000* (Tas) r 33; *Magistrates Court (Civil Division) Rules 1998* (Tas) r 155(1).

230. See, eg, *Criminal Procedure Rules 2005* (WA) r 43(1)–(2); *Local Court Regulations 2016* (NT) reg 10, sch item 4.

231. See, eg, *Supreme Court (Fees) Regulations 2018* (Vic) sch 1 item 6.3; *Supreme Court (Fees) Regulations 2002* (WA) sch 1 div 1 item 10, item 12–13, sch 1 div 2 item 8–10; *District Court (Fees) Regulations 2002* (WA) sch 1 item 12, item 15–16; *Magistrates Court Fees (Regulations) 2005* (WA) sch 1 div 1 item 4–7.

232. See, eg, *Federal Court and Federal Circuit Court Regulation 2012* (Cth) sch 1 pt 1 item 123, sch 1 pt 2 item 219.

233. See, eg, *Court Procedures (Fees) Determination 2020 (No 2)* (ACT) sch pt B item 1009–1014; *Supreme Court (Fees) Rules 2017* (Tas) sch 1 pt 2 item 1–3; *Magistrates Court (Civil Division) (Fees) Regulations 2018* (Tas) sch 1 item 7–9; *Supreme Court (Fees) Regulations 2002* (WA) sch 1 div 1 item 10–13; *District Court (Fees) Regulations 2002* (WA) sch 1 item 12, item 15–16; *Magistrates Court (Fees) Regulations 2005* (WA) sch 1 div 1 item 4, item 7–8.

234. See, eg, *Criminal Practice (Fees) Regulation 2010* (Qld) sch 1 item 1–3; *Uniform Civil Procedure (Fees) Regulation 2019* (Qld); sch 1 item 12; *Local Court Regulations 2016* (NT) sch item 4.

235. See, eg, *Court Procedures (Fees) Determination 2020 (No 2)* (ACT) sch 1 pt B item 1009–1014; *Criminal Practice (Fees) Regulation 2010* (Qld) sch 1 item 1–6, item 8; *Uniform Civil Procedure (Fees) Regulation 2019* (Qld) sch 1 item 9–10, item 12; *Magistrates Court (Civil Division) (Fees) Regulations 2018* (Tas) sch 1 item 7–9.

financial hardship.²³⁶ The Victorian Supreme Court does not require news media organisations or representatives of news media organisations to pay a fee to access information if it is for the purposes of reporting the news.²³⁷

Question 6.10: Fees for accessing information

- (1) In what circumstances should a person be charged a fee to access court information?
- (2) In what circumstances should any fees for accessing information be waived or reduced?

Other options for improving access to information

6.162 In this section, we consider some options for improving access to court information. We consider electronic access to court information in Chapter 12.²³⁸

A national access regime

6.163 One submission supports uniform provisions about the access, disclosure and publication of court information across all Australian civil and criminal jurisdictions.²³⁹ Similarly, the Australian Law Reform Commission has recommended that consideration be given to a national legislative framework or policy for accessing court information.²⁴⁰

6.164 As we discuss above, the different regimes governing access to court information in Australia are complex. Access rules vary widely not only between jurisdictions, but between and within courts in the same jurisdiction.

6.165 A nationally consistent set of rules may offer several advantages, such as:

- reducing confusion and facilitating appropriate access
- ensuring that important countervailing interests are consistently and effectively protected, and

236. *Supreme Court Regulations 1985* (NT) reg 5; *Local Court Regulations 2016* (NT) reg 12; *Supreme Court Act 1986* (Vic) s 129(3); *Federal Court and Federal Circuit Court Regulation 2012* (Cth) cl 2.04(2), cl 2.06.

237. *Supreme Court (Fees) Regulations 2018* (Vic) reg 14A.

238. See [12.26]–[12.43].

239. Banki Haddock Fiora, *Preliminary Submission PCI27*, 6.

240. Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, Report 98 (2004) rec 7-1.

- facilitating the provision of information about access to court documents to participants in the court system and the public.²⁴¹
- 6.166 One difficulty with a national framework is that different courts deal with different types of matters. Broad access rights may be appropriate for some courts but inappropriate for others. It might be possible, though, to allow some tailoring of rules depending on the court, provided they are consistent with the principles underpinning the framework.²⁴²

Question 6.11: A national access regime

Should there be a national regime governing access to documents? Why or why not?

Greater public availability of judgments and decisions

- 6.167 As we discuss above, some access regimes in NSW allow parties and non-parties to request access to judgments and orders.²⁴³ A court may also publish selected decisions on its website,²⁴⁴ or other websites such as NSW Caselaw and AustLII.
- 6.168 It is well recognised that the open justice principle requires reasons for decisions to be publicly available.²⁴⁵ In 1981, Chief Justice Street observed:

In a free and democratic society the law and all its documentation, both statutory and interpretive, that is to say both in Acts of Parliament and in judgments, must be *publici juris*—available to all to be studied, to be used and to be quoted as a matter of public entitlement.²⁴⁶

241. J Bellis, “Public Access to Court Records in Australia: An International Comparative Perspective and some Proposals for Reform” (2010) 19 *Journal of Judicial Administration* 197, 222.

242. J Bellis, “Public Access to Court Records in Australia: An International Comparative Perspective and some Proposals for Reform” (2010) 19 *Journal of Judicial Administration* 197, 222.

243. See, eg, *Uniform Civil Procedure Rules 2005* (NSW) r 36.12(1); Supreme Court of NSW, *Practice Note SC Gen 2: Access to Court Files* (2019) [7], [12]; District Court of NSW, *Practice Note DC (Civil) No 11: Access to Court Files by Non-Parties* (2005) [2].

244. See, eg, Coroners Court of NSW, “Coronial findings” (2 December 2020) <www.coroners.nsw.gov.au/coroners-court/coronial-findings-search.html> (retrieved 4 December 2020); NSW, Industrial Relations Commission, “Frequently Requested Decisions of the NSW IRC” (15 April 2016) <www.irc.justice.nsw.gov.au/Pages/IRC_judgments/IRC_judgments_freqdecisions.aspx> (retrieved 4 December 2020); NSW, Workers Compensation Commission, “Find a decision”, <www.wcc.nsw.gov.au/find-a-decision> (retrieved 4 December 2020).

245. See, eg, J Bosland and J Gill, “The Principle of Open Justice and the Judicial Duty to Give Public Reasons” (2014) 38 *Melbourne University Law Review* 482, 486; E Cunliffe, “Open Justice: Concepts and Judicial Approaches” (2012) 40 *Federal Law Review* 385, 389.

246. *R v Greiciun-King* [1982] 2 NSWLR 469, 472.

- 6.169 The International Covenant on Civil and Political Rights provides that any judgment in a criminal or civil case must be made public except in certain circumstances, including where the case involves a child or young person.²⁴⁷
- 6.170 However, the approaches to publication of decisions vary across courts. For example, most recent decisions by the Supreme Court (including the Court of Appeal and Court of Criminal Appeal) are published on NSW Caselaw. In 2019, 2,503 Supreme Court (including Court of Appeal and Court of Criminal Appeal) decisions were published.²⁴⁸
- 6.171 Similarly, the Workers Compensation Commission “operates under a presumption in favour of publication of decisions”.²⁴⁹ In 2018–2019, it published:
- 58 decisions by the Commission’s President
 - 352 decisions by arbitrators, and
 - 135 decisions by the Medical Appeal Panel.²⁵⁰
- 6.172 In contrast, only “selected written judgments” from the Local Court are published on NSW Caselaw, as the majority of judgments are delivered orally.²⁵¹ In 2019, six Local Court judgments were published on NSW Caselaw.²⁵²
- 6.173 The President of the Mental Health Review Tribunal (“MHRT”) may, from time to time, issue an official report of its proceedings in certain circumstances, including where the MHRT has decided questions of legal significance with application beyond a particular case.²⁵³ In 2019, five decisions were published on the MHRT website.²⁵⁴

247. *International Covenant on Civil and Political Rights*, 999 UNTS 171 (entered into force 23 March 1976) art 14(1).

248. Supreme Court of NSW, *2019 Annual Review* (C2020) 39.

249. NSW, Workers Compensation Commission, “Policy on Publication of Decisions in the Workers Compensation Commission” (9 January 2008) <www.wcc.nsw.gov.au/legal-resources/policy/policy-on-publication-of-decisions-in-the-workers-compensation-commission> (retrieved 4 December 2020). See also Workers Compensation Commission, *Preliminary Submission PCI43*, 2.

250. NSW Workers Compensation Commission, *Annual Review 2018/19* (C2019) 4.

251. Local Court of NSW, *Annual Review 2019* (C2020) 31.

252. See NSW Caselaw, “Recent Decisions for Local Court” (24 June 2020) <www.caselaw.nsw.gov.au/browse-court/54a634063004de94513d8280> (retrieved 4 December 2020).

253. Mental Health Review Tribunal, *Practice Direction: Publication of Official Reports of the Tribunal’s Proceedings*, 19 June 2013 [1]–[2].

254. See Mental Health Review Tribunal, “Official Reports of Proceedings” (4 August 2020) <mail.mhrt.nsw.gov.au/the-tribunal/official-reports.html> (retrieved 7 October 2020).

- 6.174 On one view, greater public availability of decisions across NSW courts, tribunals and commissions could enhance open justice. It may also promote consistency between the approaches taken by different forums.
- 6.175 On another view, it may be appropriate for different forums to take different approaches to publication of decisions, to accommodate factors like the volume and nature of matters dealt with. For example, NCAT’s approach to publication varies across its divisions, “because of the diversity of the jurisdictions exercised by the Divisions”.²⁵⁵
- 6.176 The Administrative and Equal Opportunity Division, the Occupational Division and the Appeal Panel of NCAT routinely publish written reasons for decisions, unless a non-publication order applies.²⁵⁶ The Consumer and Commercial Division does not, due to the large number of decisions it makes.²⁵⁷
- 6.177 Similarly, the Guardianship Division does not routinely publish its written reasons for decisions.²⁵⁸ Matters in this Division are sensitive, in that they relate to people who are unable to make decisions for themselves. The Division publishes any reasons for decisions in an anonymised or de-identified form, as legislation prohibits publication of the identities of people involved in those proceedings.²⁵⁹
- 6.178 The Consumer and Commercial Division and Guardianship Division may publish a selection of reasons.²⁶⁰ The Head of these Divisions decides what should be published. They may, for example, decide to publish reasons for decisions that:
- establish or consider principles that could be used or applied in other proceedings
 - raise issues of general public interest or importance, or
 - represent the majority of applications before the Division.²⁶¹
- 6.179 One submission observes that, while consistency across different forums or divisions within forums is not always appropriate, “a baseline of transparency around publication

255. NSW Civil and Administrative Tribunal, *NCAT Policy 2: Publishing Reasons for Decisions* (2019) [12].

256. NSW Civil and Administrative Tribunal, *NCAT Policy 2: Publishing Reasons for Decisions* (2019) [13], [26], [29].

257. NSW Civil and Administrative Tribunal, *NCAT Policy 2: Publishing Reasons for Decisions* (2019) [19].

258. NSW Civil and Administrative Tribunal, *NCAT Policy 2: Publishing Reasons for Decisions* (2019) [22].

259. NSW Civil and Administrative Tribunal, *NCAT Policy 2: Publishing Reasons for Decisions* (2019) [23]; *Civil and Administrative Tribunal Act 2013* (NSW) s 65.

260. NSW Civil and Administrative Tribunal, *NCAT Policy 2: Publishing Reasons for Decisions* (2019) [19]–[20], [23].

261. NSW Civil and Administrative Tribunal, *NCAT Policy 2: Publishing Reasons for Decisions* (2019) [20], [23].

would enhance accountability”. It proposes some ways to improve accessibility of decisions, such as:

- a presumption in favour of publication of reasons for decisions in certain forums or divisions within forums, and
- where there is no presumption in favour of publication, a requirement for a “minimum” percentage of reasons for decisions to be published each year.²⁶²

Question 6.12: Public availability of judgments and decisions

How could NSW courts and tribunals improve access to judgments and decisions?

262. UTS Faculty of Law, *Preliminary Submission PCI25*, 16–17.

7. Protections for children and young people

In Brief

In this Chapter, we consider exceptions to open justice in proceedings involving children and young people, including prohibitions on the publication or disclosure of information and closed court orders. These protections exist across a range of different types of proceedings, including criminal, domestic violence, care and protection, adoption and parentage proceedings. We also consider whether further protections for children and young people are needed, for example, in civil proceedings.

Protections in criminal proceedings where the child is a defendant	160
Prohibition on the publication and disclosure of identifying information	162
Arguments in support of the prohibition	163
Criticisms of the prohibition	164
Exceptions to the prohibition	164
Age at which the prohibition should be lifted	168
Protection for children under investigation	168
Closed court orders	169
Protections in non-criminal proceedings	170
Criminal diversion processes	171
Proceedings for apprehended domestic violence orders	171
Care and protection proceedings	172
Prohibition on the publication and disclosure of identifying information	172
Closed court orders	174
Adoption proceedings	175
Perspectives on exceptions to open justice in adoption proceedings	176
Parentage and surrogacy proceedings	177
Parentage declarations	177
Surrogacy arrangements	177
Should children be protected in other types of proceedings?	178

- 7.1 One of the most common justifications for qualifying open justice is to protect the privacy and safety of individuals, especially vulnerable people. In the next three

chapters, we consider some of the groups to whom NSW law provides a higher level of protection, in the form of prohibitions on publishing their identities and restrictions on accessing court proceedings they are involved in.

- 7.2 The first of these groups is children. A range of specific protections apply to court matters involving children, to prohibit the publication and disclosure of identifying information and restrict public access to court hearings, or both.
- 7.3 These protections are commonly imposed to shield children’s identities. This is considered important because publicising children’s involvement in court proceedings can lead to community stigma and psychological stress, may damage rehabilitation prospects, and is inconsistent with Australia’s international law obligations. On the other hand, some think that the community has a right to know about and to access court proceedings involving children, particularly if they have committed serious crimes.
- 7.4 This Chapter’s primary focus is the protections that apply in criminal proceedings in which a child is the defendant. This topic received considerable attention among submissions. We consider protections for child witnesses and victims in Chapter 8.
- 7.5 In this Chapter, we also look at the protections that apply in other types of matters involving children, including criminal diversion, domestic violence, care and protection, adoption, and parentage proceedings. There are presently none that generally apply when children are involved in civil proceedings. We ask whether this should change.

Protections in criminal proceedings where the child is a defendant

- 7.6 In NSW, if the defendant in a criminal proceeding is a child, several special arrangements protect the identities of children involved in those proceedings. These are in the *Children (Criminal Proceedings) Act 1987* (NSW) (“*Children (Criminal Proceedings) Act*”). The *Children (Criminal Proceedings) Act* applies to any court that exercises criminal jurisdiction.¹ This includes the Children’s Court, where most criminal proceedings involving child defendants are heard,² as well as the Local, District and Supreme Courts, where some of the more serious proceedings involving child defendants are held.³
- 7.7 There are two main protections. These are:

1. *Children (Criminal Proceedings) Act 1987* (NSW) s 4.
2. *Children (Criminal Proceedings) Act 1987* (NSW) s 28.
3. This includes “serious children’s indictable offences” and some traffic offences: *Children (Criminal Proceedings) Act 1987* (NSW) s 28(1)(a), s 28(2).

- the prohibition on broadcasting or publishing identifying information about people connected to the proceedings,⁴ and
 - the requirement for proceedings to be held in private, with the general public excluded from attending (with exceptions).⁵
- 7.8 These protections were introduced when the *Children (Criminal Proceedings) Act* was enacted in 1987, as part of a broader suite of reforms to protect children in the criminal justice and welfare systems.⁶
- 7.9 A 2008 report by the NSW Legislative Council Standing Committee on Law and Justice (“Standing Committee Report”) noted that the policy objectives of the publication prohibition included:
- reducing community stigma for juvenile offenders, facilitating their rehabilitation and re-integration into the community, and
 - protecting victims and family members of juvenile offenders from stigma associated with crime.⁷
- 7.10 The Standing Committee Report also acknowledged that the prohibition was a departure from the principle of open justice, and that it recognised that children are particularly vulnerable to the “negative impacts that may flow from their names being published”.⁸
- 7.11 All other states and territories limit public access to criminal proceedings involving children⁹ and restrict the publication of information.¹⁰ While the terms of these restrictions and their exceptions vary, they all tend to severely limit the general public’s ability to access information about criminal proceedings involving children.

4. *Children (Criminal Proceedings) Act 1987* (NSW) s 15A.

5. *Children (Criminal Proceedings) Act 1987* (NSW) s 10(1).

6. NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 8 April 1987, 10357.

7. NSW, Legislative Council Standing Committee on Law and Justice, *The Prohibition on the Publication of Names of Children Involved in Criminal Proceedings*, Report 35 (2008) [2.6].

8. NSW, Legislative Council Standing Committee on Law and Justice, *The Prohibition on the Publication of Names of Children Involved in Criminal Proceedings*, Report 35 (2008) [2.2].

9. *Court Procedures Act 2004* (ACT) s 72(1); *Youth Justice Act 2005* (NT) s 49; *Childrens Court Act 1992* (Qld) s 20; *Youth Court Act 1993* (SA) s 24; *Youth Justice Act 1997* (Tas) s 30; *Children, Youth and Families Act 2005* (Vic) s 523; *Children’s Court of Western Australia Act 1988* (WA) s 31.

10. *Criminal Code 2002* (ACT) s 712A; *Youth Justice Act 2005* (NT) s 50; *Youth Justice Act 1992* (Qld) s 301, s 234; *Young Offenders Act 1993* (SA) s 13, s 63C; *Youth Justice Act 1997* (Tas) s 22, s 31, s 108; *Children, Youth and Families Act 2005* (Vic) s 534–534B; *Children’s Court of Western Australia Act 1988* (WA) s 35–36A; *Young Offenders Act 1994* (WA) s 40.

Prohibition on the publication and disclosure of identifying information

- 7.12 Under the *Children (Criminal Proceedings) Act*, the names of certain people, or “any information, picture or other material that identifies the person or is likely to lead to the identification of the person”,¹¹ must not be published or broadcast in a way that connects them with criminal proceedings involving a child defendant. These people are:
- child defendants
 - child witnesses
 - a person who is mentioned in the proceedings in relation to something that occurred when they were a child
 - a person who is otherwise involved in the proceedings and was a child when involved, and
 - a person who is a sibling of a victim of the offence, if that person and the victim were both children when the offence was committed.¹²
- 7.13 The provision prohibits disclosure to the public, or a section of the public, by:
- publication in a newspaper or periodical publication
 - radio or television broadcast or other electronic broadcast
 - publication on the Internet, or
 - any other means of dissemination.¹³
- 7.14 It applies even if the person is no longer a child, or has died, at the time of the disclosure.¹⁴
- 7.15 It is an offence to publish or broadcast a person’s name in contravention of this section. The maximum penalty is a fine of \$5,500 (50 penalty units) and/or imprisonment for 12 months (in the case of an individual), or a fine of \$55,000 (500 penalty units) in the case of a corporation.¹⁵

11. *Children (Criminal Proceedings) Act 1987* (NSW) s 15A(5).

12. *Children (Criminal Proceedings) Act 1987* (NSW) s 15A(1).

13. *Children (Criminal Proceedings) Act 1987* (NSW) s 15A(2).

14. *Children (Criminal Proceedings) Act 1987* (NSW) s 15A(4).

15. *Children (Criminal Proceedings) Act 1987* (NSW) s 15A(7).

7.16 That the prohibition extends to *any* identifying information, including the child’s school, location or the names of friends, is not always well understood.¹⁶ One suggestion to improve awareness about this is to give the provision greater prominence in the Act.¹⁷ Another idea is to amend the Act to include a non-exhaustive list of matters likely to lead to identification.¹⁸ This could be done in the way of the *Family Violence Protection Act 2008* (Vic), which contains a list of “identifying particulars”.¹⁹

Arguments in support of the prohibition

7.17 Several submissions express general support for the current prohibition.²⁰ Reasons include:

- it is compatible with Australia’s international law obligations, including under the Convention on the Rights of the Child, and the International Covenant on Civil and Political Rights²¹
- child offenders are generally less culpable than adult offenders, and therefore deserving of more protections²²
- naming child offenders may impair their prospects of rehabilitation²³
- naming child offenders may lead to vigilantism, putting the offenders and their families at risk,²⁴ and

16. Children’s Court of NSW, *Preliminary Consultation PCI08*.

17. Children’s Court of NSW, *Preliminary Consultation PCI08*.

18. Children’s Court of NSW, *Preliminary Consultation PCI08*.

19. *Family Violence Protection Act 2008* (Vic) s 168.

20. Domestic Violence NSW, *Preliminary Submission PCI42*, 5–6; NSW Council for Civil Liberties, *Preliminary Submission PCI29*, 5; Legal Aid NSW, *Preliminary Submission PCI39*, 10; NSW Young Lawyers Criminal Law Committee, *Preliminary Submission PCI37*, 5–6; G Wade, *Preliminary Submission PCI06*, 1; NSW, Office of the Director of Public Prosecutions, *Preliminary Submission PCI12*, 6; Law Society of NSW, *Preliminary Submission PCI31*, 2; NSW, Public Defenders, *Preliminary Submission PCI33*, 5–7.

21. Domestic Violence NSW, *Preliminary Submission PCI42*, 5–6; NSW Bar Association, *Preliminary Submission PCI41*, 1; NSW Council for Civil Liberties, *Preliminary Submission PCI29*, 5; NSW Young Lawyers Criminal Law Committee, *Preliminary Submission PCI37*, 5–6; NSW, Office of the Director of Public Prosecutions, *Preliminary Submission PCI12*, 9; Law Society of NSW, *Preliminary Submission PCI31*, 2–3.

22. Legal Aid NSW, *Preliminary Submission PCI39*, 10. See also NSW, Legislative Council Standing Committee on Law and Justice, *The Prohibition on the Publication of Names of Children Involved in Criminal Proceedings*, Report 35 (2008), 13–15; S Rodrick, “Open Justice, the Media and Identifying Children Involved in Criminal Proceedings” (2010) 15 *Media and Arts Law Review* 409, 419–421.

23. NSW Bar Association, *Preliminary Submission PCI41*, 1; Legal Aid NSW, *Preliminary Submission PCI39*, 10; NSW Young Lawyers Criminal Law Committee, *Preliminary Submission PCI37*, 5–6; NSW Council of Civil Liberties, *Preliminary Submission PCI29*, 5–6.

- naming child offenders can lead to stigma, labelling, prejudice and marginalisation, which may reinforce deviant behaviour.²⁵

Criticisms of the prohibition

- 7.18 Some argue there should be no prohibition on publishing the names of young offenders at all,²⁶ or that it should be lifted once the person reaches a certain age.
- 7.19 Reasons in favour of removing or weakening the prohibition include that the offender should not be entitled to protection, this is unfair to victims, and allowing the offender's name to be published would promote community safety.²⁷
- 7.20 One submission says that the list of people whose names cannot be published in connection with proceedings involving a child unreasonably covers people "who may have been mentioned only very peripherally in criminal proceedings", and that this "serve[s] no discernible public interest purpose".²⁸
- 7.21 Some argue that the prohibition should be lifted when the child dies, as at this point they are no longer in need of protection.²⁹ A counterargument is that, regardless of whether the prohibition ceases upon the child's death, the law should recognise that the identities of siblings and friends of the child who has died might still require protection.³⁰

Exceptions to the prohibition

- 7.22 There are six exceptions to the prohibition. They are:
- the publication or broadcast is an official report of the proceedings³¹
 - the person has been convicted of a serious children's indictable offence and a court has authorised the publication or broadcast³²

24. NSW Young Lawyers Criminal Law Committee, *Preliminary Submission PCI37*, 5–6; Legal Aid NSW, *Preliminary Submission PCI39*, 10–11; see also NSW, Legislative Council Standing Committee on Law and Justice, *The Prohibition on the Publication of Names of Children Involved in Criminal Proceedings*, Report 35 (2008) [3.59]–[3.60].

25. Legal Aid NSW, *Preliminary Submission PCI39*, 10; Public Defenders, *Preliminary Submission PCI33*, 5–7; NSW Young Lawyers Criminal Law Committee, *Preliminary Submission PCI37*, 6; NSW Council for Civil Liberties, *Preliminary Submission PCI29*, 5–6.

26. D Carr, *Preliminary Submission PCI04*, 1; C Lee, *Preliminary Submission PCI05*, 1.

27. B Fordham, *Preliminary Submission PCI02*, 1; D Carr, *Preliminary Submission PCI04*, 1; C Lee, *Preliminary Submission PCI05*, 1; C O'Loughlin, *Preliminary Submission PCI07*, 1.

28. Banki Haddock Fiora, *Preliminary Submission PCI27*, 3.

29. NSW Council for Civil Liberties, *Preliminary Submission PCI29*, 6; Banki Haddock Fiora, *Preliminary Submission PCI27*, 4; Children's Court of NSW, *Preliminary Consultation PCI08*.

30. Children's Court of NSW, *Preliminary Consultation PCI08*.

31. *Children (Criminal Proceedings) Act 1987* (NSW) s 15B.

- the court consents to the publication or broadcast (if the person is under 16 years old), or the person consents (if they are 16 years or older)³³
- the person has died, and a senior available next of kin gives consent³⁴
- the proceedings are for a traffic offence and are held in a court other than the Children’s Court,³⁵ and
- a staff member of the court carries out the publication or broadcast in the proper exercise of official functions.³⁶

7.23 Despite the first exception, it is uncommon for a child’s name to be recorded in an official report of court proceedings. Most proceedings before the Children’s Court are not published at all. Of those that are published, the general practice is for the child’s name to be anonymised.³⁷ The Court of Criminal Appeal has observed that the publication of judgments on a court’s website allows for such widespread transmission that the policy objective of the *Children (Criminal Proceedings) Act* would be undermined unless the court anonymised names in the way it does.³⁸

7.24 While the court or the child themselves can consent to the publication or disclosure of their identity (under the third exception), we have heard this rarely occurs in practice.³⁹ A child aged 16 or 17 can only consent in the presence of a legal practitioner,⁴⁰ and legal practitioners tend to advise against consenting to the publication or disclosure.⁴¹

32. *Children (Criminal Proceedings) Act 1987* (NSW) s 15C(1). A serious children’s indictable offence includes homicide; any offence punishable by imprisonment for 25 years or life; aggravated sexual assault, attempted aggravated sexual assault, assault with intent to have sexual intercourse, or sexual assault by forced self-manipulation (in some circumstances); and certain serious firearms offences: *Children (Criminal Proceedings) Act 1987* (NSW) s 3 definition of “serious children’s indictable offence”; *Children (Criminal Proceedings) Regulation 2016* (NSW) cl 4.

33. *Children (Criminal Proceedings) Act 1987* (NSW) s 15D(1).

34. *Children (Criminal Proceedings) Act 1987* (NSW) s 15E(1).

35. *Children (Criminal Proceedings) Act 1987* (NSW) s 15F.

36. *Children (Criminal Proceedings) Act 1987* (NSW) s 15G.

37. S Rodrick, “Open Justice, the Media and Identifying Children Involved in Criminal Proceedings” (2010) 15 *Media and Arts Law Review* 409, 440; K Elder and others, *Balancing Children’s Confidentiality and Judicial Accountability: A Cross-Country Comparison of Best Practices Regarding Children’s Privacy in the Criminal Justice System*, Report (LAWS4052 International Participation and Community Engagement, 2020).

38. *John Fairfax Publications Pty Ltd re MSK* [2006] NSWCCA 386 [27].

39. Children’s Court of NSW, *Preliminary Consultation PCI08*.

40. *Children (Criminal Proceedings) Act 1987* (NSW) s 15D(3).

41. Children’s Court of NSW, *Preliminary Consultation PCI08*.

- 7.25 If the child has died, the senior available next of kin can consent to the child being identified (under the fourth exception). It has been said that this gives families “a sense of empowerment”.⁴² However, the next of kin cannot give consent if, for example, the child is the victim of a crime and the next of kin is the defendant in related proceedings.⁴³ This means that a parent charged with their child’s murder cannot consent to the disclosure of the child’s name.⁴⁴
- 7.26 The exception that allows a court sentencing a person for a serious children’s indictable offence to authorise the disclosure of their name without their consent⁴⁵ attracted the most criticism and discussion among submissions. A “serious children’s indictable offence” includes:
- homicide
 - any offence punishable by imprisonment for 25 years or life
 - aggravated sexual assault, attempted aggravated sexual assault, assault with intent to have sexual intercourse, or sexual assault by forced self-manipulation (in some circumstances), and
 - certain serious firearms offences.⁴⁶
- 7.27 In deciding whether to make such an order, a court must consider the following:
- the level of seriousness of the offence
 - the effect of the offence on any victim of the offence or on the victim’s family (in the case of an offence that resulted in the victim’s death)
 - the weight to be given to general deterrence
 - the subjective features of the offender
 - the offender’s prospects of rehabilitation, and
 - any other matters as the court considers relevant having regard to the interests of justice.

42. NSW, Legislative Council Standing Committee on Law and Justice, *The Prohibition on the Publication of Names of Children Involved in Criminal Proceedings*, Report 35 (2008) [5.62].

43. *Children (Criminal Proceedings) Act 1987* (NSW) s 15E(4).

44. NSW, *Parliamentary Debates*, Legislative Assembly, Agreement in Principle Speech, 8 June 2007, 1098, 1099.

45. *Children (Criminal Proceedings) Act 1987* (NSW) s 15C(2).

46. *Children (Criminal Proceedings) Act 1987* (NSW) s 3 definition of “serious children’s indictable offence”; *Children (Criminal Proceedings) Regulation 2016* (NSW) cl 4.

- 7.28 Amendments in 2009 expanded this list of considerations. Prior to this amendment, a court could only make an order authorising the person's name to be broadcast if it was satisfied that:
- the making of such an order is in the interests of justice, and
 - the prejudice to the person arising from the publication or broadcasting of their name in accordance with such an order does not outweigh those interests.⁴⁷
- 7.29 The Standing Committee Report, which informed the 2009 amendments, found that naming child offenders was not often in the public interest, and that other factors are also important.⁴⁸
- 7.30 There have been a small number of cases in which a court has authorised publication and disclosure of an offender's name.⁴⁹ In one case, the court noted that the age of the offender (17 years and 10 months at the time of the offence), the impact of the offence (murder) on the victim's family, and the need for general deterrence, all weighed in favour of authorising disclosure.⁵⁰ In another case, the offender's name had already been widely publicised in the media, and the offender did not oppose his identity being published.⁵¹
- 7.31 In relation to the requirement for the court to consider the weight of general deterrence before making a publication order, one submission argues that general deterrence when dealing with young people is of little value. This is because other young people are rarely aware of such judgments. The same submission also points to the difficulty of considering the subjective features of an offender and their prospects of rehabilitation at the time of sentencing.⁵²
- 7.32 We have also heard support for the list of considerations, with another submission saying that
- the factors achieve a balance between maintaining a broad judicial discretion and providing some legislative guidance on the factors relevant to determining the interests of justice.⁵³

47. *Children (Criminal Proceedings) Act 1987* (NSW) s 11(4C) (prior to 11 December 2009); repealed by *Children (Criminal Proceedings) Amendment (Naming of Children) Act 2009* (NSW) sch 1 cl 1.

48. NSW Legislative Council Standing Committee on Law and Justice, *The prohibition on the publication of names of children involved in criminal proceedings* (2008) [5.53]–[5.57].

49. *R v Dib* [2012] NSWSC 1431 (see [55]–[58]); *R v Milat* [2012] NSWSC 634 (see [2]).

50. *R v Dib* [2012] NSWSC 1431 [55]–[58].

51. *R v Milat* [2012] NSWSC 634 [2].

52. H Brown, *Preliminary Submission PCI10*, 2.

53. Law Society of NSW, *Preliminary Submission PCI31*, 6.

Age at which the prohibition should be lifted

- 7.33 Some suggest that, in the case of serious crimes, the prohibition on publication should be lifted when a child turns 18.⁵⁴ This would better protect “the community and public as a whole”.⁵⁵
- 7.34 One submission suggests the prohibition should be reassessed when the offender turns 21, when there should be a presumption in favour of naming offenders who commit serious crimes. This could be rebutted in special circumstances.⁵⁶

Protection for children under investigation

- 7.35 It has been suggested that the publication prohibition should be extended to apply before criminal proceedings commence (such as when a child is being investigated by police),⁵⁷ as this is often when there is most media interest.⁵⁸ There could be an exception to this rule in the case of a missing child.⁵⁹
- 7.36 The suggestion aligns with the Standing Committee Report recommendation to extend the prohibition to cover the period before charges are laid and include young people who are reasonably likely to become involved in criminal proceedings. The Australian Law Reform Commission made a similar recommendation in its 2010 report on privacy.⁶⁰
- 7.37 The NSW government did not support the Standing Committee Report recommendation at the time, because there was no equivalent provision elsewhere in Australia.⁶¹

Question 7.1: Criminal proceedings – prohibition on the publication and disclosure of identifying information

- (1) Should there continue to be a general prohibition on publishing or broadcasting the identities of children involved in criminal proceedings in NSW? Why or why not?

-
54. B Fordham, *Preliminary Submission PCI02*, 1; D Gibson, *Preliminary Submission PCI03*; C and M Burgess, *Preliminary Submission PCI21*, 1.
55. C and M Burgess, *Preliminary Submission PCI21*, 1.
56. H Brown, *Preliminary Submission PCI10*, 3.
57. NSW Council for Civil Liberties, *Preliminary Submission PCI29*, 6; NSW Young Lawyers Criminal Law Committee, *Preliminary Submission PCI37*, 5–6; Law Society of NSW, *Preliminary Submission PCI31*, 2–3.
58. NSW Council for Civil Liberties, *Preliminary Submission PCI29*, 6.
59. NSW, Office of the Director of Public Prosecutions, *Preliminary Submission PCI12*, 5, 10.
60. Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report 108 (2008) [69.93].
61. NSW Government, *Government Response to Report No 35 of the Legislative Council Standing Committee on Law and Justice entitled "The Prohibition on the Publication of Names of Children Involved in Criminal Proceedings" dated 21 April 2008* (2008) 3.

(2) What changes, if any, should be made to the existing prohibition and the exceptions to it?

Closed court orders

- 7.38 In all criminal proceedings under the *Children (Criminal Proceedings) Act* to which a child is a party, the court is closed to anyone not “directly interested” in the proceedings.⁶² However, this does not apply if the proceedings are for a traffic offence heard in a court other than the Children’s Court.⁶³
- 7.39 There are three exceptions to this rule. They are:
- if the court directs otherwise in relation to any specific person⁶⁴
 - the media,⁶⁵ and
 - immediate family members of a victim who has died.⁶⁶
- 7.40 Categories of people that the Children’s Court generally permits to attend proceedings include researchers, university students, and friends or support people of the children involved.⁶⁷ The magistrate generally decides whether a person may attend on a case by case basis, at the time of proceedings. The child’s view will usually be considered.⁶⁸
- 7.41 If a court is hearing criminal proceedings to which a child is a party, the court may direct any person to leave the court during the examination of any witness, if this is in the interests of the child.⁶⁹ However, a court cannot make this direction to:
- the child
 - a person who is “directly interested” in the proceedings, or
 - a person who was, at the time of the offence, an immediate family member of a victim who died.⁷⁰

62. *Children (Criminal Proceedings) Act 1987* (NSW) s 10(1)(a).

63. *Children (Criminal Proceedings) Act 1987* (NSW) s 10(3).

64. *Children (Criminal Proceedings) Act 1987* (NSW) s 10(1)(a).

65. *Children (Criminal Proceedings) Act 1987* (NSW) s 10(1)(b). See also [10.82].

66. *Children (Criminal Proceedings) Act 1987* (NSW) s 10(1)(c), s 10(4) definition of “member of the immediate family”.

67. Children’s Court of NSW, *Preliminary Consultation PCI08*.

68. Children’s Court of NSW, *Preliminary Consultation PCI08*.

69. *Children (Criminal Proceedings) Act 1987* (NSW) s 10(2).

70. *Children (Criminal Proceedings) Act 1987* (NSW) s 10(2), s 10(4).

- 7.42 Most other states and territories similarly provide that criminal proceedings involving children are to be held in closed court,⁷¹ although there are some variations in the exceptions to this rule. For example, some jurisdictions permit interpreters⁷² or representatives of Aboriginal welfare organisations.⁷³
- 7.43 The law is slightly different in Western Australia (“WA”) and Victoria. In WA, the Children’s Court may direct that someone is not to be present during proceedings, but there is no general rule that proceedings are closed.⁷⁴ In Victoria, proceedings in the Children’s Court are generally held in open court, although the Court may order that proceedings are heard in closed court, or that certain people are excluded.⁷⁵

Question 7.2: Criminal proceedings – closed court orders

- (1) Should criminal proceedings involving children continue to be held in closed court as a rule? Why or why not?
- (2) Are the current exceptions to the rule appropriate? If not, what changes should be made?

Protections in non-criminal proceedings

- 7.44 There are several protections that apply in non-criminal proceedings involving children. They can be broadly separated into two categories:
- protections in quasi-criminal proceedings, such as criminal diversion processes and domestic violence proceedings, and
 - protections in care and protection proceedings, including adoption and parentage proceedings.
- 7.45 The general objective behind these arrangements is to protect the identities of children.⁷⁶ This concern, in turn, may be driven by many of the same concerns that apply to criminal proceedings involving children – for example, that publicly identifying a

71. *Court Procedures Act 2004* (ACT) s 72; *Youth Justice Act 2005* (NT) s 49; *Childrens Court Act 1992* (Qld) s 20; *Youth Court Act 1993* (SA) s 24; *Youth Justice Act 1997* (Tas) s 30.

72. *Youth Justice Act 2005* (NT) s 49(2)(i).

73. *Children’s Court Act 1992* (Qld) s 20(1)(h); *Youth Justice Act 1997* (Tas) s 30(1)(i).

74. *Children’s Court of Western Australia Act 1988* (WA) s 31.

75. *Children, Youth and Families Act 2005* (Vic) s 523.

76. NSW Law Reform Commission, *Contempt by Publication*, Report 100 (2003) [10.13].

young person in connection with court proceedings may lead to harmful community stigma, which may cause psychological damage.⁷⁷

Criminal diversion processes

- 7.46 The *Young Offenders Act 1997* (NSW) (“*Young Offenders Act*”) establishes a scheme of alternative processes to court proceedings, including warnings, cautions and youth justice conferences, for children who commit certain offences.⁷⁸
- 7.47 The name or identifying information of any child dealt with under the *Young Offenders Act* must not be published or broadcast.⁷⁹ Most other states and territories have similar provisions.⁸⁰

Question 7.3: Criminal diversion processes

- (1) Is the prohibition on publishing or broadcasting the identities of young offenders who take part in criminal diversion processes appropriate? Why or why not?
- (2) What changes, if any, should be made to the existing prohibition?

Proceedings for apprehended domestic violence orders

- 7.48 The *Crimes (Domestic and Personal Violence) Act 2007* (NSW), among other things, sets out the scheme for apprehended domestic violence orders (“ADVOs”) in NSW.
- 7.49 Under this Act, the name or identifying details of a child involved in proceedings for an ADVO must not be published. This applies regardless of whether the child is seeking protection, is the person against whom protection is sought, or is a witness.⁸¹ Also, proceedings involving children and young people (including where the young person is the protected person, a witness, or the defendant) are to be heard in the absence of the public, unless the court directs otherwise.⁸²
- 7.50 Other states and territories take a variety of approaches to protecting children’s identities in domestic violence order proceedings. The law in most states and territories provides that the names of any people involved in proceedings cannot be published (not

77. Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report 108 (2008) [69.85]–[69.86].

78. *Young Offenders Act 1997* (NSW) s 3.

79. *Young Offenders Act 1997* (NSW) s 65(1).

80. *Youth Justice Act 1992* (Qld) s 301 (see also s 283); *Young Offenders Act 1994* (WA) s 40; *Young Offenders Act 1993* (SA) s 13; *Youth Justice Act 1997* (Tas) s 22; *Youth Justice Act 2005* (NT) s 43.

81. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 45(1).

82. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 41(2), s 41AA(1), s 58(1)(a).

just children) except in certain circumstances.⁸³ In some states and territories, the law provides that courts are to be, or may be, closed for proceedings generally.⁸⁴ Only NSW and the Northern Territory have dedicated rules for domestic violence order proceedings involving children.⁸⁵

Question 7.4: Proceedings for apprehended domestic violence orders

- (1) Is the prohibition on publishing the identities of children involved in apprehended domestic violence order proceedings appropriate? Why or why not?
- (2) What changes, if any, should be made to the existing protections?

Care and protection proceedings

- 7.51 The *Children and Young Persons (Care and Protection) Act 1998* (NSW) (“*Care and Protection Act*”) governs powers and procedures for the care and protection of young people in NSW, such as powers to investigate reports of harm, and to remove children from the care of their families. It also includes provisions for court proceedings under the Act, including restrictions on public access to such proceedings, which we discuss below.⁸⁶
- 7.52 Most other states and territories have similar restrictions limiting public access to care and protection proceedings,⁸⁷ and restricting the publication of information about such proceedings,⁸⁸ although these vary in scope and extent.

Prohibition on the publication and disclosure of identifying information

- 7.53 The *Care and Protection Act* provides that a person must not publish or broadcast the name of certain children or young people who are involved in court and non-court

83. *Domestic and Family Violence Protection Act 2012* (Qld) s 159; *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 33; *Family Violence Protection Act 2008* (Vic) s 166; *Restraining Orders Act 1997* (WA) s 70(2); *Family Violence Act 2016* (ACT) s 149.

84. *Domestic and Family Violence Protection Act 2012* (Qld) s 158; *Family Violence Protection Act 2008* (Vic) s 68; *Family Violence Act 2016* (ACT) s 60.

85. *Domestic and Family Violence Act 2007* (NT) s 106, s 123.

86. See [7.60]–[7.63].

87. *Court Procedures Act 2004* (ACT) s 72(1); *Childrens Court Act 1992* (Qld) s 20; *Youth Court Act 1993* (SA) s 24; *Magistrates Court (Children’s Division) Act 1998* (Tas) s 11; *Children, Youth and Families Act 2005* (Vic) s 523; *Children’s Court of Western Australia Act 1988* (WA) s 31.

88. *Criminal Code 2002* (ACT) s 712A; *Youth Justice Act 2005* (NT) s 140P; *Magistrates Court (Children’s Division) Act 1998* (Tas) s 12; *Children, Youth and Families Act 2005* (Vic) s 534; *Children’s Court of Western Australia Act 1988* (WA) s 35–36A.

proceedings under the Act.⁸⁹ Non-court proceedings include counselling, dispute resolution conferences and alternative dispute resolution processes.⁹⁰

- 7.54 This prohibition covers children and young people who:
- appear, or are reasonably likely to appear, as witnesses before the Children’s Court in any proceedings
 - are involved, or are reasonably likely to be involved, in any capacity in any non-court proceedings
 - are, or are likely to be, the subject of proceedings before the Children’s Court
 - are, or are reasonably likely to be, mentioned or otherwise involved in any proceedings before the Children’s Court or in any non-court proceedings
 - are reported to be at risk of significant harm or homeless, or
 - are, or have been, under the parental responsibility of the Minister or in out-of-home care.⁹¹
- 7.55 The prohibition only applies to publications that connect the child with the (court or non-court) proceedings. It does not prohibit the publication or broadcast of the names of children who are in the care and protection system generally, if the specific proceedings are not referred to.⁹²
- 7.56 This prohibition applies to the publication or broadcast of a child or young person’s name to the public, or a section of the public, by publication in a newspaper or periodical publication, by radio or television broadcast or other electronic broadcast, by the internet, or by any other means of dissemination.⁹³ It applies to the publication or broadcast of the name of the person, or to a reference to any information, picture or other material that identifies the child or young person, or that is likely to lead to the identification of the child or young person.⁹⁴
- 7.57 This prohibition applies until the child or young person turns 25 or dies, whichever occurs first.⁹⁵

89. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 105(6).

90. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 3(1).

91. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 105(1), s 105(1AA).

92. *Secretary, Department of Family and Community Services v Smith* [2017] NSWCA 206 [49].

93. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 105(1B).

94. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 105(4).

95. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 105(1A).

- 7.58 It is an offence to publish or broadcast the name of a child or young person in contravention of this prohibition. The maximum penalty is a fine of \$22,000 (200 penalty units) or imprisonment for two years (for an individual), or a fine of \$220,000 (2000 penalty units) for a corporation.⁹⁶
- 7.59 The exceptions to this prohibition are if the child or young person has died, or if the publication or broadcast:
- is an official report of proceedings
 - relates to findings of the Coroners Court in an inquest concerning the suspected death of the child or young person, or
 - is with the consent of the Children’s Court, the young person, the Secretary of the Department of Communities and Justice, or the Coroners Court (where relevant).⁹⁷

Question 7.5: Care and protection proceedings – prohibition on the publication and disclosure of identifying information

- (1) Is the prohibition on publishing or broadcasting the identities of children involved in care and protection proceedings appropriate? Why or why not?
- (2) What changes, if any, should be made to the existing prohibition and exceptions?

Closed court orders

- 7.60 Under the *Care and Protection Act*, at any time while the Children’s Court is hearing proceedings about a child or young person, any person who is not directly interested in the proceedings must be excluded from the court (unless the Court directs otherwise).⁹⁸
- 7.61 The Children’s Court may also exclude the child or young person from being in the court.⁹⁹ However, the Court may give this direction only if the prejudicial effect of excluding the child or young person is outweighed by the psychological harm that is likely to be caused to them if they were to be present.¹⁰⁰
- 7.62 If the Court does exclude the child or young person from proceedings, the Court must also direct that the media be excluded.¹⁰¹

96. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 105(2).

97. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 105(3).

98. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 104B.

99. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 104(1)–(2).

100. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 104(3).

101. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 104(4).

- 7.63 The Children’s Court can also exclude any person from court or non-court proceedings.¹⁰² This power was introduced in 2006,¹⁰³ to extend “the protection of children and young persons before the Children's Court to non-court proceedings”.¹⁰⁴

Question 7.6: Care and protection proceedings – closed court orders

- (1) Are the existing provisions relating to the exclusion of people (including the child or young person themselves) from court and non-court proceedings under the *Children and Young Persons (Care and Protection) Act 1998* (NSW) appropriate? Why, or why not?
- (2) What changes, if any, should be made to these provisions?

Adoption proceedings

- 7.64 The *Adoption Act 2000* (NSW) (“*Adoption Act*”) governs proceedings for the adoption of children. Several provisions of this Act restrict public access to adoption proceedings.
- 7.65 The *Adoption Act* prohibits the publication of material that identifies, or is reasonably likely to identify, a person as a person affected by an adoption application.¹⁰⁵ This includes a child in relation to whom an adoption application is made.¹⁰⁶
- 7.66 It is an offence to publish information in contravention of this section. The maximum penalty is a fine of \$2,750 (25 penalty units), imprisonment for 12 months, or both.¹⁰⁷ There are exceptions if:
- the publication is an official report of proceedings,¹⁰⁸ or
 - the parties consent to the information being published and certain other factors apply.¹⁰⁹
- 7.67 A court or tribunal may make an order forbidding publication of all or any of the information relating to an adopted person, birth parent, adoptive parent, relative or other person, which is mentioned in proceedings for adoption information.¹¹⁰ It is an offence to

102. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 104A(1)–(2).

103. *Children and Young Persons (Care and Protection) Amendment Act 2006* (NSW) sch 1 [40].

104. NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 10 May 2006, 22918.

105. *Adoption Act 2000* (NSW) s 180(1).

106. *Adoption Act 2000* (NSW) s 180(2)(a).

107. *Adoption Act 2000* (NSW) s 180(1).

108. *Adoption Act 2000* (NSW) s 180(3)(b).

109. *Adoption Act 2000* (NSW) s 180A(1), s 180(3)(a), s 180(4).

110. *Adoption Act 2000* (NSW) s 186(2).

publish information in breach of such an order. The maximum penalty is a fine of \$2,750 (25 penalty units), imprisonment for 12 months, or both.¹¹¹

- 7.68 The *Uniform Civil Procedure Rules 2005* (NSW) also prohibit a court registrar from providing a copy of an adoption order to any person except the plaintiff in court proceedings (unless the court orders otherwise).¹¹²
- 7.69 Under the *Adoption Act*, proceedings are to be heard in closed court. Only the parties and their lawyers may be present.¹¹³ However, the court may permit other people to attend if appropriate.¹¹⁴
- 7.70 All other states and territories have similar provisions that prohibit publishing information that identifies people involved in adoption proceedings,¹¹⁵ and require that adoption proceedings are held in a closed court.¹¹⁶

Perspectives on exceptions to open justice in adoption proceedings

- 7.71 Before amendments introduced in 2008,¹¹⁷ there was a general prohibition on publishing the identifying details of people involved in adoption proceedings, with no exceptions.¹¹⁸ The 2008 amendments were intended to encourage open adoption practices, relax publishing restrictions imposed on the parties, and give adoptive parents and children greater capacity to speak and write publicly about their experiences.¹¹⁹
- 7.72 The 2008 amendments reflect a broader trend away from “closed” or “secret” adoptions and towards “open” adoptions. This trend has been happening across Australia since the 1970s.¹²⁰

111. *Adoption Act 2000* (NSW) s 186(3).

112. *Uniform Civil Procedure Rules 2005* (NSW) r 36.12(3).

113. *Adoption Act 2000* (NSW) s 119(1).

114. *Adoption Act 2000* (NSW) s 119(2).

115. *Adoption Act 1993* (ACT) s 98; *Adoption of Children Act 1994* (NT) s 71; *Adoption Act 2009* (Qld) s 307Q, s 315; *Adoption Act 1988* (SA) s 31; *Adoption Act 1988* (Tas) s 109; *Adoption Act 1984* (Vic) s 121; *Adoption Act 1994* (WA) s 124.

116. *Adoption Act 1993* (ACT) s 112; *Adoption of Children Act 1994* (NT) s 79; *Adoption Act 2009* (Qld) s 307G; *Adoption Act 1988* (SA) s 24; *Adoption Act 1988* (Tas) s 93; *Adoption Act 1984* (Vic) s 107; *Adoption Act 1994* (WA) s 133.

117. *Adoption Amendment Act 2008* (NSW) sch 1 [32] (date of commencement 1 January 2009).

118. *Adoption Act 2000* (NSW) s 180.

119. NSW, *Parliamentary Debates*, Legislative Assembly, Agreement in Principle Speech, 25 September 2008, 10111.

120. NSW Law Reform Commission, *Review of the Adoption of Children Act 1965 (NSW)*, Report 81 (1997) ch 7; D Higgins, *Past and Present Adoptions in Australia*, Facts Sheet (Australian Institute of Family Studies, 2012).

- 7.73 One submission argues that a person affected by an adoption application should be entitled to consent to the publication of their identity, provided they have the capacity to provide informed consent.¹²¹

Question 7.7: Adoption proceedings

- (1) Should there continue to be prohibitions on the publication or disclosure of material that identifies people involved in adoption proceedings? Why, or why not?
- (2) What changes, if any, should be made to the existing prohibitions and exceptions?
- (3) Should adoption proceedings continue to be held in closed court? Why, or why not?
- (4) What changes, if any, should be made to the existing closed court provisions?

Parentage and surrogacy proceedings

- 7.74 Most states and territories, including NSW, have provisions for proceedings for parentage determinations or relating to surrogacy arrangements that:
- prohibit publishing information that identifies people involved in such proceedings,¹²² and/or
 - requires such proceedings to be held in closed court.¹²³

Parentage declarations

- 7.75 A person must not publish the name or identifying information of a person by, or in relation to whom, an application for a declaration of parentage is brought. The maximum penalty for breaching this restriction is a fine of \$1,100 (10 penalty units).¹²⁴
- 7.76 Hearings relating to a declaration of parentage are to be in closed court.¹²⁵

Surrogacy arrangements

- 7.77 A person must not publish any material that identifies (or is likely to identify) a person as someone who is affected by a surrogacy arrangement.¹²⁶ This includes a child of a surrogacy arrangement.¹²⁷

121. Banki Haddock Fiora, *Preliminary Submission PCI27*, 4.

122. *Surrogacy Act 2010* (NSW) s 52; *Status of Children Act 1996* (NSW) s 25; *Status of Children Act 1978* (NT) s 17(2); *Surrogacy Act 2010* (Qld) s 53; *Family Relationships Act 1975* (SA) s 13; *Surrogacy Act 2012* (Tas) s 42; *Status of Children Act 1974* (Vic) s 33; *Family Court Act 1997* (WA) s 243.

123. See, eg, *Surrogacy Act 2010* (NSW) s 47; *Status of Children Act 1996* (NSW) s 24; *Status of Children Act 1978* (NT) s 17(1); *Surrogacy Act 2010* (Qld) s 51; *Surrogacy Act 2012* (Tas) s 44; *Surrogacy Act 2008* (WA) s 43.

124. *Status of Children Act 1996* (NSW) s 25.

125. *Status of Children Act 1996* (NSW) s 24(1).

- 7.78 It is an offence to publish material in breach of this restriction. The maximum penalty is a fine of \$2,750 (25 penalty units) and/or imprisonment for 12 months.¹²⁸ However, the restriction does not apply if the person consents to being identified. In the case of a child, consent may be given by their parent.¹²⁹
- 7.79 Proceedings for a parentage order are to be heard in closed court unless the court directs otherwise.¹³⁰
- 7.80 These provisions were introduced “to protect the privacy of parties to surrogacy arrangements and to protect the child from possible stigmatisation”.¹³¹

Question 7.8: Parentage and surrogacy proceedings

- (1) Should there continue to be prohibitions on the publication or disclosure of material relating to parentage and surrogacy proceedings? Why or why not?
- (2) What changes should be made to the existing prohibitions?
- (3) Should parentage and surrogacy proceedings continue to be held in closed court? Why or why not?
- (4) What changes, if any, should be made to the existing closed court provisions?

Should children be protected in other types of proceedings?

- 7.81 There are other types of legal proceedings that involve children, apart from those discussed above. Civil proceedings (where a child may be a plaintiff, defendant or witness) are one example where protections could be introduced, if appropriate.
- 7.82 Some submissions indicate support for protections in this area, arguing that naming children in civil proceedings can have “irreversible, detrimental effects”¹³² and is a practice inconsistent with Australia’s international law obligations.¹³³

126. *Surrogacy Act 2010* (NSW) s 52(1).

127. *Surrogacy Act 2010* (NSW) s 52(2)(a).

128. *Surrogacy Act 2010* (NSW) s 52(1).

129. *Surrogacy Act 2010* (NSW) s 52(3)–(4).

130. *Surrogacy Act 2010* (NSW) s 47.

131. NSW, *Parliamentary Debates*, Legislative Council, Second Reading Speech, 21 October 2010, 26546.

132. Legal Aid NSW, *Preliminary Submission PCI39*, 10.

133. Domestic Violence NSW, *Preliminary Submission PCI42*, 5–6.

- 7.83 The Standing Committee Report considered the question of extending protections to civil proceedings, ultimately recommending that the government consider the feasibility of this proposal.¹³⁴ The government has not acted on this recommendation.¹³⁵
- 7.84 The Australian Capital Territory has closed court provisions in relation to civil proceedings involving children.¹³⁶ As far as we are aware, this is the only Australian state or territory that limits access to, or information about, children who appear in civil proceedings.

Question 7.9: Other proceedings

What further protections, if any, should there be from the publication and disclosure of, or public access to, types of legal proceedings involving children other than those to which protections already apply?

134. NSW, Legislative Council Standing Committee on Law and Justice, *The Prohibition on the Publication of Names of Children Involved in Criminal Proceedings*, Report 35 (2008) rec 7.

135. NSW Government, *Government Response to Report No 35 of the Legislative Council Standing Committee on Law and Justice entitled "The Prohibition on the Publication of Names of Children Involved in Criminal Proceedings" dated 21 April 2008* (2008).

136. *Court Procedures Act 2004* (ACT) s 72(1).

8. Victims and witnesses: privacy protections and access to information

In Brief

NSW law contains provisions that protect the privacy of victims and witnesses and assist them to give evidence. It also gives victims special rights to access information about court proceedings. We seek your views about whether these laws are appropriate and adequate.

General protections for victims and witnesses	182
Closing the court to the public for the reading of a victim impact statement	182
Automatic prohibitions on publishing or disclosing certain information	183
Suppression and non-publication orders	184
Orders under the Court Suppression and Non-publication Orders Act	184
Orders about victim impact statements in forensic proceedings	185
Should there be more general protections for victims and witnesses?	185
Broader powers to close court proceedings	185
Broader powers to make suppression and non-publication orders	186
Protections for specific types of victims and witnesses	187
Children and young people	187
Closing court proceedings	188
Automatic prohibitions on publishing the identities of child witnesses and victims	188
Should there be more protections for children and young people?	189
Complainants in sexual offence proceedings	191
Complainants and witnesses in domestic violence proceedings	192
Closing court proceedings	192
Suppression and non-publication orders	194
Should there be more protections for domestic violence complainants?	194
Should there be protections for other types of victims or witnesses?	195
Closing court proceedings for adult witnesses with cognitive impairment	195
Protections for sex workers	196
Access to information by victims	197
Entitlements under the current access regimes in NSW	197

Other entitlements to receive information	199
Entitlements under the Charter of rights of victims of crime	199
Entitlements under victims registers	200
Entitlements in relation to parole proceedings	201
Access entitlements a victim would have under the uncommenced Court Information Act	201
Additional access entitlements that could be considered	202

- 8.1 In the previous Chapter, we discuss exceptions to the open justice principle that protect the identities of children involved in court proceedings, and child defendants especially. In this Chapter, our focus is the protections that exist for victims and witnesses. The most significant protections are for vulnerable witnesses including children and sexual offence complainants. Their purpose is to assist the administration of justice by encouraging such witnesses to participate in the court process and by reducing the stress and trauma of giving evidence. This helps to ensure witnesses can give their best evidence.
- 8.2 The law also allows victims to access certain information about court proceedings; for example, information about a matter’s progress and when an imprisoned offender might be released.
- 8.3 In this Chapter, we ask whether the current protections for victims and witnesses, and victim entitlements to access court information, are appropriate. In particular, we ask whether additional protections, and stronger access entitlements, are needed.

General protections for victims and witnesses

- 8.4 In this section, we discuss the protections for victims and witnesses generally.

Closing the court to the public for the reading of a victim impact statement

- 8.5 The *Crimes (Sentencing Procedure) Act 1999* (NSW) (“*Sentencing Procedure Act*”) allows a victim to ask that a court be closed while they read out their victim impact statement (“VIS”).¹ A VIS gives a victim the opportunity to tell the sentencing court about the impact a crime has had on them.²
- 8.6 In deciding whether to allow a victim to read out their VIS in a closed court, the court is to consider:

1. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30K(1).
2. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 28; NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 24 October 2018, 72–73.

- (a) whether it is reasonably practicable to exclude the public, and
- (b) whether special reasons in the interests of justice require the statement to be read in open court, and
- (c) any other matter that the court considers relevant.³

8.7 The legislation also says the principle of open justice “does not of itself constitute special reasons in the interests of justice requiring the statement to be read in open court”.⁴

Automatic prohibitions on publishing or disclosing certain information

8.8 In NSW, there are some automatic prohibitions on publishing or disclosing certain information about victims and witnesses.

8.9 The *Criminal Procedure Act 1986* (NSW) (“*Criminal Procedure Act*”) restricts disclosure of a witness’ address or telephone number in criminal proceedings, except where:

- the address or telephone number is a materially relevant part of the evidence, or
- the court makes an order requiring disclosure.⁵

8.10 A similar provision exists in the Charter of rights of victims of crime, in the *Victims Rights and Support Act 2013* (NSW).⁶

8.11 The prosecution or defence may apply for a disclosure order under the *Criminal Procedure Act*. A court can only make one if satisfied that:

- disclosure is unlikely to present a “reasonably ascertainable risk to the welfare or protection of any person”, or
- the “interests of justice outweigh any such risk”.⁷

8.12 One submission says the restriction on disclosing witness information is a necessary protection, but one that is not always adhered to. It reports knowing of several cases in which a victim’s address has been disclosed inadvertently in court proceedings.⁸

3. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30K(2).

4. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30K(3).

5. *Criminal Procedure Act 1986* (NSW) s 280(1).

6. *Victims Rights and Support Act 2013* (NSW) s 6(6.8).

7. *Criminal Procedure Act 1986* (NSW) s 280(2)–(3).

8. Victims of Crime Assistance League Inc NSW, *Preliminary Submission PCI32*, 2.

- 8.13 Another protection can be found in the *Mental Health (Forensic Provisions) Regulation 2017* (NSW). It prohibits a “registered victim”, or any other person, from publishing any information contained in the Victims Register.⁹
- 8.14 The Victims Register includes information about each registered victim of a forensic patient, including identifying information.¹⁰ The prohibition on publishing information does not apply if:
- the Mental Health Review Tribunal (“MHRT”) or a court consents to or orders publication of the information, or
 - the information is already publicly available.¹¹

Suppression and non-publication orders

Orders under the Court Suppression and Non-publication Orders Act

- 8.15 As we discuss in Chapter 4, the *Court Suppression and Non-publication Orders Act 2010* (NSW) (“CSNPO Act”) empowers courts to make orders that prohibit or restrict publishing or disclosing information that:
- tends to identify parties, witnesses or another person associated with or related to them, or
 - relates to evidence given in proceedings before the court.¹²
- 8.16 A court may, for example, make an order where necessary to protect the safety of a victim or witness.¹³ “Safety” includes psychological safety, such as aggravation of a pre-existing mental condition, and an increased risk of suicide or other self-harm.¹⁴
- 8.17 A court may also make an order where necessary to avoid causing undue distress or embarrassment to a party or witness in proceedings for a sexual offence.¹⁵ We discuss this ground in Chapter 4.¹⁶

9. *Mental Health (Forensic Provisions) Regulation 2017* (NSW) cl 13F.

10. *Mental Health (Forensic Provisions) Regulation 2017* (NSW) cl 13A(a).

11. *Mental Health (Forensic Provisions) Regulation 2017* (NSW) cl 13F(2).

12. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 7.

13. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 8(1)(c).

14. *AB v R (No 3)* [2019] NSWCCA 46, 97 NSWLR 1046 [56]–[60]. See also *Brown v R (No 2)* [2019] NSWCCA 69 [26]–[27], [36]–[37].

15. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 8(1)(d).

16. See [4.81]–[4.89].

Orders about victim impact statements in forensic proceedings

8.18 Under the *Sentencing Procedure Act*, a victim in forensic proceedings¹⁷ may request that:

- the court not disclose all or part of the VIS to the accused person, or
- the statement not be read out to the court.¹⁸

8.19 The court must agree to the request unless it is not in the interests of justice. However, the court may disclose all or part of a VIS to the accused person's legal representative:

- if the court is satisfied that it is in the interests of justice to do so, and
- on the condition that the VIS is not disclosed to any other person.¹⁹

Should there be more general protections for victims and witnesses?

8.20 The current protections, which apply to victims and witnesses generally, are limited to the circumstances outlined above. Broader protections exist in some other jurisdictions, which NSW could consider.

Broader powers to close court proceedings

8.21 As we discuss in Chapter 2, courts can exercise their inherent or implied powers to close proceedings when this is necessary for the administration of justice. However, there are few and strictly defined categories of cases where closing the court is accepted as necessary.²⁰

8.22 Legislation could allow proceedings to be closed to protect the privacy of, or prevent hardship to, victims or witnesses, in more circumstances than simply when they are reading out a VIS.²¹ For example, in South Australia ("SA"), courts can exclude people from any proceeding to prevent hardship or embarrassment to any person.²² Contrast

17. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30L(1). These are proceedings in which an accused person has been found not guilty by reason of mental illness under the *Mental Health (Forensic Provisions) Act 1990* (NSW), or a finding has been made, following a special hearing under that Act, that on the limited evidence available, the accused person committed an offence.

18. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30N(1).

19. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30N(2)–(3).

20. See [2.17]–[2.21].

21. See [8.5]–[8.9].

22. *Evidence Act 1929* (SA) s 69(1).

this to the situation in NSW, where courts have said that embarrassment or distress to a victim or witness does not justify closing the court.²³

8.23 In federal proceedings, any Australian court can make an order excluding the public or certain people from the courtroom when a “special witness” is giving evidence about any Commonwealth offence.²⁴ A court may declare a person to be a special witness if satisfied that they are unlikely to be able to give evidence in an ordinary manner due to:

- a disability, or
- intimidation, distress or emotional trauma, arising from their age, cultural background or relationship to a party to the proceeding, the nature of the evidence, or some other relevant factor.²⁵

Broader powers to make suppression and non-publication orders

8.24 As mentioned, the *CSNPO Act* expressly permits courts to make suppression and non-publication orders where this is necessary to avoid undue distress or embarrassment to parties or witnesses in sexual offence proceedings.²⁶ NSW could consider allowing courts to make such orders to prevent distress or hardship to victims or witnesses in other circumstances as well.

8.25 For example, as referred to above, SA courts can make suppression orders to prevent “undue hardship” to victims and witnesses in any civil or criminal proceedings.²⁷ Such orders cannot be made in respect of criminal defendants or civil litigants. The rationale is that victims and witnesses:

- have a greater need for protection from adverse publicity than the parties, as they have little opportunity to defend themselves against any negative assertions that may arise in proceedings, and
- may be unwilling to testify unless they are protected from publicity, which is important for effective law enforcement.²⁸

23. See, eg, *David Syme and Co Ltd v General Motors-Holden's Ltd* [1984] 2 NSWLR 294, 307–308; *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47, 58–59; *John Fairfax Group Pty Ltd v Local Court of NSW* (1991) 26 NSWLR 131, 142–143. But see *Nationwide News Pty Ltd v District Court of NSW* (1996) 40 NSWLR 486, 493–496.

24. *Crimes Act 1914* (Cth) s 15YP.

25. *Crimes Act 1914* (Cth) s 15YAB(1) definition of “special witness”.

26. See [4.81], [8.18].

27. *Evidence Act 1929* (SA) s 69A(1).

28. NSW Law Reform Commission, *Contempt by Publication*, Discussion Paper 43 (2000) [10.88].

- 8.26 The potential hardship must be balanced against the public interest in open justice and the media’s right to publish information about the case.²⁹ The court must also be satisfied that there are special circumstances giving rise to undue hardship.³⁰
- 8.27 In the United Kingdom, a party can apply for a “reporting direction” that prohibits the publication of information that identifies an adult witness (other than the accused person) during their lifetime. An adult witness is eligible for this protection if the quality of their evidence, or their cooperation with the case, is likely to be diminished due to fear or distress in connection with being publicly identified as a witness. The court must consider factors such as the nature and circumstances of the alleged offence, the witness’ age, how the accused person or their associates have behaved towards the witness, and any views expressed by the witness.³¹
- 8.28 The court must also consider whether it would be in the interests of justice to make the direction, and the public interest in avoiding substantial and unreasonable restrictions on the reporting of court proceedings.³²

Question 8.1: General protections for victims and witnesses

- (1) Are the general privacy protections for victims and witnesses in NSW appropriate? Why or why not?
- (2) What changes, if any, should be made?

Protections for specific types of victims and witnesses

- 8.29 In this section, we outline the protections that apply to specific types of victims and witnesses.

Children and young people

- 8.30 There are several protections for children and young people involved in court proceedings. Their purpose is typically to prevent the stigmatisation, humiliation and harassment that can result from publicity.³³
- 8.31 In this section, we focus on the protections for child witnesses and victims. We consider a broader range of protections for children and young people (including those for child defendants) in Chapter 7.

29. *Evidence Act 1929* (SA) s 69A(2)(a).

30. *Evidence Act 1929* (SA) s 69A(2)(b).

31. *Youth Justice and Criminal Evidence Act 1999* (UK) s 46(1), s 46(3)–(6).

32. *Youth Justice and Criminal Evidence Act 1999* (UK) s 46(8).

33. See, eg, D A Butler and others, *Australian Media Law* (Thomson Reuters, 5th ed, 2015) [5.570].

Closing court proceedings

- 8.32 NSW law requires or permits the court to exclude the public or particular people from certain types of proceedings where a child or young person is involved. For example, the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) ("*Crimes (Domestic and Personal Violence) Act*") requires proceedings relating to an apprehended violence order ("AVO") to be closed where they involve a child or young person (including as a witness or the person protected by the AVO), unless the court directs otherwise.³⁴
- 8.33 Section 10 of the *Children (Criminal Proceedings) Act 1987* (NSW) ("*Children (Criminal Proceedings) Act*") applies to criminal proceedings against child defendants, which are heard in the Children's Court. It allows the court to direct anyone (apart from child defendants, family victims or other interested parties) to leave the court during the examination of a child (or adult) witness. However, it appears that the court can only do this if it is in the best interests of the child *defendant*.³⁵ The interests of a child witness are not a specific consideration.
- 8.34 We discuss court powers to close proceedings involving children and young people further in Chapter 7.³⁶

Automatic prohibitions on publishing the identities of child witnesses and victims

- 8.35 In NSW, legislation prohibits publishing or broadcasting the identities of children involved in certain proceedings, including as witnesses or victims. For example:
- the *Children (Criminal Proceedings) Act* prohibits publishing or broadcasting the name of a person who was a child when they were involved in criminal proceedings (including as a witness, victim or sibling of the victim), subject to certain exceptions³⁷
 - the *Children and Young Persons (Care and Protection) Act 1998* (NSW) prohibits publishing or broadcasting the name of a child or young person involved in non-criminal proceedings before the Children's Court (including as a witness in the proceedings),³⁸ and
 - the *Crimes (Domestic and Personal Violence) Act* prohibits publishing the name or identifying information of a child involved in AVO proceedings (including as a witness or the person protected by the AVO).³⁹

34. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 41, s 41AA.

35. *Children (Criminal Proceedings) Act 1987* (NSW) s 10(2) (emphasis added).

36. See [7.38]–[7.43], [7.49], [7.60]–[7.63], [7.69], [7.76], [7.79].

37. *Children (Criminal Proceedings) Act 1987* (NSW) s 15A.

38. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 105.

39. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 45(1).

8.36 Several submissions support prohibitions on publishing the identities of children involved in court proceedings.⁴⁰ Some observe that this:

- prevents harm to and stigmatisation of children⁴¹
- allows children to recover from trauma and embarrassment,⁴² and
- ensures that children are not deterred from coming forward to authorities.⁴³

8.37 We discuss prohibitions on publishing the identities of children and young people further in Chapter 7.⁴⁴

Should there be more protections for children and young people?

8.38 As mentioned, the court can exclude the public when a child witness is giving evidence in criminal proceedings against a child defendant. However, in deciding whether to do so, the court must consider the interests of the child defendant.⁴⁵ It could be worth considering introducing provisions that require a court to take account of the interests of a child witness specifically.

8.39 Courts have no legislative powers to close the court when a child witness is giving evidence in criminal proceedings relating to an adult defendant.⁴⁶ Again, this might be an amendment worth considering. Closing the court to the public may prevent unnecessary distress for the child witness and assist them to give their best evidence.

8.40 A court could potentially rely on its inherent or implied powers to close the proceedings, provided it is necessary for the administration of justice.⁴⁷ However, an express legislative power or requirement could provide greater certainty.

8.41 It would also be consistent with the protections for other types of vulnerable witnesses. For example, complainants in proceedings for prescribed sexual offences are entitled to give evidence in a closed court.⁴⁸

40. See, eg, NSW Council for Civil Liberties, *Preliminary Submission PCI29*, 5; Legal Aid NSW, *Preliminary Submission PCI39*, 10; Domestic Violence NSW, *Preliminary Submission PCI42*, 5–6.

41. Legal Aid NSW, *Preliminary Submission PCI39*, 10.

42. NSW Council for Civil Liberties, *Preliminary Submission PCI29*, 5.

43. NSW Council for Civil Liberties, *Preliminary Submission PCI29*, 5.

44. See [7.12]–[7.37], [7.47], [7.49], [7.53]–[7.59], [7.65]–[7.68], [7.75], [7.77]–[7.78].

45. *Children (Criminal Proceedings) Act 1987* (NSW) s 10(2).

46. Legal Aid NSW, *Preliminary Submission PCI39*, 11–12. See also Legal Aid NSW, Submission to the NSW Department of Justice, *Review of Protections for Certain Witnesses Giving Evidence* (June 2018) 7–8.

47. See [2.17].

48. *Criminal Procedure Act 1986* (NSW) s 291, s 294B.

- 8.42 Legislation elsewhere in Australia permits or requires the public or certain people to be excluded from proceedings when a child witness gives evidence.⁴⁹ Often the circumstances are broad. For example, in Victoria, a court can make a closed court order where this is necessary “to avoid causing undue distress or embarrassment to a child who is a witness in any criminal proceeding”.⁵⁰
- 8.43 Arguably, there are other ways to assist child witnesses to give evidence in proceedings without the need to close the court. The *Criminal Procedure Act* already includes some provisions for “vulnerable witnesses” (that is, children or people with cognitive impairment) that are designed to assist them to give evidence.⁵¹ Among other things, a child witness is entitled to:
- give their evidence in chief in the form of a recording of the police interview⁵²
 - give evidence from outside the courtroom using closed-circuit television (“CCTV”) or other similar technology,⁵³ and
 - give evidence using alternative arrangements, such as screens or planned seating arrangements to prevent the witness from seeing the accused person.
- 8.44 A child witness can give their evidence in chief by way of a recording in any criminal proceeding. They must not be present in the court, or visible or audible to the court, while it is viewing or hearing the recording, unless they choose to be. However, they must attend court for cross-examination and re-examination. This can be conducted orally in the courtroom or through alternative arrangements.⁵⁴
- 8.45 The Child Sexual Offence Evidence Pilot Scheme (“Pilot Scheme”), which operates at the Downing Centre District Court and Newcastle District Court, expands the use of pre-recorded evidence for child complainants in indictable proceedings for a prescribed sexual offence.⁵⁵ It commenced on 31 March 2016 and has been extended to 30 June 2022.⁵⁶

49. See *Crimes Act 1914* (Cth) s 15YP(a); *Evidence Act 1977* (Qld) s 21A(1) definition of “special witness”, s 21AU.

50. *Open Courts Act 2013* (Vic) s 30(2)(e).

51. See *Criminal Procedure Act 1986* (NSW) ch 6 pt 6.

52. *Criminal Procedure Act 1986* (NSW) s 306U.

53. *Criminal Procedure Act 1986* (NSW) s 306ZB.

54. *Criminal Procedure Act 1986* (NSW) s 306S, s 306U, s 306W.

55. See *Criminal Procedure Act 1986* (NSW) sch 2 pt 29.

56. *Criminal Procedure Regulation 2017* (NSW) cl 108A; District Court of NSW, *Criminal Practice Note 11: Child Sexual Offence Evidence Program Scheme: Downing Centre*, 2019.

- 8.46 The Pilot Scheme requires that *all* evidence of a child (including evidence given in cross-examination and re-examination):
- must be given by way of a recording, if the child is under 16, and
 - may be given in this way, if the child is aged 16 or 17.⁵⁷
- 8.47 Giving evidence via CCTV is available for child witnesses in various types of proceedings, such as criminal proceedings for a personal assault offence and AVO proceedings. It is also available for child witnesses aged 16 or 17 if they were under 16 when the charge was laid for the personal assault offence to which the proceedings relate.⁵⁸
- 8.48 A court may, on its own initiative or on application by a party, order that the child witness not give evidence via CCTV, if satisfied that there are special reasons in the interests of justice for this not to occur. If the court makes such an order, CCTV is unavailable, or the witness chooses not to give evidence by CCTV, the witness can use alternative arrangements such as physical screens.⁵⁹

Complainants in sexual offence proceedings

- 8.49 In NSW, there are several protections that apply to complainants and witnesses in proceedings for sexual offences. They include:
- a requirement to close the court while the complainant is giving evidence or reading out their VIS⁶⁰
 - an automatic prohibition on publishing the identities of complainants,⁶¹ and
 - the power to make suppression or non-publication orders where this is “necessary to avoid causing undue distress or embarrassment” to a party to or witness in criminal proceedings for a sexual offence.⁶²
- 8.50 In general, these protections are meant to avoid causing additional trauma or distress to complainants and to encourage people who experience sexual offending to report it.⁶³ We discuss them further in Chapter 9.

57. *Criminal Procedure Act 1986* (NSW) sch 2 pt 29 cl 84.

58. *Criminal Procedure Act 1986* (NSW) s 306ZA, s 306ZB.

59. *Criminal Procedure Act 1986* (NSW) s 306ZB(4)–(5), s 306ZH.

60. *Criminal Procedure Act 1986* (NSW) s 291(2); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 301.

61. *Crimes Act 1900* (NSW) s 578A.

62. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 8(1)(d).

63. See [9.3], [9.17].

Complainants and witnesses in domestic violence proceedings

Closing court proceedings

- 8.51 Legislation has recently commenced that entitles complainants in criminal proceedings for a domestic violence offence, and related apprehended domestic violence order (“ADVO”) proceedings, to give evidence in a closed court. It also enables the court to direct that other parts of the proceedings, or the entire proceedings, be closed.⁶⁴
- 8.52 A “domestic violence offence” is defined as a personal violence offence in circumstances where the accused person has, or has had, a domestic relationship with the complainant. It also includes offences other than a personal violence offence, where the commission of the offence is intended to coerce or control the complainant, or cause the complainant to be intimidated or fearful.⁶⁵
- 8.53 Related ADVO proceedings are those involving the same defendant and complainant as those in criminal proceedings for a domestic violence offence.⁶⁶
- 8.54 Courts must now be closed while a domestic violence complainant gives evidence, including when a recorded statement is played, unless the court otherwise directs.⁶⁷ Closing the court would arguably assist domestic violence complainants to give their best evidence,⁶⁸ and encourage reporting of domestic violence offences.⁶⁹
- 8.55 Courts can direct that the proceedings remain open while the domestic violence complainant gives evidence, on request of a party to the proceedings. However, the court must be satisfied that:
- there are special reasons in the interest of justice to do so, or
 - the complainant consents to giving their evidence in open court.⁷⁰

64. *Criminal Procedure Act 1986* (NSW) s 289T–289UA, inserted by *Stronger Communities Legislation Amendment (Domestic Violence) Act 2020* (NSW) sch 2 [3].

65. *Criminal Procedure Act 1986* (NSW) s 3 definition of “domestic violence offence”; *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 11.

66. *Criminal Procedure Act 1986* (NSW) s 289T(1)(b), inserted by *Stronger Communities Legislation Amendment (Domestic Violence) Act 2020* (NSW) sch 2 [3].

67. *Criminal Procedure Act 1986* (NSW) s 289U(1), inserted by *Stronger Communities Legislation Amendment (Domestic Violence) Act 2020* (NSW) sch 2 [3].

68. Women’s Legal Service NSW, *Preliminary Consultation PCI04*.

69. NSW Young Lawyers Criminal Law Committee, *Preliminary Submission PCI37*, 5.

70. *Criminal Procedure Act 1986* (NSW) s 289U(2), inserted by *Stronger Communities Legislation Amendment (Domestic Violence) Act 2020* (NSW) sch 2 [3].

- 8.56 The principle that criminal proceedings should generally be open or public in nature, or that justice should be seen to be done, does not itself constitute “special reasons” requiring the court to be open.⁷¹
- 8.57 One view is that only the complainant, and not the defendant, should be able to request an open court while the complainant gives evidence. The concern is that defendants in domestic violence proceedings could make these requests to deter complainants from participating in the proceedings or make it more difficult for them to do so.⁷²
- 8.58 In addition to the requirement to close the proceedings while the complainant gives evidence, courts can direct that other parts of the proceedings, or the entire proceedings, be closed, either on its own motion or at the request of a party. In deciding whether to make a direction, the court must consider:
- the complainant’s need to have any person excluded from the proceedings
 - the complainant’s need to have any person present in those proceedings
 - the interests of justice, and
 - any other matter that the court considers relevant.⁷³
- 8.59 If the court makes a direction, it may still exempt a person from the direction to allow them to be present as a support for a person giving evidence, or exempt any other person that the court thinks fit. This exemption may be absolute or subject to conditions.⁷⁴
- 8.60 Elsewhere in Australia, legislation either:
- requires proceedings relating to domestic or family violence to be closed,⁷⁵ or
 - allows courts to make orders to close these proceedings.⁷⁶

71. *Criminal Procedure Act 1986* (NSW) s 289U(3), inserted by *Stronger Communities Legislation Amendment (Domestic Violence) Act 2020* (NSW) sch 2 [3].

72. Women’s Legal Service NSW, *Preliminary Consultation PCI04*.

73. *Criminal Procedure Act 1986* (NSW) s 289UA(1)–(3), inserted by *Stronger Communities Legislation Amendment (Domestic Violence) Act 2020* (NSW) sch 2 [3].

74. *Criminal Procedure Act 1986* (NSW) s 289UA(5), inserted by *Stronger Communities Legislation Amendment (Domestic Violence) Act 2020* (NSW) sch 2 [3].

75. See, eg, *Domestic and Family Violence Protection Act 2012* (Qld) s 158; *Domestic and Family Violence Act 2007* (NT) s 106.

76. See, eg, *Family Violence Act 2016* (ACT) s 60(1)(a); *Family Violence Protection Act 2008* (Vic) s 68.

Suppression and non-publication orders

8.61 The *Crimes (Domestic and Personal Violence) Act* enables courts to prohibit publication of the names of the following types of people involved in AVO proceedings:

- the person protected by the AVO
- a witness in the proceedings, and
- a person who is mentioned or otherwise involved in the proceedings.⁷⁷

8.62 As we discuss above, courts can also make suppression or non-publication orders under the *CSNPO Act* to protect victims or witnesses in court proceedings.⁷⁸ We have heard that orders in proceedings relating to domestic violence are generally made on the following grounds:

- where it is necessary to protect the safety of any person, or
- where it is necessary to prevent prejudice to the proper administration of justice.⁷⁹

8.63 One submission says that a complainant or victim of domestic violence may feel silenced or controlled when a court decides to make an order to protect their identity without consulting them. This can also compound their sense of disempowerment.⁸⁰

8.64 One solution might be for legislation to require, or at least expressly permit, courts to consider the views of victims in deciding whether to make an order.⁸¹

Should there be more protections for domestic violence complainants?

8.65 Several submissions support an automatic prohibition on publishing the identities of complainants.⁸² Some argue that the same policy reasons for an automatic prohibition

77. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 45(2).

78. See [8.15]–[8.17].

79. Women's Domestic Violence Court Advocacy Service NSW, *Preliminary Submission PCI30*, 4; *Court Suppression and Non-publication Orders Act 2010* (NSW) s 8(1)(a), s 8(1)(c).

80. Women's Domestic Violence Court Advocacy Service NSW, *Preliminary Submission PCI30*, 2–3.

81. See, eg, Women's Domestic Violence Court Advocacy Service NSW, *Preliminary Submission PCI30*, 7.

82. NSW, Office of the Director of Public Prosecutions, *Preliminary Submission PCI12*, 6; Victims of Crime Assistance League Inc NSW, *Preliminary Submission PCI32*, 2–3; NSW Young Lawyers Criminal Law Committee, *Preliminary Submission PCI37*, 5; No to Violence, *Preliminary Submission PCI38*, 1–2.

on publishing the identities of sexual offence complainants also apply in this context.⁸³ Namely, there is a need to:

- encourage reporting of domestic violence offences,⁸⁴ and
- protect complainants from re-traumatisation, stigma and shame when entering the court process.⁸⁵

8.66 In the 2008 *Report on Access to Court Information*, the NSW Attorney General's Department recommended a similar approach.⁸⁶ Legislation in several other Australian states and territories automatically prohibits publication of the identities of people involved in proceedings relating to domestic or family violence.⁸⁷

Question 8.2: Current protections for specific types of victims and witnesses

- (1) Are the privacy protections for specific types of victims and witnesses in NSW appropriate? Why or why not?
- (2) What changes, if any, should be made?

Should there be protections for other types of victims or witnesses?

Closing court proceedings for adult witnesses with cognitive impairment

8.67 As mentioned above, the *Criminal Procedure Act* includes certain provisions to assist vulnerable witnesses (that is, children and people with cognitive impairment) in court proceedings.⁸⁸ Among other things, adult witnesses with cognitive impairment are entitled to give evidence using CCTV or alternative arrangements in certain proceedings.⁸⁹ The rationale is that “such witnesses often suffer a deficit in the ability to communicate and find it harder to adapt to new environments and situations”.⁹⁰

83. NSW, Office of the Director of Public Prosecution, *Preliminary Submission PCI12*, 6; No to Violence, *Preliminary Submission PCI38*, 1–2.

84. NSW Young Lawyers Criminal Law Committee, *Preliminary Submission PCI37*, 5.

85. Domestic Violence NSW, *Preliminary Submission PCI42*, 5.

86. NSW, Attorney General's Department, *Report on Access to Court Information* (2008) rec 6(c).

87. See, eg, *Family Violence Act 2016* (ACT) s 149; *Family Violence Protection Act 2008* (Vic) s 166(2)(b)–(c); *Domestic and Family Violence Protection Act 2012* (Qld) s 159(1); *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 33; *Restraining Orders Act 1997* (WA) s 70(2).

88. *Criminal Procedure Act 1986* (NSW) s 306M definition of “vulnerable person”.

89. See *Criminal Procedure Act 1986* (NSW) s 306ZA–306ZB, s 306ZH.

90. NSW, *Parliamentary Debates*, Legislative Assembly, Agreement in Principle Speech, 9 May 2007 106.

8.68 There are no specific provisions that require or permit the court to be closed while an adult witness with cognitive impairment is giving evidence.⁹¹ On one view, existing provisions (such as those allowing the use of CCTV to give evidence) may be enough to assist these witnesses to give evidence, without the need to close the court to the public.

8.69 On another view, closing the court may:

- provide further assistance, as giving evidence in public may cause unnecessary distress and adversely impact on their ability to communicate, and
- promote consistency in the protections available for different types of vulnerable witnesses.

Protections for sex workers

8.70 The Sex Workers Outreach Project (“SWOP”) argues that, when a sex worker is asked to appear as a witness, they are often fearful that their identity as a sex worker will be publicly revealed.⁹² This fear “represents a significant barrier to their full participation in the NSW justice system”.⁹³

8.71 SWOP supports the use of “identity suppression orders” to protect the identities of sex workers, rather than closing the proceedings to the public or media. It considers that this would appropriately balance the open justice principle with the safety of sex workers.⁹⁴

8.72 SWOP suggests that suppression or non-publication orders could be made to protect the identities of sex workers under s 8(1)(e) of the *CSNPO Act*.⁹⁵ This provides that an order can be made where “it is otherwise necessary in the public interest for the order for the order to be made and that public interest significantly outweighs the public interest in open justice”.

8.73 SWOP says there have been cases in which judges have denied requests for suppression or non-publication orders to protect the identities of sex workers. It also says that, even when orders are made to protect the identities of sex workers, they are not always followed.⁹⁶

8.74 This may indicate a need for a stronger protection, such as an automatic prohibition on publishing or disclosing the identity of a sex worker. A default position of anonymity

91. See *Criminal Procedure Act 1986* (NSW) pt 6.

92. Sex Workers Outreach Project, *Preliminary Submission PCI16*, 2.

93. Sex Workers Outreach Project, *Preliminary Submission PCI16*, 3.

94. Sex Workers Outreach Project, *Preliminary Submission PCI16*, 3, 7.

95. Sex Workers Outreach Project, *Preliminary Submission PCI16*, 6, 7.

96. Sex Workers Outreach Project, *Preliminary Submission PCI16*, 5.

could encourage greater awareness of, and compliance with, a prohibition on identifying sex workers.

Question 8.3: Protections for other types of victims and witnesses

What privacy protections, if any, are needed for other types of victims and witnesses?

Access to information by victims

- 8.75 As we discuss in Chapter 6, there are many different regimes governing access to court information by parties and non-parties. In general, access by non-parties is more limited, as they must have leave or permission of the court to access certain information.⁹⁷
- 8.76 The same rules governing access to information by non-parties tend to apply to victims. This may reflect a traditional view of the victim's role in proceedings, which is limited to that of a witness for the prosecution.⁹⁸
- 8.77 One question is whether victims should have stronger entitlements to access documents or other information in court proceedings. This would complement a victim's right to be kept informed about matters relating to the case, including the progress of the case and the impending release of the offender.⁹⁹

Entitlements under the current access regimes in NSW

- 8.78 Like non-parties generally, victims must apply to the court for permission to access documents in court proceedings. They must explain why they wish to access them.¹⁰⁰
- 8.79 For example, the application form for accessing materials in criminal proceedings in the District Court, Local Court and Children's Court requires applicants to specify their reason for requesting the information. Victims can tick a box saying, "I am a victim of crime in the proceedings".¹⁰¹
- 8.80 Victims will normally be given access to certain court materials, unless the Registrar, Magistrate or Judge dealing with the application considers the material (or portions of it)

97. See [6.92].

98. See, eg, Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Report (2016) [2.1], [2.9].

99. See [8.85].

100. NSW, Department of Communities and Justice, Victims Services, *Access to Court Documents: Information for Victims of Crime* (2019) 1.

101. See, eg, Local Court of NSW, "Record of Application by a Non-Party for Access to Material held by the Court: Application" (supplied by Local Court of NSW, 24 November 2020).

to be confidential.¹⁰² For summary proceedings in the Local Court, the materials they can access are:

- the court record of proceedings conducted in open court
- documents that record what was said or done in open court
- material that was admitted into evidence, and
- information that would have been heard or seen by any person present in open court.¹⁰³

8.81 For proceedings in the District Court, the materials they can access are:

- transcripts of the victim's evidence, the accused person's evidence, the judge's sentencing remarks (as revised), and the judgment (if the trial was heard by a judge alone)
- the police summary of facts or agreed statement of facts
- the victim's statement to police
- the indictment, and
- the result of proceedings.¹⁰⁴

8.82 For proceedings in the Supreme Court, these materials are:

- pleadings and judgments that have been concluded
- documents that record what was said or done in open court
- material that was admitted into evidence, and
- information that would have been heard or seen by any person present in open court.¹⁰⁵

102. NSW, Department of Communities and Justice, Victims Services, *Access to Court Documents: Information for Victims of Crime* (2019) 1, 2.

103. NSW, Department of Communities and Justice, Victims Services, *Access to Court Documents: Information for Victims of Crime* (2019) 1.

104. NSW, Department of Communities and Justice, Victims Services, *Access to Court Documents: Information for Victims of Crime* (2019) 1. See also District Court of NSW, *Practice Note DC (Civil) No 11: Access to Court Files by Non-Parties*, 2005, 1.

8.83 Access to other materials in Local Court, District Court and Supreme Court proceedings will not be allowed unless the Registrar, Magistrate or Judge is satisfied that exceptional circumstances exist.¹⁰⁶

Other entitlements to receive information

8.84 While the rules governing access to documents in court proceedings are similar for victims and non-parties generally, victims have certain entitlements to receive information about their case or the offender.

Entitlements under the Charter of rights of victims of crime

8.85 Under the NSW Charter of rights of victims of crime, victims can receive certain information relating to their case. The Charter provides that:

- A victim will, on request, be provided with information about the investigation of the crime, unless the disclosure might jeopardise the investigation. In that case, the victim will be informed accordingly.¹⁰⁷
- A victim will be informed about certain matters relating to the prosecution of the accused person “in a timely manner”. These matters include the charges laid against the accused person, the date and place of hearing of any charge laid, and the outcome of the criminal proceedings against the accused person.¹⁰⁸
- A victim who is a witness in the trial for the crime will be informed about the trial process, and their role as a witness in the prosecution of the accused person.¹⁰⁹
- A victim will be informed about any special bail conditions imposed on the accused person, which are designed to protect the victim or their family.¹¹⁰
- A victim will be informed of the outcome of a bail application, if the accused person has been charged with sexual assault or other serious personal violence.¹¹¹

105. NSW, Department of Communities and Justice, Victims Services, *Access to Court Documents: Information for Victims of Crime* (2019) 2. See also Supreme Court of NSW, *Practice Note SC Gen 2: Access to Court Files*, 4 October 2019 [7].

106. NSW, Department of Communities and Justice, Victims Services, *Access to Court Documents: Information for Victims of Crime* (2019) 1–2. See also District Court of NSW, *Practice Note DC (Civil) No 11: Access to Court Files by Non-Parties*, 9 August 2005 [2]; Supreme Court of NSW, *Practice Note SC Gen 2: Access to Court Files*, 4 October 2019 [7].

107. *Victims Rights and Support Act 2013* (NSW) s 6(6.4).

108. *Victims Rights and Support Act 2013* (NSW) s 6(6.5).

109. *Victims Rights and Support Act 2013* (NSW) s 6(6.6).

110. *Victims Rights and Support Act 2013* (NSW) s 6(6.12).

111. *Victims Rights and Support Act 2013* (NSW) s 6(6.13).

- A victim will, on request, be kept informed about the offender’s impending release or escape from custody, or of any change in security classification that results in the offender being eligible for unescorted absence from custody.¹¹²
- 8.86 The rights in the Charter are not legally enforceable, and there are no sanctions for failing to comply. They are principles or guidelines, which guide individuals and agencies that provide services to victims of crime.¹¹³
- 8.87 Legislation in other Australian states and territories recognises victim rights, including the right to receive certain information about the case.¹¹⁴ These rights are also not legally enforceable.

Entitlements under victims registers

- 8.88 Certain victims may elect to be on a victims register and be kept informed about a range of matters relating to the offender. There are three victims registers in NSW:
- the victims of adult offenders register¹¹⁵
 - the victims of forensic patients register,¹¹⁶ and
 - the victims of juvenile offenders register.¹¹⁷
- 8.89 The information that victims can receive varies based on the particular register, but includes information such as the offender’s impending parole or release, escape from custody, location while in custody, and death.¹¹⁸
- 8.90 Several other Australian states and territories have victims registers, which enable certain victims to receive information about the offender.¹¹⁹

112. *Victims Rights and Support Act 2013* (NSW) s 6(6.15).

113. NSW, Department of Justice, Victims Services, *NSW Code of Practice: Charter of Victims Rights* (2015) 8.

114. See, eg, *Victims of Crime Act 1994* (ACT) s 4(b)–(e), s 4(g), s 4(k)–(l); *Victims’ Charter Act 2006* (Vic) s 8–9A, s 9C–10; *Victims of Crime Act 2001* (SA) s 8–9; *Victims of Crime Act 1994* (WA) sch 1 cl 6–8, cl 11–12.

115. See *Crimes (Administration of Sentences) Act 1999* (NSW) s 256; NSW, Department of Justice, Corrective Services, *Victims Register: Information Guide and Registration Form* (2016) 2.

116. See *Mental Health (Forensic Provisions) Regulation 2017* (NSW) pt 3A; Mental Health Review Tribunal, *Forensic Patient Victims Register: Registration Information* (2017).

117. See *Children (Detention Centres) Act 1987* (NSW) s 100A; NSW, Department of Communities and Justice, Youth Justice, *Victims Register: Information Guide and Registration Form* (C2019) 3.

118. See NSW, Department of Justice, Corrective Services, *Victims Register: Information Guide and Registration Form* (2016) 2; Mental Health Review Tribunal, *Forensic Patient Victims Register: Registration Information* (2017) 2; NSW, Department of Communities and Justice, Youth Justice, *Victims Register: Information Guide and Registration Form* (C2019) 3.

Entitlements in relation to parole proceedings

8.91 Under the *Crimes (Administration of Sentences) Act 1999* (NSW), a victim of a serious offender is entitled to access all documents held by or on behalf of the State Parole Authority (“SPA”), in relation to the offender:

but only to the extent to which those documents indicate the measures that the offender has taken, or is taking, to address his or her offending behaviour.¹²⁰

8.92 A victim cannot access these documents in certain circumstances, including where a judicial member of SPA considers that it would:

- jeopardise the conduct of any lawful investigation
- adversely affect the supervision of any offender who has been released on parole, or
- disclose the contents of any offender’s medical, psychiatric or psychological report.¹²¹

Access entitlements a victim would have under the uncommenced Court Information Act

8.93 As we discuss in Chapter 6, the *Court Information Act 2010* (NSW) (“*Court Information Act*”) was introduced with the aim of regulating access to court information by parties and non-parties. It has not commenced.¹²²

8.94 Like the current access regimes, the *Court Information Act* would apply different rules for parties and non-parties.¹²³ As victims are not parties to proceedings, they would have the same access rights under the *Court Information Act* as non-parties.

8.95 Non-parties would be able to access “open access information” as of right, unless the court ordered otherwise. Information classified as “open access information” would include, for example, transcripts of proceedings in open court and records of any judgments given.¹²⁴ Non-parties would only be able to access “restricted access information” with leave of the court, or if permitted by regulations. Information classified

119. See, eg, *Corrections Act 1986* (Vic) s 30A; *Corrective Services Act 2006* (Qld) s 320, s 324A, s 325; *Correctional Services Act 1982* (SA) s 5, s 85D; *Corrections Act 1997* (Tas) s 87A–87B; *Victims of Crime Rights and Services Act 2006* (NT) pt 4.

120. *Crimes (Administration of Sentences) Act 1999* (NSW) s 193A.

121. *Crimes (Administration of Sentences) Act 1999* (NSW) s 194.

122. See [6.4], [6.18]–[6.19].

123. See [6.98]–[6.99].

124. *Court Information Act 2010* (NSW) s 5, s 8.

as “restricted access information” would include, for example, personal identification information and information contained in a medical or psychiatric report.¹²⁵

Additional access entitlements that could be considered

- 8.96 In its 2008 report, the NSW Attorney General’s Department supported additional access rights for victims, given their particular connection to proceedings. The Department said victims should be entitled to access information that the *Court Information Act* would classify as “restricted access information”. It considered that access to this type of information would be consistent with existing entitlements under the Charter of Victims Rights.¹²⁶ The *Court Information Act* did not adopt this approach.
- 8.97 One submission argues that NSW law should recognise access rights for victims. It says that, in particular, victims need access to judges’ sentencing remarks to make “cogent submissions” to SPA in relation to the potential release of an offender. It also says registered victims, who make submissions to the MHRT about the release of a forensic patient,¹²⁷ need access to court documents concerning the patient’s diagnosis. Access to these documents can be difficult because of the sensitive nature of psychiatric reports.¹²⁸

Question 8.4: Access to court information by victims

- (1) Are the current arrangements governing access to court information by victims appropriate? Why or why not?
- (2) What changes, if any, should be made?

125. *Court Information Act 2010* (NSW) s 6, s 9.

126. NSW, Attorney General’s Department, *Report on Access to Court Information* (2008) 25–26.

127. See *Mental Health (Forensic Provisions) Act 1990* (NSW) s 74A.

128. H Brown, *Preliminary Submission PCI10*, 1.

9. Protections for sexual offence complainants

In Brief

Certain protections exist that are designed to assist complainants in sexual offence proceedings. In this Chapter, we discuss the prohibition against publishing complainants' identities and provisions allowing or requiring the court to be closed at certain times during sexual offence proceedings.

The prohibition on publishing the identities of complainants in sexual offence proceedings	204
Perspectives on the prohibition	207
General perspectives	207
Are the exceptions appropriate?	208
Closing courts during sexual offence proceedings	209
When courts must, or may, be closed	209
When the complainant gives evidence	209
When the complainant reads a victim impact statement	211
Other parts of the proceedings	211
Incest proceedings	212
Perspectives on the situations where courts may, or must, be closed	212
Exceptions for media access	213

- 9.1 In the previous two chapters, we consider specific categories of people for whom the law makes exceptions to the principle of open justice. In this Chapter, we consider a third category: complainants in sexual offence proceedings.
- 9.2 This is a longstanding and well established category of people for whom exceptions to the open justice principle are made.¹ Every Australian state and territory has laws that

1. Tasmania Law Reform Institute, *Protecting the Anonymity of Victims of Sexual Crimes*, Final Report 19 (2013) [2.3.2]; D Waterhouse-Watson, "The Media and the Law, an Uneasy Relationship" in *Football and Sexual Crime, from the Courtroom to the Newsroom: Transforming Narratives* (SpringerLink, 2019) 27.

limit public access to the identity, personal information and evidence of complainants in sexual offence proceedings.

9.3 These complainants are widely recognised as having particular rights and needs. This means that the laws and practices regarding what can be reported about sexual offence proceedings differ from other crimes.² Justifications for limiting public access to information about sexual offence complainants include:

- complainants of sexual offences are more likely to experience stigma than victims of other types of offences³
- the restrictions protect complainants from unnecessary distress and humiliation,⁴ and
- the restrictions may encourage other people who experience sexual offences to report them.⁵

The prohibition on publishing the identities of complainants in sexual offence proceedings

9.4 The *Crimes Act 1900* (NSW) (“*Crimes Act*”) prevents a person from publishing anything that identifies (or is likely to identify) a complainant in a proceeding for a “prescribed sexual offence”.⁶ A matter is likely to identify a complainant if it is “more probable than not” that it would identify the complainant.⁷

9.5 This prohibition applies even after proceedings are finished.⁸ If there are other restrictions on the publication of information relating to the proceedings, this prohibition applies in addition to those.⁹

2. D Waterhouse-Watson, “The Media and the Law, an Uneasy Relationship” in *Football and Sexual Crime, from the Courtroom to the Newsroom: Transforming Narratives* (SpringerLink, 2019) 27.

3. Tasmania Law Reform Institute, *Protecting the Anonymity of Victims of Sexual Crimes*, Final Report 19 (2013) [2.3.2].

4. Legal Aid NSW, *Preliminary Submission PCI39*, 8; Tasmania Law Reform Institute, *Protecting the Anonymity of Victims of Sexual Crimes*, Final Report 19 (2013) [2.3.2].

5. Legal Aid NSW, *Preliminary Submission PCI39*, 8; knowmore, *Preliminary Submission PCI35*, 2–3; Tasmania Law Reform Institute, *Protecting the Anonymity of Victims of Sexual Crimes*, Final Report 19 [2.3.2].

6. *Crimes Act 1900* (NSW) s 578A(2).

7. *Doe v Fairfax Media Publications Pty Ltd* [2018] NSWSC 1996 [202].

8. *Crimes Act 1900* (NSW) s 578A(3).

9. *Crimes Act 1900* (NSW) s 578A(6).

- 9.6 A “prescribed sexual offence” includes, among others, child prostitution, incest, female genital mutilation, sexual assault, sexual touching, and sexual act against both adults and children.¹⁰ A law recently commenced in NSW, which ensures offences involving recording and distributing intimate images without consent are also covered.¹¹
- 9.7 Every other Australian state and territory has a similar prohibition on publishing the name and/or other identifying details of a complainant in sexual offence proceedings.¹² In Tasmania, it is an offence to publish the identifying information of *any* witness in sexual offence proceedings, barring the defendant.¹³
- 9.8 There are six exceptions to the NSW prohibition. These are:
- the judge authorises the publication
 - the complainant consents to the publication (provided they are 14 or over)
 - a court consents to the publication (provided the complainant is under 16)
 - the publication is an official law report of the proceedings
 - the publication involves supplying transcripts to researchers, or
 - the publication is made after the complainant’s death.¹⁴
- 9.9 A judge cannot authorise a publication (under the first exception) unless they have sought and considered the views of the complainant and are satisfied that the publication is in the public interest.¹⁵
- 9.10 Elsewhere in Australia, legislation also provide that a court may authorise a publication which identifies the complainant.¹⁶ Like NSW, the law in Tasmania and the Northern

10. *Crimes Act 1900* (NSW) s 578A(1); *Criminal Procedure Act 1986* (NSW) s 3(1) definition of “prescribed sexual offence”.

11. *Criminal Procedure Act 1986* (NSW) s 3(1) definition of “prescribed sexual offence”, amended by *Stronger Communities Legislation Amendment (Miscellaneous) Act 2020* (NSW) sch 1.8 [2]. See also NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 14 October 2020, 7.

12. *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 74; *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 6; *Criminal Law (Sexual Offences) Act 1978* (Qld) s 10; *Evidence Act 1929* (SA) s 71A; *Evidence Act 2001* (Tas) s 194K; *Judicial Proceedings Reports Act 1958* (Vic) s 4; *Evidence Act 1906* (WA) s 36C.

13. *Evidence Act 2001* (Tas) s 194K(1)(b)(ii).

14. *Crimes Act 1900* (NSW) s 578A(4).

15. *Crimes Act 1900* (NSW) s 578A(5).

16. *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 8(1)(e), s 9; *Evidence Act 1929* (SA) s 71A(4); *Evidence Act 2001* (Tas) s 194K(5); *Judicial Proceedings Reports Act 1958* (Vic) s 4(1BF); *Evidence Act 1906* (WA) s 36C(1).

Territory (“NT”) requires the court to consider the views of the complainant before making an order.¹⁷

- 9.11 The law in all other Australian states and territories also provides that a complainant may consent to being identified.¹⁸ However, in some cases, the complainant may only consent to being identified once proceedings have concluded.¹⁹
- 9.12 Currently, in Victoria, a complainant may consent to being identified if the proceedings are not pending in a court, but cannot do so if the proceedings are still pending.²⁰ If the proceedings have concluded and the accused person has been convicted, a complainant may only be identified if they consent *and* the court grants permission.²¹ This has been criticised.²² In response to these criticisms the Victorian government passed reforms in 2020 to “make it easier for victim-survivors of sexual offences to speak publicly about their experiences, and control when and how their stories are published by others”.²³
- 9.13 Publication in breach of the NSW prohibition is an offence. The maximum penalty is a fine of \$5,500 or imprisonment for six months (in the case of an individual), or a fine of \$55,000 (in the case of a corporation).²⁴ Proceedings may be brought in the Local Court or in the Supreme Court in its summary jurisdiction.²⁵ However, if proceedings are

17. *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 9(2), s 9; *Evidence Act 2001* (Tas) s 194K(5)(a)(i).

18. *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 74(2); *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 6(2)(b); *Criminal Law (Sexual Offences) Act 1978* (Qld) s 10(2); *Evidence Act 1929* (SA) s 71A(4); *Evidence Act 2001* (Tas) s 194K(3)(b); *Judicial Proceedings Reports Act 1958* (Vic) s 4(1BB), s 4(1BC); *Evidence Act 1906* (WA) s 36C(6).

19. *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 6(2); *Evidence Act 2001* (Tas) s 194K(3)(b); *Judicial Proceedings Reports Act 1958* (Vic) s 4(1B)(b)(ii), s 4(1CA)(b).

20. *Judicial Proceedings Reports Act 1958* (Vic) s 4(1B)(b)(ii), s 4(1CA)(b); *Judicial Proceedings Reports Act 1958* (Vic) s 4(1C).

21. *Judicial Proceedings Reports Act 1958* (Vic) s 4(1CA).

22. N Funnell, “#LetUsSpeak: Victoria Blocks Sexual Assault Victims from Using Real Names” (26 August 2020) *news.com.au* <www.news.com.au/lifestyle/real-life/news-life/letusspeak-victoria-blocks-sexual-assault-victims-from-using-real-names/news-story/821647419aee0cdbba5f89678c5a6a14> (retrieved 22 October 2020); S Stockwell, “‘Let Us Speak’: Advocates Push for Victoria to Repeal Laws Silencing Sexual Assault Survivors” *tripleJHACK* (online, 26 August 2020) <www.abc.net.au/triplej/programs/hack/let-us-speak-victorian-laws-slammed/12599152> (retrieved 22 October 2020); Melissa, “Let Her Speak: How the Victorian Government is Still Silencing Survivors” *New Matilda* (online, 8 October 2020) <newmatilda.com/2020/10/08/let-her-speak-how-the-victorian-government-is-still-silencing-survivors/> (retrieved 22 October 2020).

23. *Justice Legislation Amendment (Supporting Victims and Other Matters) Act 2020* (Vic); Victoria, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 14 October 2020, 2662.

24. *Crimes Act 1900* (NSW) s 578A(2). One penalty unit is \$110; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 17.

25. *Crimes Act 1900* (NSW) s 578A(7).

brought in the Local Court, the maximum fine that may be imposed on a corporation is \$5,500.²⁶

9.14 The Supreme Court has recently observed that this offence is a strict liability offence. This means the prosecution is not required to prove a defendant had a particular state of mind when publishing the material, but the defendant can claim, as a defence, that they made an honest and reasonable mistake of fact.²⁷

9.15 The prohibition was originally introduced in 1987 as part of a range of reforms to domestic violence and sexual offences.²⁸ The then Premier said, at the time:

In the past, fear of being identified has inhibited many victims from reporting sexual assault to the police. It is hoped that this reform will thoroughly protect the privacy of sexual assault victims.²⁹

9.16 Encouraging victims to report offences is often cited as a key justification for this and equivalent provisions, along with protecting victims from the humiliation and distress that might result from their names being published.³⁰

Perspectives on the prohibition

General perspectives

9.17 Several submissions support the prohibition.³¹ Arguments in favour of it include:

- sexual offence complainants are more likely to experience stigma than victims of other types of offences³²
- the media may be more likely to report sexual offences “ruthlessly and salaciously,” compared with other offences³³

26. *Crimes Act 1900* (NSW) s 578A(8).

27. *Doe v Fairfax Media Publications Pty Ltd* [2018] NSWSC 1996 [162].

28. *Crimes (Personal and Family Violence) Amendment Act 1987* (NSW) sch 3 [11].

29. NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 29 October 1987, 15467.

30. See, eg, B McLachlin, “Courts, Transparency and Public Confidence: To the Better Administration of Justice” (2003) 8 *Deakin Law Review* 1, 4; D Waterhouse-Watson, “The Media and the Law, an Uneasy Relationship” in *Football and Sexual Crime, from the Courtroom to the Newsroom: Transforming Narratives* (SpringerLink, 2019) 27; Tasmania Law Reform Institute, *Protecting the Anonymity of Victims of Sexual Crimes*, Final Report 19 (2013) [2.3.2].

31. See, eg, Legal Aid NSW, *Preliminary Submission PCI39*, 8; NSW Young Lawyers Criminal Law Committee, *Preliminary Submission PCI37*, 5; knowmore, *Preliminary Submission PCI35*, 7.

32. Tasmania Law Reform Institute, *Protecting the Anonymity of Victims of Sexual Crimes*, Final Report 19 (2013) [2.3.2].

- complainants highly value it³⁴
 - it protects complainants from unnecessary distress and humiliation³⁵
 - it encourages complainants to report offences,³⁶ and
 - the fact that it is automatic means that victims do not have to apply for a suppression or non-publication order to protect their privacy themselves.³⁷
- 9.18 One commentator argues that prohibiting the publication of the names of sexual offence complainants, but not other details of the proceedings, represents an “acceptable compromise between the rights of the media and the rights of individuals”. This is because the media is still able to report on court proceedings, while complainants are afforded privacy.³⁸

Are the exceptions appropriate?

- 9.19 Some submissions support the exception to the prohibition that applies when the complainant consents to the publication.³⁹ One says that “allowing those who have experienced sexual violence to disclose their story can be a positive step in that person’s trauma journey,” and notes that this is consistent with the recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse.⁴⁰
- 9.20 Another supports these exceptions but cautions that “[i]t is vital to ensure that any consent being given by a survivor is truly informed from a mental health, cultural safety and legal perspective”. This submission recommends that complainants are provided with free independent legal advice before they decide whether to consent to their identity being published.⁴¹

33. Tasmania Law Reform Institute, *Protecting the Anonymity of Victims of Sexual Crimes*, Final Report 19 (2013) [2.3.2].

34. Legal Aid NSW, *Preliminary Submission PCI39*, 8.

35. Legal Aid NSW, *Preliminary Submission PCI39*, 8; Tasmania Law Reform Institute, *Protecting the Anonymity of Victims of Sexual Crimes*, Final Report 19 (2013) [2.3.2].

36. Legal Aid NSW, *Preliminary Submission PCI39*, 8; Tasmania Law Reform Institute, *Protecting the Anonymity of Victims of Sexual Crimes*, Final Report 19 (2013) [2.3.2].

37. knowmore, *Preliminary Submission PCI35*, 2–3; Victorian Law Reform Commission, *Contempt of Court*, Report (2020) [12.51].

38. C Davis, “The Injustice of Open Justice” (2001) 8 *James Cook University Law Review* 92, 106. See also Tasmania Law Reform Institute, *Protecting the Anonymity of Victims of Sexual Crimes*, Final Report 19 (2013) [2.3.2].

39. Rape and Domestic Violence Services Australia, *Preliminary Submission PCI36*, 6; knowmore, *Preliminary Submission PCI35*, 4–5.

40. Rape and Domestic Violence Services Australia, *Preliminary Submission PCI36*, 6.

41. knowmore, *Preliminary Submission PCI35*, 4-5.

Question 9.1: The prohibition on publishing the identities of sexual offence complainants

- (1) Is the prohibition on publishing the identities of complainants in sexual offence proceedings and the exceptions to the prohibition appropriate? Why or why not?
- (2) What changes, if any, should be made?

Closing courts during sexual offence proceedings

- 9.21 The *Criminal Procedure Act 1986* (NSW) (“*Criminal Procedure Act*”) and the *Crimes (Sentencing Procedure) Act 1999* (NSW) (“*Sentencing Procedure Act*”) contain provisions that permit or require part or all of proceedings for prescribed sexual offences to be held in a closed court. This means that everyone except the judge, court staff and the parties (and some other limited categories of people, such as support people) are removed from the courtroom.⁴² The power to close courts to the general public has been described as “the most intrusive form of intervention in relation to open justice”.⁴³ We discuss it further in Chapter 2.
- 9.22 There are four main provisions that require or permit courts to be closed in sexual offence proceedings. The District Court has recently observed that these provisions, among other things, are intended to:
- protect the complainant against stress, embarrassment and humiliation
 - encourage the complainant to give accurate, reliable, coherent and complete evidence, and
 - protect the complainant’s privacy.⁴⁴

When courts must, or may, be closed

When the complainant gives evidence

- 9.23 The *Criminal Procedure Act* provides that any part of a sexual offence proceeding in which the complainant gives evidence is to be held in a closed court unless the court directs otherwise.⁴⁵ This applies regardless of whether the complainant’s evidence is

42. Lexis Advance, *Encyclopaedic Australian Legal Dictionary* (online), definition of “in camera”.

43. Tasmania Law Reform Institute, *Protecting the Anonymity of Victims of Sexual Crimes*, Final Report 19 (2013) [2.3.4].

44. *R v Cannon* [2020] NSWDC 327 [26], [28].

45. *Criminal Procedure Act 1986* (NSW) s 291(1).

electronically pre-recorded or given in the courtroom in person or through closed-circuit television (“CCTV”).⁴⁶

9.24 A court may direct that this part of the proceedings is to be held in open court only at the request of a party, and if the court is satisfied that:

- special reasons in the interests of justice require that part of the proceedings are to be held in open court, or
- the complainant consents to giving their evidence in open court.⁴⁷

9.25 The principle that proceedings for an offence should generally be open or public, or that justice should be seen to be done, does not itself constitute a special reason for the relevant part of the proceedings to be held in open court.⁴⁸

9.26 Based on a review of case law, it appears that directions under this provision are rare.⁴⁹

9.27 When it was first introduced in 1999, the provision only provided that a court *may* direct that sexual offence proceedings, or parts of these proceedings, are held in camera.⁵⁰ It was amended in 2005, and now provides that any part of a sexual offence proceeding in which the complainant gives evidence is to be held in camera unless the court directs otherwise.⁵¹ This was intended to “give greater certainty and privacy to sexual assault complainants and ... assist in the giving of best evidence”.⁵²

9.28 The 2005 amendment was part of a broader package of reforms to procedures in sexual assault trials. In introducing these reforms, the then Attorney General remarked:

By making it easier for complainants to give evidence ... these reforms will encourage reporting and encourage those victims who do choose to report to see the legal process through.⁵³

9.29 The law in the NT and Queensland similarly provides that in sexual offence proceedings, the evidence of the complainant is to be heard in a closed court.⁵⁴ In the

46. *Criminal Procedure Act 1986* (NSW) s 292(2); *R v Cannon* [2020] NSWDC 327 [26].

47. *Criminal Procedure Act 1986* (NSW) s 291(3).

48. *Criminal Procedure Act 1986* (NSW) s 291(4).

49. For an example of where a direction was sought and refused, see *R v Cannon* [2020] NSWDC 327.

50. *Crimes Legislation Amendment (Sentencing) Act 1999* (NSW) sch 2 [31].

51. *Criminal Procedure Further Amendment (Evidence) Act 2005* (NSW) sch 1 [7].

52. NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 23 March 2005, 14900.

53. NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 23 March 2005, 14900.

54. *Evidence Act 1939* (NT) s 21F; *Criminal Law (Sexual Offences) Act 1978* (Qld) s 5.

Australian Capital Territory, the court may direct that the evidence of certain witnesses (including complainants) in sexual offence proceedings is to be heard in closed court. Before making such an order, the court must consider whether it is in the interests of justice that the witness give evidence in open court, but give paramount consideration to whether the witness wants to give evidence in open court.⁵⁵

When the complainant reads a victim impact statement

9.30 The *Sentencing Procedure Act* provides that when a victim impact statement is read out in sexual offence proceedings, the court is to be closed, unless:

- the court directs, at the request of a party to the proceedings, that the proceedings are to be held in open court, and
- the court is satisfied that special reasons in the interests of justice require that part of the proceedings to be held in open court, or the victim to whom the statement relates consents to the statement being read out in open court.⁵⁶

9.31 As with the *Criminal Procedure Act*, the principle that proceedings for an offence should generally be open or public, or that justice should be seen to be done, does not itself constitute a special reason for that part of the proceedings to be held in open court.⁵⁷

9.32 This provision was introduced in 2017,⁵⁸ and was intended to align with the protections that apply when a complainant gives evidence. It was hoped it would “provide greater protections and support to victims of sexual violence and minimise further trauma and embarrassment”.⁵⁹

9.33 There are similar protections elsewhere in Australia.⁶⁰

Other parts of the proceedings

9.34 The *Criminal Procedure Act* also provides that a court may close for any other part of sexual offence proceedings.⁶¹ The court may do this on its own motion or at the request of a party.⁶² In deciding whether to make this direction, the court must consider:

55. *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 73.

56. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30I(1).

57. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30I(2).

58. *Justice Legislation Amendment Act 2017* (NSW) sch 1.6.

59. NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 21 June 2017.

60. *Criminal Law (Sexual Offences) Act 1978* (Qld) s 5; *Evidence Act 1939* (NT) s 21A; *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 50(1).

61. *Criminal Procedure Act 1986* (NSW) s 291A(1).

62. *Criminal Procedure Act 1986* (NSW) s 291A(2).

- the need of the complainant to have any person excluded from those proceedings
- the need of the complainant to have any person present in those proceedings
- the interests of justice, and
- any other matter that the court thinks relevant.⁶³

9.35 An example of a part of proceedings which may be held in closed court is where a witness gives tendency evidence that the accused person sexually assaulted them on previous occasions.⁶⁴

Incest proceedings

9.36 The *Criminal Procedure Act* provides that any proceedings for an incest offence are to be held entirely in a closed court.⁶⁵ The only exceptions are to allow a support person to be present.⁶⁶ This was introduced in 2000.⁶⁷

Perspectives on the situations where courts may, or must, be closed

9.37 One submission argues that the protection could be strengthened by removing the court's discretion to open the court during the complainant's evidence. It argues this is consistent with the principles behind the protection.⁶⁸

9.38 Others consider that the protection goes too far in encroaching on the open justice principle. For example, it has been suggested that there should be more scope for friends and family members of the accused person to be present while the complainant is giving evidence, because if they are excluded and the accused person is ultimately convicted, they "will [never] hear or know the basis on which he is convicted".⁶⁹ It has also been suggested that it is inconsistent for the media to be allowed access to the proceedings, but not the friends and family of the accused.⁷⁰

63. *Criminal Procedure Act 1986* (NSW) s 291A(3).

64. *R v James Duncan Smith* [2009] NSWDC 244.

65. *Criminal Procedure Act 1986* (NSW) s 291B.

66. *Criminal Procedure Act 1986* (NSW) s 291B(2)–(3).

67. *Crimes Legislation Amendment Act 2000* (NSW) sch 5 [1]. Note this section has been renumbered multiple times.

68. Women's Legal Service NSW, *Preliminary Consultation PCI04*.

69. Judicial Commission of NSW, "Procedure in Prescribed Sexual Offence Cases" in *Sexual Assault Trials Handbook* (last updated 6 February 2009) <www.judcom.nsw.gov.au/publications/benchbks/sexual_assault/tupman-procedure_in_prescribed_sexual_offence_cases.html> (retrieved 22 October 2020) [6].

70. Judicial Commission of NSW, "Procedure in Prescribed Sexual Offence Cases" in *Sexual Assault Trials Handbook* (last updated 6 February 2009)

- 9.39 Another suggestion is that closing the court is unnecessary when the complainant is giving evidence from somewhere outside the courtroom via CCTV, “particularly as the witness can see no more of the courtroom than the bench and the middle of the bar table”.⁷¹
- 9.40 A further criticism is that having the court closed during a complainant’s evidence may perpetuate the stigma associated with sexual offences. A counterargument is that this consideration is outweighed by considerations including protecting complainants from harm and encouraging them to report offences.⁷² Further, removing the protection for this reason “unfairly pushes the burden of changing public attitudes about rape onto victims”.⁷³

Exceptions for media access

- 9.41 The *Criminal Procedure Act* provides for some media access in cases when a court is closed during sexual offence proceedings.
- 9.42 If a complainant in a sexual offence proceeding is giving evidence by CCTV from outside the courtroom, then a media representative may enter and remain in the courtroom while the evidence is being given, unless the court directs otherwise.⁷⁴
- 9.43 If sexual offence proceedings (or part of those proceedings) are held in a closed court, the court may still allow media representatives to view or hear the evidence while it is given, or to view or hear a record of that evidence, as long as the media representatives are not present in the courtroom or other place where the evidence is given during the proceedings.⁷⁵
- 9.44 We discuss media access to closed sexual offence proceedings further in Chapter 10.⁷⁶

<www.judcom.nsw.gov.au/publications/benchbks/sexual_assault/tupman-procedure_in_prescribed_sexual_offence_cases.html> (retrieved 22 October 2020) [8].

71. Judicial Commission of NSW, “Procedure in Prescribed Sexual Offence Cases” in *Sexual Assault Trials Handbook* (last updated 6 February 2009)

<www.judcom.nsw.gov.au/publications/benchbks/sexual_assault/tupman-procedure_in_prescribed_sexual_offence_cases.html> (retrieved 22 October 2020) [6].

72. D Waterhouse-Watson, “The Media and the Law, an Uneasy Relationship” in *Football and Sexual Crime, from the Courtroom to the Newsroom: Transforming Narratives* (SpringerLink, 2019) 29–30.

73. D Waterhouse-Watson, “The Media and the Law, an Uneasy Relationship” in *Football and Sexual Crime, from the Courtroom to the Newsroom: Transforming Narratives* (SpringerLink, 2019) 29.

74. *Criminal Procedure Act 1986* (NSW) s 291C(1).

75. *Criminal Procedure Act 1986* (NSW) s 291C(2).

76. See [10.76]–[10.80].

Question 9.2: Closing courts during sexual offence proceedings

- (1) Are the situations in which courts may be closed during sexual offence proceedings appropriate? Why or why not?
- (2) What changes, if any, should be made?

10. Media access to information

In Brief

The media play an important role in facilitating open justice by informing the public about court proceedings. The law recognises this by giving the media a special right to access documents in criminal proceedings, allowing the media to attend court proceedings that are otherwise closed to the public, and giving the media standing to oppose suppression and non-publication orders. At a time when the media landscape is changing, it is timely to consider who should have special access, and whether the current arrangements are appropriate.

The need for media access to court information and proceedings	216
Media access to court information in NSW	217
The media's right to inspect certain documents in criminal proceedings	217
Access is limited to media representatives to compile a fair report of proceedings	218
The media must apply to the court registrar	218
The media can inspect certain documents	218
The media's right is to "inspect" only	219
The two-day time limit for access	219
Limits to the media's access entitlement	220
Other concerns about practical operation	220
Media access to information under other access regimes	221
Media access to documents in civil proceedings	221
Media access to Supreme Court information	222
Media access to Local and District Court information	224
Access to documents relating to sentencing	225
Media access to court information elsewhere in Australia	226
Harmonisation or separate treatment?	228
Court Information Act	229
Media access to court proceedings	231
Media access to closed proceedings	231
Media access to prescribed sexual offence proceedings	231
Media access to proceedings involving children	232
Access restrictions during the COVID-19 pandemic	233
Broadcasting court proceedings	234

Restrictions on publication	237
Automatic prohibitions on publishing information	237
Suppression and non-publication orders	238
The media’s standing in applications for suppression and non-publication orders	239
How is the media notified of suppression and non-publication orders?	240
Contemporary media	242
How is “the media” defined in legislation?	242
How should “the media” be defined?	244

- 10.1 In this Chapter, we examine the laws and practices that affect media access to court information and proceedings in NSW, and the steps courts can take to promote greater access to the media and, in turn, the public.
- 10.2 We explore the evolving concept of the media and the media’s role in applications for orders restricting or prohibiting the publication and disclosure of information about court proceedings. We also consider trends in the practice of NSW courts and tribunals that have impacted on the openness of their proceedings, including during the COVID-19 pandemic.

The need for media access to court information and proceedings

- 10.3 Jeremy Bentham said “[p]ublicity is the very soul of justice ... and the surest of all guards against improbity”.¹ Journalists provide a critical medium through which the public is informed of the work of the courts. In this way, the media is essential to “the proper working of an open and democratic society and to the maintenance of public confidence in the administration of justice”.²
- 10.4 Courts in Australia and around the world recognise the important role of the media in disseminating information about court proceedings. The Federal Court of Australia (“Federal Court”) has observed that, “[a]s few members of the public have the time, or even the inclination, to attend courts in person, in a practical sense [the principle of open justice] demands that the media be free to report what goes on in them”.³ The

1. *The Works of Jeremy Bentham*, Published under the Superintendence of his Executor, John Bowring (W Tait, 1843) vol iv, 316.

2. *John Fairfax and Sons Ltd v Police Tribunal of NSW* (1986) 5 NSWLR 465, 481.

3. *R v Davis* (1995) 57 FCR 512, 514. See also *Richmond Newspapers Inc v Virginia* (1980) 448 US 555, 572–3; *Re Guardian Newspapers Ltd* [2005] 3 All ER 155, 162.

High Court of Australia has said the right to publish a report of court proceedings is the practical embodiment of open justice.⁴ The Supreme Court of NSW has observed that “[t]he entitlement of the media to report on court proceedings is a corollary of the right of access to the court by members of the public”.⁵

- 10.5 While the media play an important role in facilitating open justice, this does not mean they have an unfettered right to access court information. Consistent with international law,⁶ NSW legislation and case law restricts media access to the courts in various ways. Most NSW courts have published rules and practices that set the parameters for media access. Practicalities also affect media access, including physically attending court or paying fees to access information.

Media access to court information in NSW

- 10.6 The provisions governing media access to court information in NSW are inconsistent and spread across multiple laws, rules and practices. There are, in effect, multiple regimes that can apply to the same document in the same proceedings.
- 10.7 The *Criminal Procedure Act 1986* (NSW) (“*Criminal Procedure Act*”) gives media representatives the right to inspect certain documents in criminal proceedings. The media can also access court information under the access regimes that apply to non-parties generally.
- 10.8 Submissions and consultations highlight confusion, uncertainty and dissatisfaction from those using and administering the different regimes.

The media’s right to inspect certain documents in criminal proceedings

- 10.9 Under the *Criminal Procedure Act*, media representatives are entitled to inspect certain documents in criminal proceedings.⁷ This applies to all criminal proceedings, which likely includes committal proceedings, any trial and sentencing of a person for an offence, as well as bail, pre-trial and interlocutory proceedings,⁸ and to all NSW courts.

4. See, eg, *Esso Australia Resources Ltd v Plowman* [1995] HCA 19, 183 CLR 10, 43, citing *John Fairfax and Sons Ltd v Police Tribunal of NSW* (1986) 5 NSWLR 465, 481.

5. *John Fairfax Publications Pty Ltd v District Court of NSW* [2004] NSWCA 324, 61 NSWLR 344 [20].

6. See, eg, *International Covenant on Civil and Political Rights*, 999 UNTS 171 (entered into force 23 March 1976) art 14(1).

7. *Criminal Procedure Act 1986* (NSW) s 314(1).

8. See *Criminal Procedure Act 1986* (NSW): s 295(1) definition of “criminal proceedings”, definition of “preliminary criminal proceedings”.

Access is limited to media representatives to compile a fair report of proceedings

- 10.10 Access to documents under the *Criminal Procedure Act* must be for the purpose of compiling “a fair report of the proceedings” for publication.⁹ NSW courts have long recognised that the media has no common law right of access to court documents,¹⁰ but that there is a public interest in facilitating fair and accurate reporting of court proceedings.¹¹ A court considering an application to inspect documents should assume that a fair and accurate report of the trial will occur.¹²
- 10.11 Access is restricted to “media representatives” for this reason.¹³ This term is not defined in the Act, nor has it or the concept of the media in this Act more generally been subject to judicial comment. We discuss what the media is in contemporary Australia later in the Chapter.

The media must apply to the court registrar

- 10.12 A media representative must apply to the court registrar to inspect documents. The form of application depends on each court. The registrar deciding the application does not need to provide any document “not in the possession or control of the registrar”.¹⁴ For example, if the proceedings are before a magistrate at the time of application, the court file is likely to be held by the magistrate and not by the registry and will not be made available.¹⁵
- 10.13 The Act is silent about whether media representatives are charged a fee to inspect documents.

The media can inspect certain documents

- 10.14 The documents the media are entitled to inspect are exhaustively listed in the *Criminal Procedure Act*:
- copies of the indictment, court attendance notice or other document commencing the proceedings
 - witness statements tendered as evidence
 - the brief of evidence (that is, a collection of documents that the police may use as evidence)

9. *Criminal Procedure Act 1986* (NSW) s 314(1).

10. *John Fairfax Publications Pty Ltd v Ryde Local Court* [2005] NSWCA 101, 62 NSWLR 512 [29]–[31].

11. *John Fairfax Publications Pty Ltd v Ryde Local Court* [2005] NSWCA 101, 62 NSWLR 512 [47].

12. *R v Elomar (No 3)* [2008] NSWSC 1443 [24].

13. *Criminal Procedure Act 1986* (NSW) s 314(1).

14. *Criminal Procedure Act 1986* (NSW) s 314(1), s 314(3).

15. Local Court of NSW, *Preliminary Consultation PCI12*.

- the police fact sheet (that is, the document that tells the version of events according to the police), in the case of a guilty plea
- transcripts of evidence, and
- any record of a conviction or order.¹⁶

The media’s right is to “inspect” only

- 10.15 A media representative can “inspect” these documents.¹⁷ This term is not defined in the *Criminal Procedure Act* nor is there judicial guidance on its scope. In practice, media representatives may only be permitted to view documents and not copy them.¹⁸
- 10.16 In consultations, we heard that not being able to copy documents may make preparing an accurate report of the proceedings difficult. Media representatives may be unable to fully inspect lengthy documents in the short time between court proceedings ending and the registry closing.¹⁹

The two-day time limit for access

- 10.17 Access under the *Criminal Procedure Act* is only available from the commencement of the proceeding until two working days after they are “disposed of” (they have ended).²⁰ Criminal proceedings commence when a court attendance notice is issued,²¹ and end when the defendant is sentenced or the charges are dismissed.²²
- 10.18 In consultations, we heard concerns about the practical impediment of the two-day rule. For example, one journalist said that it often meant that accessing information about a co-defendant being sentenced at a later date was difficult. It was uncertain whether access would be granted by the registry once the two-day limit expired.²³
- 10.19 Some noted the need for flexibility in the time limit where a journalist is not able to make the request within two days due to other priorities.²⁴ When the rule resulted in access

16. *Criminal Procedure Act 1986* (NSW) s 314(2).

17. *Criminal Procedure Act 1986* (NSW) s 314(1).

18. Local Court of NSW, *Preliminary Consultation PCI12*.

19. Sydney Morning Herald, *Preliminary Consultation PCI06*.

20. *Criminal Procedure Act 1986* (NSW) s 314(1).

21. *Criminal Procedure Act 1986* (NSW) s 47–49, s 172–174.

22. *Maxwell v R* (1996) 184 CLR 501, 509, 510–511.

23. Sydney Morning Herald, *Preliminary Consultation PCI06*.

24. Sydney Morning Herald, *Preliminary Consultation PCI06*; Sydney Morning Herald, *Preliminary Consultation PCI07*.

being denied, journalists often had to piece together the missing information from less reliable sources.²⁵

- 10.20 The two-day limit on inspecting documents in criminal cases under the *Criminal Procedure Act* allows for contemporaneous reporting without burdening court registries with access requests over extended periods. However, there may be other ways to relieve the burden on registries, without the need to rely on a time limit.
- 10.21 For example, NSW could adopt a similar provision to that of the uncommenced *Court Information Act 2010* (NSW) ("*Court Information Act*"), which would allow courts to refuse access where "providing access would require an unreasonable diversion of the court's resources".²⁶ We discuss the *Court Information Act* further below.²⁷

Limits to the media's access entitlement

- 10.22 The *Criminal Procedure Act* provides that the registrar must not make documents available to the media for inspection if:
- the proceedings are subject to a suppression or non-publication order, or
 - the documents are subject to an automatic prohibition on publication or disclosure.²⁸

Other concerns about practical operation

- 10.23 While no submissions criticise the media's right to access certain documents under the *Criminal Procedure Act*, some express concern about the way the provision operates in practice.
- 10.24 Legal Aid NSW observes that registry staff sometimes apply the provision incorrectly. There have been occasions when registries have given whole court files to the media, which may include information not tendered or raised in court.²⁹ This can mean the media are given inadmissible, uncontested or confidential information. The media may be otherwise prohibited from publishing this information under other legislation or in accordance with any suppression or non-publication orders.
- 10.25 Some express concern about how the access restrictions in the *Criminal Procedure Act* are interpreted and applied.³⁰ As we discuss above, the Act provides that the registrar

25. Sydney Morning Herald, *Preliminary Consultation PCI07*.

26. *Court Information Act 2010* (NSW) s 14(4)(a).

27. See [10.66]–[10.72].

28. *Criminal Procedure Act 1986* (NSW) s 314(4).

29. Legal Aid NSW, *Preliminary Submission PCI39*, 7.

30. Banki Haddock Fiora, *Preliminary Submission PCI27*, 2, 3; Sydney Morning Herald, *Preliminary Consultation PCI06*; Sydney Morning Herald, *Preliminary Consultation PCI07*; 9News, *Preliminary Consultation PCI09*.

must not make documents available to the media for inspection that are subject to an automatic prohibition on publication or disclosure.³¹

10.26 Some say registries impose a “blanket ban” on media access to courts documents in proceedings for a prescribed sexual offence. They suggest the reason for the approach is the automatic prohibition on publishing the identities of complainants in such proceedings.³² One submission argues that this approach has:

- significantly affected the media’s ability to accurately report on matters of public interest
- resulted in media organisations having to bring costly and time-consuming applications for access, and
- tipped the balance too far in favour of the privacy and confidentiality of individuals, at the expense of open justice.³³

10.27 In consultations, we heard that appeals against registry decisions to refuse access in such cases were often successful.³⁴ In other cases, attempts to obtain the documents were abandoned altogether.³⁵ We heard that registries might sometimes show too much concern about media gaining access to sensitive material, despite the fact that journalists are aware of restrictions on publication and can obtain legal advice if they are uncertain.³⁶

Media access to information under other access regimes

10.28 In Chapter 6, we consider the access regimes that apply to non-parties (as well as media). In this section, we consider some of these regimes as they relate specifically to the media.

Media access to documents in civil proceedings

10.29 The media does not have any special entitlement to access documents in civil proceedings. The *Uniform Civil Procedure Rules 2005* (NSW) provide that any person, on payment of any prescribed fee, can obtain a copy of:

- a judgment or order, unless the court otherwise orders, and

31. See [10.22].

32. Banki Haddock Fiora, *Preliminary Submission PCI27*, 2, 3; Sydney Morning Herald, *Preliminary Consultation PCI06*; 9News, *Preliminary Consultation PCI09*. See *Crimes Act 1900* (NSW) s 578A.

33. Banki Haddock Fiora, *Preliminary Submission PCI27*, 3.

34. Sydney Morning Herald, *Preliminary Consultation PCI06*.

35. 9News, *Preliminary Consultation PCI09*.

36. Sydney Morning Herald, *Preliminary Consultation PCI07*.

- pleadings or other documents, if they appear “to have a sufficient interest in the proceedings”.³⁷
- 10.30 The Supreme and District Court practice notes state that, unless the judge or registrar considers that it should be kept confidential, non-parties, including the media, will ordinarily be given access to:
- pleadings and judgments in proceedings that have been concluded
 - documents recording what was said or done in open court
 - material that was admitted into evidence, and
 - information that would have been heard or seen by any person present in open court.³⁸
- 10.31 Access to other types of material will only be granted if the judge or registrar is satisfied that “exceptional circumstances” exist.³⁹
- 10.32 Unlike under the *Criminal Procedure Act*, there is no time limit on accessing the information.

Media access to Supreme Court information

- 10.33 Basic information about proceedings before the Supreme Court, Court of Appeal and Court of Criminal Appeal is available online, including daily lists, judgments and statistics. The three courts routinely publish decisions on the NSW Caselaw website. Even suppressed decisions are posted, though the contents are omitted. However, many decisions or details in classes of proceedings are not routinely posted, such as release applications and arraignments.
- 10.34 There are different avenues for media access to information in Supreme Court proceedings. As well as the entitlement to access certain documents in criminal proceedings under the *Criminal Procedure Act*, the media can seek access to information in both criminal and civil proceedings before the Supreme Court, Court of

37. *Uniform Civil Procedure Rules 2005* (NSW) r 36.12(2)(b). This rule applies to civil proceedings in various courts and tribunals in NSW: see *Uniform Civil Procedure Rules 2005* (NSW) sch 1.

38. Supreme Court of NSW, *Practice Note SC Gen 2: Access to Court Files* (2019) [7]; District Court of NSW, *Practice Note DC (Civil) No 11: Access to Court Files by Non-Parties* (2005) [2].

39. Supreme Court of NSW, *Practice Note SC Gen 2: Access to Court Files* (2019) [7]; District Court of NSW, *Practice Note DC (Civil) No 11: Access to Court Files by Non-Parties* (2005) [2].

Appeal and Court of Criminal Appeal in accordance with two practice notes.⁴⁰ The rules apply to the media in the same way as to non-parties generally.

- 10.35 The Supreme Court practice note provides that access to court materials “is restricted to parties, except with the leave of the Court”.⁴¹ When exercising this discretion to allow access, the Court should consider the principle of open justice.⁴²
- 10.36 The practice note provides that access will normally be granted to non-parties (including the media) for certain types of information, such as material that was admitted into evidence. The applicant must still show there are “exceptional circumstances” to access material not covered.⁴³
- 10.37 The information the media can seek access to under the practice note is broader than that available under the *Criminal Procedure Act*. For example, the media cannot access electronic or photographic exhibits under the Act, but may seek access to this material under the practice note.⁴⁴ Non-parties to a proceeding wishing to make an application to access information must apply to the registrar of the appropriate division of the Court in the prescribed form. In the application, “[t]he applicant must demonstrate that access should be granted in respect of the particular documents the subject of the application and state why the applicant desires access”.⁴⁵
- 10.38 The Court will consider what the applicant wishes to do with the information. While the *Criminal Procedure Act* says that a media representative can “inspect” a document, the practice note says a person may copy or take extracts from the document or information.⁴⁶
- 10.39 The Supreme Court also has inherent powers to decide access requests, despite the provisions of the practice note.⁴⁷ However, in considering applications by the media for access to information, the Court routinely refers to the practice note.⁴⁸

40. Supreme Court of NSW, *Practice Note SC Gen 2: Access to Court Files* (2019); Supreme Court of NSW, *Practice Note SC Gen 3: Copying of Court Documents* (2013).

41. Supreme Court of NSW, *Practice Note SC Gen 2: Access to Court Files* (2019) [6].

42. *John Fairfax Publications Pty Ltd v Ryde Local Court* [2005] NSWCA 101, 62 NSWLR 512 [60].

43. Supreme Court of NSW, *Practice Note SC Gen 2: Access to Court Files* (2019) [7].

44. See, eg, *R v Dirani (No 23)* [2019] NSWSC 288 [41]–[47].

45. Supreme Court of NSW, *Practice Note SC Gen 2: Access to Court Files* (2019) [17].

46. Supreme Court of NSW, *Practice Note SC Gen 2: Access to Court Files* (2019) [18].

47. *Hammond v Scheinberg* [2001] NSWSC 568, 52 NSWLR 49 [6].

48. See, eg, *R v Xu (No 1)* [2005] NSWSC 73 [17]–[23]; *R v Sam (No 5)* [2009] NSWSC 543 [4]; *R v Wran* [2016] NSWSC 1026 [17].

10.40 In 2019, the Court received more than 5,600 requests for information. Only a very small minority of these requests came from people other than journalists or news media organisations.⁴⁹ This is generally consistent with previous years.⁵⁰

Media access to Local and District Court information

10.41 As well as the entitlement to inspect certain documents in criminal proceedings under the *Criminal Procedure Act*, there are other avenues for media access to information in the District and Local Courts.

10.42 The *District Court Rules 1973* (NSW) provide that non-parties may only “search the file kept by the registrar in respect of the proceedings” with leave of the Court or registrar. This also applies to searching “any book of record kept by the registrar”.⁵¹

10.43 The process of seeking leave is similar to that in the Supreme Court. The District Court practice note largely replicates the Supreme Court practice note, but applies only to civil proceedings.⁵²

10.44 The Local Court does not have a practice note on accessing court documents. The *Local Court Rules 2009* (NSW) (“*Local Court Rules*”) allow non-parties (including the media), with leave of a magistrate or registrar, to:

- access a copy of the court record or transcript of evidence taken at any committal, summary or application proceeding, and
- obtain a copy of these materials, on payment of any prescribed fee.⁵³

10.45 In Local Court criminal proceedings, the media can apply for access under the *Criminal Procedure Act* or the *Local Court Rules*. It is not always clear to applicants or decision-makers what provisions the application has been made under.⁵⁴

10.46 There are marked differences in access between the avenues. As we discuss above, the media can only access certain documents under the *Criminal Procedure Act*, such

49. Supreme Court of NSW, *2019 Annual Review* (C2020) 37.

50. See, eg, Supreme Court of NSW, *2018 Annual Review* (C2019) 37; Supreme Court of NSW, *2017 Annual Review* (C2018) 37; Supreme Court of NSW, *2016 Annual Review* (C2017) 37.

51. *District Court Rules 1973* (NSW) pt 52 r 3(2), r 3(4).

52. District Court of NSW, *Practice Note DC (Civil) No 11: Access to Court Files by Non-Parties* (2005).

53. *Local Court Rules 2009* (NSW) pt 8 r 8.10(3).

54. Local Court of NSW, *Preliminary Consultation PCI12*.

as the court attendance notice.⁵⁵ The information accessible under the *Local Court Rules* is broader. It can be any “court record or transcript of evidence”.⁵⁶

- 10.47 Unlike the *Criminal Procedure Act*, there is no two-day limit under the *Local Court Rules*.
- 10.48 The form of access is also broader under the *Local Court Rules*, in that the media are not only entitled to “inspect” documents. The media may “have access to a copy” or “obtain a copy” of the court record or transcript.⁵⁷
- 10.49 Access under the *Local Court Rules* is more discretionary than under the *Criminal Procedure Act*. Under the *Criminal Procedure Act*, media representatives are “entitled to inspect” the documents.⁵⁸ Under the *Local Court Rules*, access is given only with leave of a magistrate or registrar if, in their opinion, “it is appropriate to do so in the circumstances”. When considering whether it is appropriate to grant leave, the magistrate or registrar must consider matters including the open justice principle, the applicant’s connection with the proceedings, and the reasons why access is sought.⁵⁹

Access to documents relating to sentencing

- 10.50 The access regimes outlined in this Chapter do not specify, or are silent about, whether the media can access documents containing details about a defendant that are prepared for sentencing (such as a pre-sentence report), or advancing defences that requires details about a defendant’s subjective factors (such as a medical or psychiatric assessment). These documents are not included in what can be accessed under the *Criminal Procedure Act*, and court rules and practice notes are silent about whether they fall within scope for media access.
- 10.51 Under the uncommenced *Court Information Act*, information contained in a medical, psychiatric, psychological or pre-sentence report constitutes “restricted access information”, unless that information is contained or summarised in a judgment given or orders made in proceedings. Access to such information would only be possible with leave of the court or if permitted by regulations.⁶⁰ We discuss the *Court Information Act* further below.⁶¹

55. See [10.14].

56. *Local Court Rules 2009* (NSW) r 8.10(3).

57. *Local Court Rules 2009* (NSW) pt 8, r 8.10(3).

58. *Criminal Procedure Act 1986* (NSW) s 314(1).

59. *Local Court Rules 2009* (NSW) r 8.10(4), r 8.10(5).

60. *Court Information Act 2010* (NSW) s 6(2)(e), s 9(1).

61. See [10.66]–[10.72].

Media access to court information elsewhere in Australia

- 10.52 There are mixed approaches to media access to documents and other information across Australia. Many Australian access regimes give courts some discretion to allow media access to information in criminal or civil proceedings, but, unlike NSW, the media are not *entitled* to access certain documents in criminal proceedings. For example:
- In Victoria, documents filed in criminal proceedings in the County and Supreme Courts are not accessible “unless the Court or the Registrar so directs”.⁶² According to its media guidelines, the County Court’s media team will give the media basic case information (such as sentencing outcomes), without the need to apply to a judge⁶³
 - In Western Australia (“WA”), the media can apply for transcripts and exhibits of criminal proceedings before the Magistrates Court, but there is no entitlement to the material.⁶⁴
- 10.53 Some access regimes do not distinguish between the media and the public when it comes to accessing court materials.⁶⁵ For example:
- in Victoria, access to court documents in the County Court is available to all, but, in practice, a distinction is drawn between the public and the media⁶⁶
 - for criminal proceedings in Queensland, there are special rules for accessing trial exhibits for publication, but these are not limited to the media,⁶⁷ and
 - in WA, case information in the Magistrates Court is available to any person,⁶⁸ but a distinction is drawn between the public and the media for accessing transcripts and exhibits.⁶⁹
- 10.54 The two-day rule in the *Criminal Procedure Act* is not found in other Australian access regimes, although many applications processes and application forms contemplate the proceedings being on foot. For example, the Victorian County Court uploads “unrevised

62. *County Court Criminal Procedure Rules 2019* (Vic) r 1.08.1; *Supreme Court (Criminal Procedure) Rules 2017* (Vic) r 1.11(4), r 1A.03(6).

63. County Court of Victoria, *County Court of Victoria Media Guidelines* (2018) 3.

64. *Magistrates Court Act 2004* (WA) s 33(9)(b); *Magistrates Court (General) Rules 2005* (WA) r 40B.

65. See, eg, *Criminal Practice Rules 1999* (Qld) r 56(2), r 56A(1), r 57(3); *Court Procedures Rules 2006* (ACT) r 2903(1), r 4053(1).

66. See County Court of Victoria, *County Court of Victoria Media Guidelines* (2018).

67. *Criminal Practice Rules 1999* (Qld) r 56A.

68. *Magistrates Court Act 2004* (WA) s 33(9)(b); *Magistrates Court (General) Rules 2005* (WA) r 40(1)(a)–(b).

69. *Magistrates Court Act 2004* (WA) s 33(9)(b); *Magistrates Court (General) Rules 2005* (WA) r 40A–40F.

audio recordings of *recent* decisions ... to facilitate fair and accurate reporting” to its media portal, which is accessible to journalists accredited by the Court.⁷⁰

- 10.55 Fees for media access can be imposed under some access regimes.⁷¹ Where fees can be imposed, it is not always clear whether they are in practice. The Federal Court imposes a flat rate of \$50 to produce a court file, and \$1 per page to make a copy of a document, regardless of the number of documents sought.⁷²
- 10.56 Other Australian access regimes generally make available to the media the same types of documents that are accessible in NSW. For example, the media can access similar documents in Queensland.⁷³ In the WA Magistrates Court, the media can access transcripts of proceedings and “any other document ... tendered in evidence in the case”.⁷⁴
- 10.57 The Victorian County Court does not generally allow access to documents relating to the subjective circumstances of the defendant (at sentencing).⁷⁵ The Australian Capital Territory (“ACT”) excludes a larger class of documents, but ones that are generally untested or yet to be adopted in court.⁷⁶
- 10.58 Some other Australian access regimes expressly permit the media to inspect *and* copy court documents. For example:
- In the WA Magistrates Court, the media “may apply to the Court for leave to inspect or obtain a copy of” transcripts or other documents.⁷⁷
 - In the ACT, the media can “search the registry for, inspect, or take a copy of” certain materials.⁷⁸
 - In Queensland, the media can apply for permission to copy exhibits in criminal proceedings for publication. The judge or magistrate hearing the application may consider matters including whether copying for publication is in the public interest, the nature of the proposed publication, the content of the exhibit, whether copying for

70. County Court of Victoria, *County Court of Victoria Media Guidelines* (2018) 5 (emphasis added).

71. See, eg, *Criminal Practice Rules 1999* (Qld) r 56A(1), r 57(3); *Court Procedures Rules 2006* (ACT) r 4053(1); *Federal Court Rules 2011* (Cth) r 2.32(5)(b); *High Court Rules 2004* (Cth) r 4.07.4.

72. *Federal Court and Federal Circuit Court Regulation 2012* (Cth) sch 1 item 123.

73. *Criminal Practice Rules 1999* (Qld) r 57(1).

74. *Magistrates Court (General) Rules 2005* (WA) r 40B.

75. County Court of Victoria, *County Court of Victoria Media Guidelines* (2018) 4.

76. *Court Procedures Rules 2006* (ACT) r 2903(2), r 4053(2).

77. *Magistrates Court (General) Rules 2005* (WA) r 40B.

78. *Court Procedures Rules 2006* (ACT) r 2903(1)–(2); r 4053(1)–(2).

publication is likely to prejudice a fair trial and the cost and facilities available to copy the exhibit.⁷⁹

- In the Victorian County Court, the rules contemplate only inspection of documents filed in criminal proceedings.⁸⁰ However, in practice, inspection is limited to the court file, and the media may be provided with copies of documents.⁸¹

Harmonisation or separate treatment?

- 10.59 An issue to consider is whether the media should have special rights to access information in both criminal and civil proceedings.
- 10.60 The criminal trial has a markedly different purpose to civil proceedings. Criminal prosecutions are generally brought by the state on behalf of the community and there is naturally more public interest in the conduct and outcome of such proceedings. Lord Steyn reflected:
- A criminal trial is a public event. ... The glare of contemporaneous publicity ensures that trials are properly conducted. It is a valuable check on the criminal process. ... Full contemporaneous reporting of criminal trials in progress promotes public confidence in the administration of justice. It promotes the value of the rule of law.⁸²
- 10.61 Civil proceedings are diverse. They might involve a contract dispute between two businesses, a successful native title claim, a dispute over the custody of a child, a suit brought against a newspaper for defaming a person's reputation, disciplinary action for a financial adviser's misconduct, a dispute over the amount of provision given to a relative in a will or civil penalties sought against a large company for not complying with money laundering legislation.
- 10.62 Reporting on such cases can also be clearly in the public interest, such as when it involves a precedent that may expose people to civil liability or impacts on estate planning, establishes a legal entitlement, impacts on the amenity in a local area, or involves a person or company with a public profile, class actions with many plaintiffs, or simply facts that attract the public's attention. The deterrent effect of criminal law and tort law would be greatly minimised without the publicity provided by the media. Every day the media report on such cases.
- 10.63 Despite the clear public interest that may arise in all manner of proceedings before NSW courts, the media only have a special entitlement to access certain documents in

79. *Criminal Practice Rules 1999* (Qld) r 56A(1)–(4).

80. *County Court Criminal Procedure Rules 2019* (Vic) r 1.08.1.

81. County Court of Victoria, *County Court of Victoria Media Guidelines* (2018) 3.

82. *Re S (A Child)* [2004] UKHL 47, [2005] 1 AC 593 [30].

criminal proceedings. There is no equivalent entitlement for civil proceedings which means that the media are subject to the same access rules that apply to non-parties generally.

- 10.64 The policy justification for this is unclear. If open justice is important in civil cases, a specific right for media access to documents in these cases may ensure this principle is preserved.
- 10.65 Not all Australian access regimes differentiate between civil and criminal proceedings. For example, in South Australia (“SA”), access to court records is the same in the Supreme, District and Magistrates Courts. Documents specific to civil and criminal proceedings are set out in an exhaustive list of accessible documents, but under a general access provision that applies to all proceedings.⁸³

Court Information Act

- 10.66 As we discuss in Chapter 6, the uncommenced *Court Information Act* was Parliament’s attempt to regulate access to documents and other court information, including for the media, in relation to both criminal and civil proceedings.⁸⁴
- 10.67 Under the *Court Information Act*, the media would have the same entitlement as the public to “open access information”. It lists separately for civil and criminal proceedings the relevant documents that constitute “open access information”.⁸⁵
- 10.68 Members of the public would not be able to access information classified as “restricted access information”, unless the court grants leave or access is permitted by regulations.⁸⁶ However, the media would be automatically entitled to access certain types of “restricted access information”:
- a transcript of proceedings held in closed court
 - a transcript of, and statements and affidavits admitted into evidence in, voir dire proceedings (proceedings in which the judge hears legal arguments in the absence of the jury), once these proceedings have concluded
 - a transcript of, and statements and affidavits admitted into evidence in, proceedings for a suppression or non-publication order

83. *Supreme Court Act 1935* (SA) s 131(1)–(2); *District Court Act 1991* (SA) s 54(1)–(2); *Magistrates Court Act 1991* (SA) s 51(1)–(2).

84. See [6.18].

85. *Court Information Act 2010* (NSW) s 5, s 8(1). See further [6.33]–[6.34], [6.67]–[6.69], [6.99].

86. *Court Information Act 2010* (NSW) s 9. See further [6.35], [6.99].

- a court record that is only classified as restricted access information because it contains personal identification information
 - the brief of evidence admitted in criminal proceedings, and
 - a record admitted into evidence that is a document in written form, or that can readily be reproduced as a document in written form (such as sound or video recordings).⁸⁷
- 10.69 It is unclear whether the types of “restricted access information” the media would be able to access under the *Court Information Act* are also accessible under the *Criminal Procedure Act* in criminal cases. For example, the media can inspect “transcripts of evidence” under the *Criminal Procedure Act*. The *Court Information Act* would allow the media to access transcripts of closed court proceedings, voir dire proceedings, and proceedings for applications for a suppression or non-publication order.⁸⁸
- 10.70 Media access to certain restricted access information would also be subject to any suppression or non-publication order that prohibits or restricts publication or disclosure of that information, or any automatic statutory prohibition prohibiting or restricting the publication or disclosure of that information.⁸⁹
- 10.71 Some submissions oppose the special treatment afforded to the media under the *Court Information Act*, arguing that open justice principles should apply equally to all.⁹⁰
- 10.72 Courts would be able to charge the media a fee for accessing information under the *Court Information Act*.⁹¹ Decision-makers could also refuse an access request in a particular case, and impose conditions on the way the information is provided and its use.⁹²

Question 10.1: Media access to court information in NSW

- (1) Are the current arrangements for the media to access court information in relation to both civil and criminal proceedings appropriate? Why or why not?
- (2) Should the media have special privileges to access court information in relation to civil and/or criminal proceedings? Why or why not?
- (3) What changes, if any, should be made to the current arrangements, including in relation to:
 - (a) the nature of the access provided

87. *Court Information Act 2010* (NSW) s 10(1).

88. *Court Information Act 2010* (NSW) s 10(1)(a)–(c).

89. *Court Information Act 2010* (NSW) s 13.

90. Law Society of NSW, *Preliminary Submission PCI31*, 2; NSW Bar Association, *Preliminary Submission PCI41*, 1.

91. *Court Information Act 2010* (NSW) s 15(1).

92. *Court Information Act 2010* (NSW) s 8(2), s 10(2), s 14(3)–(4).

- (b) the types of documents that may be accessed
- (c) time limits on access, and
- (d) application procedures?

Media access to court proceedings

- 10.73 As we discuss in Chapter 2, a range of NSW laws allow courts to close proceedings to the public in certain circumstances. In this Chapter, we focus on where special allowance is made for the media to access closed proceedings.

Media access to closed proceedings

- 10.74 Many NSW laws that allow or require closed proceedings do not contain exceptions for the media.⁹³ This is notwithstanding that the court often has an additional power to make suppression or non-publication orders, which can address some of the reasons for closing a court, while allowing the media to attend.⁹⁴
- 10.75 Some laws expressly permit the media to enter and remain in closed court proceedings. We outline these laws below.

Media access to prescribed sexual offence proceedings

- 10.76 Media representatives have special entitlements to attend proceedings while complainants are giving evidence in proceedings for a prescribed sexual offence. A “prescribed sexual offence” includes sexual assault, sexual touching and sexual act offences against both adults and children and child prostitution offences, incest and female genital mutilation.⁹⁵ A “media representative” is defined as “a person engaged in preparing a report of the proceedings for dissemination through a public news medium”.⁹⁶
- 10.77 If a complainant in a prescribed sexual offence proceeding gives evidence remotely (that is, by closed-circuit television or other technology) in closed proceedings, media representatives can enter or remain in the courtroom while the complainant testifies, unless the court otherwise directs.⁹⁷ If a complainant gives evidence in the courtroom in closed proceedings, the media can still be allowed to view or hear the evidence, or a

93. See eg, *Law Enforcement (Controlled Operations) Act 1997* (NSW) s 28(1)(a); *Terrorism (Police Powers) Act 2002* (NSW) s 26P(1)–(2).

94. See, eg *Law Enforcement (Controlled Operations) Act 1997* (NSW) s 28(1)(b); *Terrorism (Police Powers) Act 2002* (NSW) s 26P(3).

95. See *Criminal Procedure Act 1986* (NSW) s 3(1) definition of “prescribed sexual offence”.

96. *Criminal Procedure Act 1986* (NSW) s 291C(3).

97. *Criminal Procedure Act 1986* (NSW) s 291C(1).

record of that evidence, provided they are not in the courtroom or place where the complainant testifies.⁹⁸

- 10.78 In the District and Supreme Courts, the registrar will discuss reasonable and practical options to allow the media to view the proceedings in this way and give a written report to the court. The court will then determine what arrangements are made. The media may be liable for additional costs in arranging for their viewing.⁹⁹
- 10.79 Some proceedings are off limits to even the media without exception. Proceedings for incest must be entirely closed, but the court may make an order to allow a support person to be present.¹⁰⁰
- 10.80 The media is not afforded any special entitlement to remain in a closed court or view proceedings of a closed court where a victim impact statement is read out.¹⁰¹

Media access to proceedings involving children

- 10.81 In criminal proceedings against a child defendant, “any person who is engaged in preparing a report on the proceedings for dissemination through a public news medium” can enter or remain in the place where the proceedings are being heard, unless the court otherwise directs. The court can exclude the media during a witness’ examination if their exclusion is in the child defendant’s interests.¹⁰²
- 10.82 Similarly, the media are entitled to enter and remain in care and protection proceedings in the Children’s Court, unless the court otherwise directs.¹⁰³ If a child or young person who is the subject of the proceedings is required to leave the courtroom, the Court must also direct the media to leave, if their exclusion is in the child or young person’s interests.¹⁰⁴
- 10.83 Allowing the media access to proceedings involving children is balanced with automatic restrictions on disclosure and publication of information about children and the proceedings, and court powers to make suppression or non-publication orders. We discuss the application of these laws and orders below.¹⁰⁵

98. *Criminal Procedure Act 1986* (NSW) s 291C(2).

99. Supreme Court of NSW, *Practice Note SC CL 8: Media Access to Sexual Assault Proceedings Heard in Camera*, 2005 [6]–[8]; District Court of NSW, *Criminal Practice Note 4: Media Access to Sexual Assault Proceedings Heard in Camera*, 2005 [2]–[5].

100. *Criminal Procedure Act 1986* (NSW) s 291B(1)–(2).

101. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30I(1).

102. *Children (Criminal Proceedings) Act 1987* (NSW) s 10(1)(b), s 10(2).

103. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 104C.

104. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 104(4).

105. See [10.100]–[10.116].

Access restrictions during the COVID-19 pandemic

- 10.84 From March 2020, a number of courts used “virtual courtrooms” and took other measures in response to public health restrictions introduced during the COVID-19 pandemic. The Supreme Court prohibited attendance at its courts from late March 2020, instead using a virtual courtroom via video or telephone conference to conduct hearings.¹⁰⁶ It has since resumed face-to-face hearings in select cases.¹⁰⁷
- 10.85 Courts do not, as a matter of course, publish details to access virtual courtrooms. The Supreme Court fact sheet provides that “[t]he usual concept of open justice is applicable to the Virtual Courtrooms” but “the Court discourages the wide sharing of Virtual Courtroom contact information in order to minimise interruptions in the Virtual Courtroom environment”.¹⁰⁸ The media must request the unique virtual courtroom login details from the Court. A similar model was adopted in the District Court.¹⁰⁹
- 10.86 The media’s experience in accessing virtual courtrooms during the pandemic is mixed. In consultations, one journalist expressed satisfaction with improved convenience in accessing courts virtually.¹¹⁰ Another found that access to dial-in details is inconsistent, and depends on individual judges or proceedings.¹¹¹ Virtual access to Local and District Court proceedings is more difficult than the Supreme Court,¹¹² which in turn is more difficult than virtual access to Federal Court proceedings.¹¹³
- 10.87 We discuss the shift to virtual courts further in Chapter 12.¹¹⁴
- 10.88 As to physical attendance in court, the *Court Security Act 2005* (NSW) (“*Court Security Act*”) allows a magistrate or judge to order members of the public not to be admitted to the court.¹¹⁵ The Act was amended in May 2020 to specifically address the exclusion of

106. Supreme Court of NSW, “COVID-19: Changes to Court Operations” (23 March 2020) <www.supremecourt.justice.nsw.gov.au/Pages/coronavirus_covid19_announcement.aspx> (retrieved 4 December 2020).

107. Supreme Court of NSW, “Media Release: NSW Supreme Court moves towards resuming face-to-face hearings” (9 June 2020) <www.supremecourt.justice.nsw.gov.au/Pages/coronavirus_covid19_announcement.aspx> (retrieved 9 December 2020).

108. Supreme Court of NSW, *Fact Sheet: The Virtual Courtroom* (April 2020) 4.

109. District Court of NSW, “Virtual Court Media User Guide” (3 April 2020) <www.districtcourt.nsw.gov.au/content/dam/dcj/ctsd/districtcourt/documents/covid-19-communications/For_Media_-_Virtual_Court_Fact_Sheet._3_1.pdf> (retrieved 4 December 2020).

110. Sydney Morning Herald, *Preliminary Consultation PCI06*.

111. Sydney Morning Herald, *Preliminary Consultation PCI07*.

112. 9News, *Preliminary Consultation PCI09*.

113. Sydney Morning Herald, *Preliminary Consultation PCI07*.

114. See [12.5]–[12.19].

115. *Court Security Act 2005* (NSW) s 7(1)(b).

persons exhibiting signs of illness from court precincts.¹¹⁶ A number of orders made under these new laws do not give specific regard to the importance of the media's presence in court. For example, the Local Court Chief Magistrate has made repeated orders that "members of the public who do not have a legitimate reason associated with a particular matter listed before [the Court] not be admitted to Local Court premises" during the pandemic.¹¹⁷

Question 10.2: Media access to court proceedings

- (1) Is the current regime governing media access to proceedings appropriate and workable? Why or why not?
- (2) What changes, if any, should be made to the current regime, including in relation to:
 - (a) prescribed sexual offence proceedings
 - (b) proceedings involving children
 - (c) accessing "virtual courtrooms", and
 - (d) orders excluding people under the *Court Security Act 2005* (NSW)?

Broadcasting court proceedings

- 10.89 Media recording and broadcasting of court proceedings is generally prohibited without the presiding judge or magistrate's permission.¹¹⁸ Allowing such broadcasting is a relatively recent development.
- 10.90 Parliament introduced legislation in 2014 to allow media recording and broadcasting of certain proceedings in the District and Supreme Courts.¹¹⁹ This is different from where the court broadcasts its own proceeding.¹²⁰ In the Supreme Court, permission is normally granted to the media for recording and broadcasting delivery of final judgments in civil proceedings and sentencing remarks in criminal matters.¹²¹

116. *Court Security Act 2005* (NSW) s 12E, inserted by *COVID-19 Legislation Amendment (Emergency Measures – Attorney General) Act 2020* (NSW) sch 1 [1.1].

117. Local Court of NSW, "Court Security Act 2005: Section 7(1)(b): Order" (2020).

118. *Court Security Act 2005* (NSW) s 9(2)(a).

119. *District Court Act 1973* (NSW) pt 5, inserted by *Courts Legislation Amendment (Broadcasting Judgments) Act 2014* (NSW) sch 1; *Supreme Court Act 1970* (NSW) pt 9A, inserted by *Courts Legislation Amendment (Broadcasting Judgments) Act 2014* (NSW) sch 2.

120. See [12.20]–[12.25].

121. See, eg, Supreme Court of NSW, *2019 Annual Review* (C2020) 37; Supreme Court of NSW, *2018 Annual Review* (C2019) 37; Supreme Court of NSW, *2017 Annual Review* (C2018) 38; Supreme Court of NSW, *2016 Annual Review* (C2017) 37.

- 10.91 The *Court Security Act* prohibits the use of a recording device to record sound or images (or both) in court premises.¹²² The media can use recording devices in public areas of a court precinct,¹²³ but not in the court itself, without the approval of the judge or magistrate.¹²⁴
- 10.92 Most courts and tribunals have procedures whereby the media can apply to record and broadcast proceedings. Legislation or court practice tends to limit what types of proceedings, and what parts, can be recorded and broadcasted.¹²⁵
- 10.93 Media recording and broadcasting of Supreme Court (and Court of Appeal and Court of Criminal Appeal) proceedings is limited to “judgment remarks”, which includes:
- in criminal trials, the delivery of the verdict and any sentencing remarks, that are delivered or made in open court, and
 - in other proceedings, any remarks made by the Court in open court when announcing the judgment determining the proceedings.¹²⁶
- 10.94 The *Supreme Court Act 1970* (NSW) allows any person to apply to record or broadcast judgment remarks.¹²⁷ However, the Court’s policy is restricted to “news media organisations”,¹²⁸ and broadcasting itself is limited to “news media organisations”.¹²⁹
- 10.95 Media can transmit live, or make the recording publicly available at a later date.¹³⁰ Broadcasting is allowed “to ensure the fair and accurate reporting of the Court’s judgment remarks”.¹³¹ As such, the recording must be made available to other news media organisations as soon as practicable after the conclusion of the judgment remarks. If it is a live broadcast, equal access to other news media organisations must be given.¹³²

122. *Court Security Act 2005* (NSW) s 9(1).

123. *Court Security Act 2005* (NSW) s 6(2), s 9(2)(d).

124. *Court Security Act 2005* (NSW) s 9(2)(a).

125. See, eg, Supreme Court of NSW, *Recording and Broadcasting of Judgment Remarks Policy* (2014); District Court of NSW, *Directions for Recording and Broadcasting of Judgment Remarks* (2015); Local Court of NSW, *Practice Note 1 of 2013: Recording of Court Proceedings Practice Note* (2013).

126. *Supreme Court Act 1970* (NSW) s 127 definition of “judgment remarks”.

127. *Supreme Court Act 1970* (NSW) s 128(1).

128. Supreme Court of NSW, *Recording and Broadcasting of Judgment Remarks Policy* (2014) [1], [4].

129. *Supreme Court Act 1970* (NSW) s 128(2). See also *Supreme Court Act 1970* (NSW) s 127 definition of “news media organisation”.

130. *Supreme Court Act 1970* (NSW) s 127 definition of “broadcast”. See also Supreme Court of NSW, *Recording and Broadcasting of Judgment Remarks Policy* (2014) [10].

131. Supreme Court of NSW, *Recording and Broadcasting of Judgment Remarks Policy* (2014) [2].

132. *Supreme Court Rules 1970* (NSW) r 5.

- 10.96 There is a presumption in favour of granting permission,¹³³ except where:
- the broadcast would be likely to reveal the identity of a person whose identity is protected by a suppression or non-publication order or automatic prohibition on publication or disclosure
 - the judgment remarks will contain material that is subject to a suppression or non-publication order or automatic prohibition on publication or disclosure, likely to be prejudicial to other criminal proceedings or a current criminal investigation, or likely to reveal the existence of a covert operation carried out by law enforcement officials
 - the broadcast of the judgment remarks would pose a significant risk to the safety and security of any person in the courtroom or who has participated, or has otherwise been involved, in the proceedings, or
 - the Chief Justice has directed that the judgment remarks not be recorded or broadcast because it would be detrimental to the orderly administration of the Court.¹³⁴
- 10.97 Identifying images of jurors, an accused person, a victim in the criminal trial, or a member of the accused person or victim's immediate family, or any other person, must not be recorded.¹³⁵
- 10.98 In recent years, the overwhelming majority of applications have been granted. In 2018 and 2019, only one application in each year was refused from 16 and 13, respectively.¹³⁶ In 2017, all 14 requests to record criminal sentences were granted,¹³⁷ though six of 22 requests were refused in 2016.¹³⁸ Most of the interest seems to be in criminal cases, as the majority of applications in 2018, and all requests in 2017, related to such cases.¹³⁹
- 10.99 Near identical provisions govern media recording and broadcasting of proceedings in the District Court.¹⁴⁰ In the Local Court, recordings can only be of decisions in final

133. *Supreme Court Act 1970* (NSW) s 128(2).

134. *Supreme Court Act 1970* (NSW) s 128(3); Supreme Court of NSW, *Recording and Broadcasting of Judgment Remarks Policy* (2014) [6].

135. *Supreme Court Act 1970* (NSW) s 128(4).

136. Supreme Court of NSW, *2019 Annual Review* (C2020) 37; Supreme Court of NSW, *2018 Annual Review* (C2019) 37.

137. Supreme Court of NSW, *2017 Annual Review* (C2018) 38.

138. Supreme Court of NSW, *2016 Annual Review* (C2017) 37.

139. Supreme Court of NSW, *2018 Annual Review* (C2019) 37; Supreme Court of NSW, *2017 Annual Review* (C2018) 38.

140. See *District Court Act 1973* (NSW) pt 5.

hearings. This is defined as “the financial decision or judgment in civil proceedings and the sentencing of the convicted person or persons in criminal proceedings”.¹⁴¹ Like the Supreme Court, recording is allowed “for the purpose of preparing a fair and accurate report of those proceedings” but later broadcasting of audio and visual images is allowed. The recording must also be shared with other media outlets and equal access given to any live feeds.¹⁴²

Question 10.3: Broadcasting court proceedings

- (1) Are the rules that apply to media recording and broadcasting of court proceedings appropriate? Why or why not?
- (2) What changes, if any, should be made?

Restrictions on publication

10.100 We discuss the schemes in NSW that prohibit or restrict the publication of information about court proceedings in Chapters 3 and 4, and the enforcement of those prohibitions in Chapter 5. In this Chapter, we consider how automatic prohibitions and court orders restricting or prohibiting publication affect the media’s ability to report on court proceedings.

Automatic prohibitions on publishing information

10.101 In NSW, there are a number of automatic prohibitions on publishing certain information that apply in certain contexts. Examples of particular relevance to the media, which we discuss elsewhere in this Consultation Paper, include prohibitions on:

- publishing or broadcasting the name of a person who was a child when they were involved in criminal proceedings (as the defendant, a witness, the victim, the sibling of a victim or a person who is mentioned or otherwise involved),¹⁴³ and
- publishing any matter that would identify the complainant in proceedings for a prescribed sexual offence.¹⁴⁴

10.102 Automatic prohibitions on publishing certain information impact on media reporting. The prohibitions are spread across different statutes, which may make it difficult for the media to ensure they comply. These different statutes also use different terminology (for

141. Local Court of NSW, *Practice Note 1 of 2013: Recording of Court Proceedings Practice Note* (2013) 1.

142. Local Court of NSW, *Practice Note 1 of 2013: Recording of Court Proceedings Practice Note* (2013).

143. *Children (Criminal Proceedings) Act 1987* (NSW) s 15A(1). See further [7.12]–[7.37].

144. *Crimes Act 1900* (NSW) s 578A. See further [9.4]–[9.20].

example, different definitions of identifying information and publication), which may make it hard for the media to know when they are breaching the laws.

Suppression and non-publication orders

- 10.103 In this section, we focus on the impact of suppression and non-publication orders made under the *Court Suppression and Non-publication Orders Act 2010* (NSW) (“*CSNPO Act*”) on media reporting. The *CSNPO Act* is the principal legislation under which a court may prohibit or restrict media publication of information about court proceedings, by either suppressing details of the case or ordering there be no publication of those details. In Chapter 4, we set out in detail the grounds for making a suppression or non-publication order.¹⁴⁵
- 10.104 Suppression and non-publication orders profoundly impact the media’s work. The orders can prohibit publication (whether in print, online, radio or television)¹⁴⁶ of details about parties, witnesses and evidence given in open court,¹⁴⁷ which may inhibit accurate reporting of a case.
- 10.105 When considering whether to make an order, the court must “take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice”.¹⁴⁸ The intention is to promote access to court information to the public, including the media, but also “ensure that the fair conduct of court proceedings, the administration of justice and the privacy and safety of participants in court proceedings are not unduly compromised”.¹⁴⁹
- 10.106 The media’s role in facilitating access to court information is not expressly referenced in the *CSNPO Act*. However, the media plays an important part in delivering the objectives of open justice. The public do not always attend open courts, and the public relies heavily on the media for information about court proceedings. The courts also rely heavily on the media to communicate their decisions and the law arising from them. The media can also expose criminal offending by reporting on court proceedings.¹⁵⁰
- 10.107 One submission suggests that the *CSNPO Act* refer to “the principle of free communication of information” and recognise “the consequential right of the news media to publish information relating to court proceedings”.¹⁵¹

145. See [4.60]–[4.93].

146. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 3 definition of “publish”.

147. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 7.

148. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 6.

149. NSW, *Parliamentary Debates*, Legislative Assembly, Agreement in Principle Speech, 29 October 2010, 27197.

150. Banki Haddock Fiora, *Preliminary Submission PCI27*, 6.

151. Australia’s Right to Know Media Coalition, *Preliminary Submission PCI13*, 3.

10.108 There is a difference between preserving the public interest in open justice, reporting what is in the public interest, and allowing the media to report on what it considers might interest the public. The *CSNPO Act* does not require courts to take into account whether a case is of interest to the public; it is only required to take into account the public interest in open justice generally. Even in making an order under s 8(1)(e) of the Act – “it is otherwise necessary in the public interest for the order to be made and that public interest significantly outweighs the public interest in open justice” – it is the public interest in open justice, rather than in the specific case, that is relevant.

The media’s standing in applications for suppression and non-publication orders

10.109 Under the *CSNPO Act*, a “news media organisation” can appear and be heard in applications for suppression and non-publication orders.¹⁵² This reflects the common law.¹⁵³ The media can also apply for, and appear and be heard, in reviews of orders.¹⁵⁴

10.110 The media’s standing to be heard in such matters is critical to the proper functioning of open justice. The media report on court proceedings and are thus exposed to penalties for breaching orders. Breaching an order amounts to an offence under the *CSNPO Act* and may also be punished as contempt.¹⁵⁵

10.111 None of the submissions we received disputed the media’s standing in such cases, but one submission recommends removing any “standing requirements”. It says people such as

freelance writers, reporters, bloggers, activists and student journalists might have legitimate open justice and public interest reasons for opposing or amending [orders] and should therefore have standing to appear and be heard.¹⁵⁶

10.112 The submission suggests such people may not have standing under the *CSNPO Act* as a “news media organisation”.¹⁵⁷ While the court may allow other people who have a “sufficient interest in the question of whether a suppression or non-publication order should be made” to appear and be heard,¹⁵⁸ the submission argues that “in the interest of open justice, such standing should not be left to the discretion of the court”.¹⁵⁹

152. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 9(2)(d).

153. See, eg, *John Fairfax Group Pty Ltd v Local Court of NSW* (1992) 26 NSWLR 131.

154. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 13(2)(d).

155. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 16.

156. J Johnson, P Keyzer, A Wallace and M Pearson, *Preliminary Submission PCI26*, 5.

157. J Johnson, P Keyzer, A Wallace and M Pearson, *Preliminary Submission PCI26*, 5.

158. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 9(2)(e).

159. J Johnson, P Keyzer, A Wallace and M Pearson, *Preliminary Submission PCI26*, 5.

10.113 Another concern raised in submissions is that the media may not have access to regional courts to be heard on applications.¹⁶⁰ We discuss a possible requirement to notify the media of an application for an order in Chapter 4.¹⁶¹ Some submissions recommend that an independent statutory office should be established to be heard in applications to represent the public interest.¹⁶² We discuss this suggestion in Chapter 13.¹⁶³

How is the media notified of suppression and non-publication orders?

10.114 A “news media organisation” is generally only liable for an offence for breaching an order (and for contempt)¹⁶⁴ if they are aware of it.¹⁶⁵ Arrangements to notify the media (and the public) that a suppression or non-publication order is in place depends on each court. Based on our consultations with media representatives and the courts, it is clear there is no one repository of orders.¹⁶⁶

10.115 The Department of Communities and Justice and the Supreme Court Media Manager emails a list of orders to media contacts.¹⁶⁷ We heard support for this approach in consultations.¹⁶⁸

10.116 Legal Aid NSW notes that it regularly writes to media outlets to draw their attention to potential breaches of orders.¹⁶⁹

10.117 Some submissions support establishing a register of orders.¹⁷⁰ One submission notes that the register “could require, as a precondition for the entering of an order, that the

160. Australia’s Right to Know Media Coalition, *Preliminary Submission PCI13*, 4; J Johnson, P Keyzer, A Wallace and M Pearson, *Preliminary Submission PCI26*, 5.

161. See [4.43]–[4.44].

162. NSW Council for Civil Liberties, *Preliminary Submission PCI29*, 5, rec 4; NSW Law Society, *Preliminary Submission PCI31*, 4.

163. See [13.13]–[13.26].

164. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 16.

165. See [5.12], [5.92].

166. NSW Department of Communities and Justice, *Preliminary Consultation PCI01*; Local Court of NSW, *Preliminary Consultation PCI12*; Supreme Court of NSW, *Preliminary Consultation PCI11*.

167. Sydney Morning Herald, *Preliminary Consultation PCI06*; NSW Department of Communities and Justice, *Preliminary Consultation PCI01*; Supreme Court of NSW, *Media Guidelines: Reporting Criminal Proceedings* (2016) 3.

168. Sydney Morning Herald, *Preliminary Consultation PCI06*.

169. Legal Aid NSW, *Preliminary Submission PCI39*, 9. See also NSW, Office of the Director of Public Prosecutions, *Preliminary Submission PCI12*, 9–10.

170. Banki Haddock Fiora, *Preliminary Submission PCI27*, 6; NSW Council for Civil Liberties, *Preliminary Submission PCI29*, 4, rec 3. See also Australia’s Right to Know Media Coalition, *Preliminary Submission PCI13*, 3; Legal Aid NSW, *Preliminary Submission PCI39*, 9; NSW, Public Defenders, *Preliminary Submission PCI133*, 13.

order specify the grounds ... upon which the order is made, and specify the duration of the order”.¹⁷¹

- 10.118 Some Australian states and territories already have publicly accessible central registers of suppression and non-publication orders. In SA, the registrar of each court is required to “establish and maintain a register of all suppression orders”. Once an order is sent to the register, they must “enter the order in the register” and send notice of the order to “authorised news media representatives”. An “authorised news media representative” is someone nominated by a member of the news media as that member’s authorised representative to receive notices.¹⁷²
- 10.119 In addition, the register is also open for public inspection public free of charge during office hours. Entering the order in the register is treated as providing notice to the media (and public) across Australia.¹⁷³
- 10.120 In WA, judges’ associates send orders made to the sheriff, who enters the details in a central register. The register is not accessible by the public, but the Supreme Court Media Liaison Officer provides information to the media when requested.¹⁷⁴
- 10.121 The Supreme Court of Tasmania lists active suppression orders on its website, with a link to a copy of the order. The media may need to approach the Court’s registrar for copies of very recent orders, but the fact they were made is entered on the website.¹⁷⁵
- 10.122 A 2017 review of the *Open Courts Act 2013* (Vic) recommended a central, publicly accessible register of suppression orders made by all Victorian courts.¹⁷⁶ The recommendation has not been implemented to date. Previously, Justice Blue of the Supreme Court of SA proposed to the Harmonisation of Rules Committee (which comprises representatives from each Australian state and territory) that a central register of all suppression orders made in Australia be created. No action was taken on this proposal.¹⁷⁷
- 10.123 Mailing lists and online databases (whether accessible to the media or more widely available) require a reliable source of information to work effectively. The *JusticeLink* database used by most NSW courts and tribunals can contain information about orders,

171. Banki Haddock Fiora, *Preliminary Submission PCI27*, 6.

172. See *Evidence Act 1929* (SA) s 69A(8)(a), s 69A(10), s 69A(13)(a) definition of “authorised news media representative”.

173. *Evidence Act 1929* (SA) s 69A(11)–(12).

174. F Vincent, *Open Courts Act Review* (2017) [205].

175. See Supreme Court of Tasmania, “Suppression Orders” <www.supremecourt.tas.gov.au/the-court/media/suppression-orders/> (retrieved 3 December 2020).

176. F Vincent, *Open Courts Act Review* (2017) [469]–[473] rec 7.

177. F Vincent, *Open Courts Act Review* (2017) [310].

however the efficacy of the information depends on actually and correctly inputting information about orders. Consultations with court representatives indicate that compiling information about orders made, even if they are in *JusticeLink*, is difficult.¹⁷⁸

Question 10.4: Impact of publication prohibitions on the media

- (1) Are the laws that prohibit the media from publishing or broadcasting information relating to court proceedings appropriate? Why or why not?
- (2) What changes, if any, should be made?
- (3) In relation to suppression and non-publication orders:
 - (a) are the interests of the media adequately reflected in the grounds for making such orders?
 - (b) is the list of people with standing to be heard in applications for suppression or non-publication orders appropriate?
 - (c) are the current arrangements for communicating the existence of suppression and non-publication orders adequate?
- (4) What changes, if any, should be made to the laws and procedures relating to the media and suppression and non-publication orders?

Contemporary media

How is “the media” defined in legislation?

- 10.124 The media is defined in several different laws that deal with access to, and suppression of, court information. Definitions are not consistent across NSW. Some do not define the term at all or define it by what is produced rather than who is producing it.
- 10.125 Several statutes, including the uncommenced *Court Information Act* and the *CSNPO Act*, use the term “news media organisation”. A “news media organisation” is either:
- “a commercial enterprise that engages in the business of broadcasting or publishing news”, or
 - “a public broadcasting service that engages in the dissemination of news through a public news medium”.¹⁷⁹

178. Supreme Court of NSW, *Preliminary Consultation PCI11*; Local Court of NSW, *Preliminary Consultation PCI12*.

179. *Supreme Court Act 1970* (NSW) s 127 definition of “news media organisation”; *District Court Act 1973* (NSW) s 178 definition of “news media organisation”; *Court Information Act 2010* (NSW) s 10(5) definition of “news media organisation”; *Court Suppression and Non-publication Orders Act 2010* (NSW) s 3 definition of “news media organisation”.

10.126 There are two public broadcasting services in Australia: the Australian Broadcasting Corporation (“ABC”) and the Special Broadcasting Service (“SBS”).¹⁸⁰ “Public news medium” is not defined in the laws that use that term. It has not been subject to judicial consideration, nor is it explained in the explanatory materials for the laws. It appears to cover how the ABC and the SBS disseminate their news via television, radio and the internet.

10.127 The *Court Security Act* deals with entry into, and conduct in, courts and defines media by reference to “journalists” and the “media reports” they prepare. A “journalist” under this Act potentially captures a much broader range of people than a “news media organisation”. It means:

a person engaged in the profession or practice of reporting, photographing, editing or recording for a media report of a news, current affairs, information or documentary character.¹⁸¹

10.128 The definition of a “media report” might capture an even broader range of people. It means:

an article, program or other report for publication in or broadcast on any of the following

- (a) a newspaper, magazine, journal or other periodical,
- (b) a radio or television broadcasting service,
- (b) an electronic service (including a service provided by the Internet) that is similar to a newspaper, magazine, radio broadcast or television broadcast.¹⁸²

10.129 The *Criminal Procedure Act* uses the term “media representative” and defines it as “a person engaged in preparing a report of the proceedings for dissemination through a

180. Established under the *Australian Broadcasting Corporation Act 1983* (Cth) s 5(1) and the *Special Broadcasting Service Act 1991* (Cth) s 5(1) respectively.

181. *Court Security Act 2005* (NSW) s 4(1) definition of “journalist”.

182. *Court Security Act 2005* (NSW) s 4(1) definition of “media report”.

public news medium”.¹⁸³ Similar language is used in some other laws.¹⁸⁴ It is also found in court policies and practice notes on recording and broadcasting proceedings.¹⁸⁵

10.130 Like in NSW, legislation in Victoria defines “news media organisation” as:

- “a commercial enterprise that engages in the business of broadcasting or publishing news”, or
- “a public broadcasting service that engages in the dissemination of news through a public news medium”.¹⁸⁶

How should “the media” be defined?

10.131 There is an obvious need to review the scope of “the media”. The media enjoys privileged access to court information and courtrooms, standing to be heard in applications for suppression and non-publication orders, and is particularly susceptible to breaching these orders in the course of their work.

10.132 Consultations highlight difficulties in defining the media.¹⁸⁷ There are concerns about broadening the definition, including that less experienced individuals may not be properly trained in ethical journalism, report fairly and accurately, or know or understand statutory prohibitions on publishing certain information.¹⁸⁸

10.133 The definition of “news media organisation” has potentially very broad scope beyond what is understood as traditional news media. Courts readily recognise widely disseminated newspaper publishers and television networks as “news media organisations”.¹⁸⁹ Some are obvious. For example, *Nine* is a commercial enterprise that is in the business of broadcasting and publishing news. It owns the Nine television

183. *Criminal Procedure Act 1986* (NSW) s 291C(3).

184. See, eg, *Children (Criminal Proceedings) Act 1987* (NSW) s 10(1)(b); *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 104(4), s 104C; Supreme Court of NSW, *Recording and Broadcasting of Judgment Remarks Policy* (2014).

185. See, eg, Supreme Court of NSW, *Recording and Broadcasting of Judgment Remarks Policy* (October 2014).

186. *Open Courts Act 2013* (Vic) s 3 definition of “news media organisation”.

187. NSW Department of Communities and Justice, *Preliminary Consultation PCI01*; Local Court of NSW, *Preliminary Consultation PCI12*; NSW Civil and Administrative Tribunal, *Preliminary Consultation PCI13*.

188. Legal Aid NSW, *Preliminary Submission PCI39*, 10–11; NSW Department of Communities and Justice, *Preliminary Consultation PCI01*; Sydney Morning Herald, *Preliminary Consultation PCI07*.

189. See, eg, *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125, 83 NSWLR 52 [13].

network, up to ten online and print newspapers and magazines, and several AM radio channels around Australia.¹⁹⁰

- 10.134 Commercial enterprises not typically associated with traditional media might also fall within the definition. Notwithstanding the term, social media companies and other internet platforms such as *Netflix*, *YouTube*, *Twitter*, *Facebook*, *TikTok* and *Instagram* all host news posted by users from other sources or users themselves, such as commentaries or blogs.
- 10.135 These emerging sources of media also often publish and broadcast their own content on these sites. Whether hosting news or other media amounts to “engag[ing] in the business of broadcasting or publishing news” is not clear. For these companies, their principal business may not be broadcasting or publishing news, but it forms a sizable portion of what they do and how they make money through advertising.
- 10.136 What is clear is that they are publishing the content. “Publish” in the *CSNPO Act*, for example, means “disseminate or provide access to the public or a section of the public by any means”, including via the Internet.¹⁹¹
- 10.137 Consumption of news in Australia is changing. In a recent survey, two thirds of Australian news consumers said they watched television news and 52% said they use online news sources. Almost half (46%) of news consumers said they access news on social media.¹⁹² We pointed to an emerging shift in consumption of media as early as 2003, in the NSW Law Reform Commission report on contempt by publication.¹⁹³
- 10.138 Some court policies require news media organisations to be approved or recognised, or that their employees provide appropriate professional identification.¹⁹⁴ Court policies and consultations with a number of court representatives reveal that email lists of journalists and other media representatives are maintained to distribute information, including about the making of suppression and non-publication orders.¹⁹⁵
- 10.139 Media are formally accredited in the County Court of Victoria to enjoy privileged access to court information, resources and communications, including access to the Media

190. Nine, “About Us” (2020) <www.nineforbrands.com.au/about/> (retrieved 4 December 2020).

191. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 3 definition of “publish”.

192. C Fisher and others, *Digital News Report: Australia 2019* (News and Media Research Centre, University of Canberra, 2019) 26.

193. NSW Law Reform Commission, *Contempt by Publication*, Report 100 (2003) [2.62].

194. Supreme Court of NSW, *Recording and Broadcasting of Judgment Remarks Policy* (2014) [8]–[9], [11]; Supreme Court of NSW, *Use of Mobile Telephones or Personal Digital Assistants (PDAs) in Courtrooms*, 2008; Local Court of NSW, *Practice Note 1 of 2013: Recording of Court Proceedings Practice Note* (2013) 1.

195. NSW Department of Communities and Justice, *Preliminary Consultation PCI01*; Supreme Court of NSW, *Media Guidelines: Reporting Criminal Proceedings* (2016) 3.

Portal (containing audio recordings of court proceedings) and court lists with charge details.¹⁹⁶

- 10.140 Courts are not themselves constrained by registry accreditation of media. Courts must read and interpret the legislation. Those news media organisations accredited to access court information may not necessarily be the same (or the only) entities that can be heard in applications for, and seek review of or appeal, suppression or non-publication orders under the *CSNPO Act*. As such, there is the potential for inconsistency in the way the definition, which applies to both regimes, is applied.
- 10.141 Given the proliferation of non-traditional sources of media for many Australians, it is important to consider whether the definition of “news media organisation” is appropriate. Should the dominant business of the “commercial enterprise” be broadcasting or publishing news? What if this is a small part of the enterprise’s business? While they may “publish” news, are social media companies and other platforms really in the business of publishing and broadcasting such that they should enjoy (or even want) the privileged access that comes with being “news media organisations”?
- 10.142 The question of who constitutes a journalist is also pertinent. Is limiting application to just commercial enterprises justified? Should a freelance journalist or journalism student reporting for a university paper be able to oppose a suppression order? Should the same apply to a blogger who has a keen interest in environmental crime cases or a celebrity who updates their millions of *Twitter* followers on current events?

Question 10.5: Contemporary media

- (1) Are the current definitions and use of the terms “media” and “news media organisation” appropriate? Why or why not?
- (2) What changes, if any, should be made to these terms and their definitions?
- (3) How else could members of the media be identified for the purposes of the laws dealing with media access to court information and proceedings?

196. County Court of Victoria, “Media Portal” (2020) <www.countycourt.vic.gov.au/news-and-media/media-portal> (retrieved 4 December 2020).

11. Researcher access to information

In Brief

There is no single entry point for researchers to access court information in NSW. Generally, researchers must rely on public access schemes to obtain court information for research purposes, which can be expensive, time-consuming and uncertain. We consider how courts facilitate academic research and potential improvements to researcher access to court information.

Who is a researcher and what is research?	248
What information is important to researchers?	249
Researcher access to court information in NSW	250
Information in the Supreme Court	250
Information in the Coroners Court	251
Information in the Children's Court	251
Judgments and transcripts	251
Other information relating to criminal proceedings	254
Other information relating to civil proceedings	255
Bureau of Crime Statistics and Research data	255
Researcher access to court archives	256
Researcher access to information under the Court Information Act	258
Access schemes for researchers in other places	258
Federal Court of Australia	258
Victoria	259
England and Wales	260
New Zealand	260

- 11.1 In NSW, researchers largely have the same entitlements to access court information as the public. Researchers' experience in accessing court information is characterised by

inconsistency and uncertainty.¹ Few courts have specific policies on researcher access to court information.

11.2 In this Chapter, we consider how to improve the arrangements for researchers in accessing court information and ask whether researchers should have greater access.

11.3 Arguably, research is essential to open justice. It can investigate and evaluate the operation of areas of the law and the operation of courts, highlight shortcomings and lead to improvements in these areas. One submission notes:

The quality of the scrutiny which is at the heart of the principle of open justice is enhanced if non-party access rights are enjoyed not only by media organisations focused on the dissemination of information about a particular case, but also by academic researchers who seek to conduct rigorous, systematic and impartial analyses of multiple aspects of the operation of the court system.²

Who is a researcher and what is research?

11.4 An initial issue to consider is who constitutes a “researcher” and what constitutes “research”. The terms can be broad. School and university students preparing court reports, internet bloggers writing on crime statistics, and someone interested in researching a feature of the criminal justice system with no view to publishing their findings are all potential “researchers”.

11.5 Court information may also be relevant to non-law research, such as in psychology, public administration, other social sciences and medicine. For example, public health advocates might be interested in court information on offender treatment for mental illness. Aged care reform researchers might be interested in court information from coronial inquiries into deaths in aged care, or information from the Guardianship Division of the NSW Civil and Administrative Tribunal about the appointment of guardians and financial managers for the elderly.

11.6 The purpose of research can be varied. There is systemic research aimed at improving the operation of the justice system. There is also historical research relating to the institutions or individuals within the criminal justice system. Both may be aimed at improving how systems operate at an institutional or individual level.

1. See, eg, L McNamara and J Quilter, *Preliminary Submission PCI14*, 4; UTS Faculty of Law, *Preliminary Submission PCI25*, 17.

2. L McNamara and J Quilter, *Preliminary Submission PCI14*, 1.

- 11.7 NSW courts with specific policies about researcher access to court information may require the person to be undertaking a research project sponsored and supervised by a university or approved by an ethics committee.³ The project does not need to relate to law. The Children’s Court has not published a policy but applies similar standards.⁴
- 11.8 The NSW Supreme Court may also allow access to government agencies responsible for law reform or policy development.⁵ The Federal Court of Australia (“Federal Court”) will ordinarily grant research requests from academic or government researchers, and the County Court of Victoria (“County Court”) may allow access to “academic or other researchers”.⁶
- 11.9 The Federal Court policy provides that it does not ordinarily grant research requests by private individuals or organisations, unless the research is “of benefit to the Court or its users and is not of a commercial nature”.⁷

What information is important to researchers?

- 11.10 Researcher methods inform what court information is useful to a research project. Researchers may want historical data and statistics, court files (including transcripts) of ongoing proceedings, or the experiences and perspectives of court staff and judicial officers. Researchers may wish to access types of information different from the parties, the media and the public.
- 11.11 Court statistical information normally omits the granular details of individual cases that might be useful to researchers. One submission notes:

researchers often want to pursue studies of an area of law (eg sexual assault, manslaughter, offensive language etc) by analysing actual cases within a particular time period or a representative sample of such matters.⁸

-
3. See, eg, Supreme Court of NSW, *Release of Statistics, Data and Information* (2010) 1; Coroners Court of NSW, *Access to Coronial Documents* (30 October 2020) <www.coroners.nsw.gov.au/coroners-court/access-to-coronial-documents.html#Media6> (retrieved 4 December 2020).
4. Children’s Court, *Preliminary Consultation PCI08*.
5. Supreme Court of NSW, *Release of Statistics, Data and Information* (2010) 1.
6. Federal Court of Australia, “Research Requests: Policy on Requests for Access to Court Data or Information for the Purposes of Research” (2016) <www.fedcourt.gov.au/services/research-requests> (retrieved 4 December 2020); County Court of Victoria, *Research Requests Policy* (2020) [7], [9].
7. Federal Court of Australia, “Research Requests: Policy on Requests for Access to Court Data or Information for the Purposes of Research” (2016) <www.fedcourt.gov.au/services/research-requests> (retrieved 4 December 2020).
8. L McNamara and J Quilter, *Preliminary Submission PCI14*, 4.

- 11.12 In past reviews, the NSW Law Reform Commission has benefited from accessing court files for these details, including for reviews of succession law and the law of consent in relation to sexual offences.⁹

Researcher access to court information in NSW

- 11.13 When it comes to deciding whether to grant researchers access to court information, individual NSW courts have significant discretion. Differing approaches result in inconsistent and uncertain outcomes, which can frustrate the research process. One submission notes that “[i]n the absence of any formal rules, guidelines or legislation permitting access to, and use of, criminal evidence, knowledge about decision making and actual use of this material is anecdotal and arbitrary”.¹⁰
- 11.14 Some NSW government agencies have arrangements with courts to access information for research purposes, such as the Bureau of Crime Statistics and Research (“BOCSAR”).¹¹ Similar arrangements can also be set up under specific legislation.¹²
- 11.15 There is a small selection of specific laws and rules expressly giving researchers access to court information not otherwise enjoyed by the public. For example, one statute recognises the importance of research, exempting a person from criminal conduct where they receive identifying information about jurors or ask jurors questions as part of a research project into juries or jury service with the authority of the Attorney General.¹³

Information in the Supreme Court

- 11.16 The Supreme Court’s policy on the release of information provides that it will try to assist with providing “reliable statistical data” to academic and government researchers. The type of information released under this policy is very limited. It includes that which “is necessary to manage its cases, for example, numeric analysis of the Court’s caseload by case type”. The Court will “generally not release private information about

9. J E Dekker and M V A Howard, *I Give, Devise and Bequeath: An Empirical Study of Testator’s Choice of Beneficiaries*, Research Report 13 (NSW Law Reform Commission, 2006) [2.1]–[2.2]; NSW Law Reform Commission, *Consent in Relation to Sexual Offences*, Report 148 (2020) [1.53]–[1.55], [8.100], [8.126].

10. UTS Faculty of Law, *Preliminary Submission PCI25*, 3, citing K Biber, “In Crime’s Archive: The Cultural Afterlife of Criminal Evidence” (2013) 53 *British Journal of Criminology* 1033, 1038.

11. See, eg, *Court Suppression and Non-publication Orders Act 2010* (NSW) s 15(2).

12. See, eg, *Adoption Act 2000* (NSW) s 175A; *Children’s Guardian Act 2019* (NSW) s 160; *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 254A.

13. *Jury Act 1977* (NSW) s 68(5), s 68A(3).

litigants or third parties unless that information is given in evidence in court proceedings”.¹⁴

- 11.17 Researchers wishing to access court files or other court information not covered by the Court’s policy may need to apply to the court for access, like other non-parties must do.

Information in the Coroners Court

- 11.18 Researchers with ethics-approved projects can seek access to coronial documents under the *Coroners Act 2009* (NSW).¹⁵ While researchers are not expressly mentioned in the legislation, an application form on the Coroners Court website permits “[a] person who is conducting research approved by an appropriate human research ethics committee” to apply for certain documents. These include the full brief of evidence (comprising all police reports and witness statements, autopsy reports, transcripts and the Coroner’s findings). In the application, researchers must give reasons why they want access and attach documents showing ethics approval.¹⁶

Information in the Children’s Court

- 11.19 The Children’s Court has a standardised process for researchers seeking access to court information. The Court may allow researchers to access court files, observe proceedings and receive court data. Researchers must have ethics approval.¹⁷
- 11.20 The Children’s Court may make arrangements with researchers for storing, destroying, using and distributing information, and anonymising parties’ names and information. The executive office processes applications, in consultation with presiding magistrates where necessary.¹⁸
- 11.21 Research into Children’s Court practices is valuable in evaluating the effectiveness of its services and their delivery. For example, a process evaluation conducted by the University of Western Sydney into the Youth Koori Court process is being used to reform and refine the model.¹⁹

Judgments and transcripts

- 11.22 Judgments are available to researchers, and the public, online. NSW Caselaw is a collection of selected decisions from a variety of NSW courts and tribunals. It is

14. Supreme Court of NSW, *Release of Statistics, Data and Information* (2010) 1.

15. *Coroners Act 2009* (NSW) s 65(2).

16. Local Court of NSW, *Application for Access to Coronial Documents: Form 24* (2020).

17. Children’s Court of NSW, *Preliminary Consultation PCI08*.

18. Children’s Court of NSW, *Preliminary Consultation PCI08*.

19. NSW, Department of Justice, *Annual Report 2018–19* (C2019) 36.

designed “to provide open access to justice and legal research”. Decisions are generally released within 24 hours of being handed down.²⁰

11.23 Most recent decisions of the Supreme Court (including the Court of Appeal and Court of Criminal Appeal), are available. In the case of the Industrial Relations Commission and Land and Environment Court, only certain decisions are published (for example, those that are particularly topical or noteworthy).²¹

11.24 Some courts only publish a very small selection of decisions on NSW Caselaw. For example:

- The NSW Civil and Administrative Tribunal’s approach to publication varies across its Divisions. For example, the Administrative and Equal Opportunity Division, Occupational Division and the Appeal Panel routinely publish decisions. The Guardianship Division and the Consumer and Commercial Division do not routinely publish decisions because of the sensitivities or volume of work. The latter division publishes decisions likely to be of public interest or of precedential value.²²
- Whether a District Court decision is published depends on the individual judge.
- The Local Court publishes a small selection of decisions, if they provide interpretations of legislation relevant to Local Court matters. In 2020, only one Local Court decision has been published on NSW Caselaw at the time of writing.²³

11.25 Some submissions express concern over the limited availability of judgments of lower courts and tribunals and the impact this has on research.²⁴ One submission notes that, “[i]n 2018, only 9 Local Court criminal law judgments were published ... compared to 174 District Court of NSW judgments, 280 Supreme Court of NSW judgments and 191 NSW Court of Criminal Appeal judgments”. It notes that:

[w]hen these figures are compared with the number of criminal matters finalised in NSW courts each year, the stark under-representation of the Local Court and, to a lesser extent, the District Court, in published judgments is clear.²⁵

20. NSW Caselaw, “Access Policy” (24 June 2020) <www.caselaw.nsw.gov.au/policy#release> (retrieved 4 December 2020).

21. NSW Caselaw, “Access Policy” (24 June 2020) <www.caselaw.nsw.gov.au/policy#release> (retrieved 4 December 2020).

22. See [6.175]–[6.178].

23. *DPP v Mikulic* [2020] NSWLC 1.

24. L McNamara and J Quilter, *Preliminary Submission PCI14*, 2–3; UTS Faculty of Law, *Preliminary Submission PCI25*, 14–16.

25. L McNamara and J Quilter, *Preliminary Submission PCI14*, 2 (footnotes omitted).

- 11.26 As the submission observes, disproportionately few decisions are published by other courts.²⁶
- 11.27 If the decision is not published, researchers must request a transcript from the court under the general arrangements for access to court information for criminal and civil proceedings. The Supreme Court practice note provides that non-parties will normally be given access to judgments in concluded proceedings.²⁷ One submission notes that “[t]here is no such presumption in the rules governing access to documents (including judgments) in the Local Court and the District Court”. It supports improved access to unpublished judgments in these courts.²⁸
- 11.28 Under the *Uniform Civil Procedure Rules 2005* (NSW) any person, on payment of a prescribed fee, can obtain a sealed or certified copy of a judgment or order, unless the court otherwise orders.²⁹ The prescribed fee of \$63 per document could be seen as expensive,³⁰ especially if a large volume of documents were required for a research project.
- 11.29 In most cases, a researcher must pay a fee to obtain a transcript. One submission expresses concern about the high cost of transcripts, arguing that this is “prohibitive” for research projects that involve examining transcripts in multiple cases.³¹ Another submission says the “commercialisation of court transcription services” is a source of discontent among researchers.³²
- 11.30 A transcript of a civil or criminal proceeding in NSW is \$94, plus an additional \$11 for each page after the first eight pages provided the matter transcribed is under three months old. Higher fees are payable for older matters.³³
- 11.31 As noted above, research may involve looking at historical cases or at least ones older than three months.³⁴ Even well resourced researchers may find the cost of obtaining this information prohibitive. One submission notes similarly high costs in Queensland.

26. L McNamara and J Quilter, *Preliminary Submission PCI14*, 2.

27. Supreme Court of NSW, *Practice Note SC Gen 2: Access to Court Files* (2019) [7].

28. L McNamara and J Quilter, *Preliminary Submission PCI14*, 2, 3.

29. *Uniform Civil Procedure Rules 2005* (NSW) r 36.12(1). This rule applies to civil proceedings in various courts and tribunals in NSW: see *Uniform Civil Procedure Rules 2005* (NSW) sch 1.

30. *Civil Procedure Regulation 2017* (NSW) sch 1 pt 5 item 6.

31. L McNamara and J Quilter, *Preliminary Submission PCI14*, 3.

32. UTS Faculty of Law, *Preliminary Submission PCI25*, 17.

33. See *Criminal Procedure Regulation 2017* (NSW) sch 2 pt 1 item 11; *Civil Procedure Regulation 2017* (NSW) sch 1 pt 5 item 10.

34. See [11.6].

The applicant sought access to transcripts in two Queensland cases, and the fee for a daily transcript was averaged at \$1,526.58.³⁵

11.32 Fees for transcripts also vary between courts.³⁶ Courts can waive or postpone fees,³⁷ but this is “entirely a matter of discretion”.³⁸ One submission says there is “a strong argument that substantive open justice demands that fees should be waived or significantly reduced” where access is for non-commercial purposes, such as academic research.³⁹

11.33 One submission points out that researchers have been charged transcription fees “where court hearings have already been transcribed and a typed version is readily available”. It notes that the

exorbitant fees for access to transcripts, reasons for judgment or other court materials ... serve as a barrier to legal research, particularly for early-career research scholars and PhD students who are less likely to have access to adequate funding for their research.⁴⁰

11.34 The submission also points out that research funding often comes from state and federal governments, meaning researchers expend public funds to access information from public agencies.⁴¹

11.35 We are not aware of access regimes in other states or territories that expressly provide for the waiver or reduction of fees for accessing transcripts by researchers.

Other information relating to criminal proceedings

11.36 Researchers do not enjoy the same entitlements to inspect any document relating to criminal proceedings as the media under the *Criminal Procedure Act 1986* (NSW), since access depends on whether the person seeking access is a “media representative” and it is “for the purpose of compiling a fair report of the proceedings for publication”. This entitlement only exists from when the proceedings commence until two working days after they are finally disposed of, which is tailored to the media’s practice of producing contemporaneous news reports of proceedings.⁴²

35. UTS Faculty of Law, *Preliminary Submission PCI25*, 19, citing K Biber, “Inside Jill Meagher’s Handbag: Looking at Open Justice” (2014) 39 *Alternative Law Journal* 73, 77.

36. See [6.152]–[6.155].

37. *Criminal Procedure Regulation 2017* (NSW) cl 16; *Civil Procedure Regulation 2017* (NSW) cl 11.

38. L McNamara and J Quilter, *Preliminary Submission PCI14*, 3.

39. L McNamara and J Quilter, *Preliminary Submission PCI14*, 3.

40. UTS Faculty of Law, *Preliminary Submission PCI25*, 22.

41. UTS Faculty of Law, *Preliminary Submission PCI25*, 22.

42. *Criminal Procedure Act 1986* (NSW) s 314(1). See further [10.9]–[10.11], [10.17], [10.20].

11.37 If this entitlement was extended to researchers, it may need to take account of the fact that research is rarely conducted while proceedings are ongoing or very recently concluded. Research may involve looking at historical cases or trends, which requires court records and files to be inspected long after proceedings have ended. A requirement for an application to be made within a short period after disposal will likely limit the data and information that researchers can use.

Other information relating to civil proceedings

- 11.38 In relation to civil proceedings, there are no special provisions that relate to a researcher's ability to access court information.
- 11.39 The registrar may provide a copy of pleadings or documents other than judgments or orders to a non-party if they appear "to have a sufficient interest in the proceedings".⁴³ There is no definition of "sufficient interest" and it is unclear if genuine academic research is relevant to an assessment.
- 11.40 The fees applicable to these documents are \$13 for the first 20 pages and \$7 for each 10 pages thereafter.⁴⁴

Bureau of Crime Statistics and Research data

- 11.41 BOCSAR is a government agency that publishes statistics and research on the criminal justice system. BOCSAR collects data from, among other sources, NSW courts. Data is published periodically or in research papers.⁴⁵
- 11.42 BOCSAR publishes comprehensive data on criminal cases finalised in NSW courts, including the Children's Court. The data includes, among other information:
- types of charges finalised and penalties imposed
 - defendants' bail status and personal characteristics, including age, gender and Indigenous status
 - length of proceedings from commencement to finalisation
 - number of apprehended violence orders made by courts
 - appeals finalised, and
 - number and type of domestic violence and child sexual assault offences.⁴⁶

43. *Uniform Civil Procedure Rules 2005* (NSW) r 36.12(2)(b).

44. *Civil Procedure Regulation 2017* (NSW) sch 1 pt 5 item 7.

45. NSW Bureau of Crime Statistics and Research, *Information Service Policy* (2019) 4–5, 6.

- 11.43 Researchers can request data collected by BOCSAR relevant to court proceedings. BOCSAR charges fees where data collation takes more than half an hour. However, researchers collaborating with BOCSAR on research projects are generally exempt. Students and academics doing grant-funded research projects will be charged for data requests, even if the project is supported by a NSW Government agency.⁴⁷

Researcher access to court archives

- 11.44 Researcher access to historical court records is limited and current archiving of court records is fragmented. Archiving largely depends on agreements between the courts and NSW State Archives and Records, of which little is known. The approach to archiving court records varies greatly between courts. One submission observes:

there is no comprehensive, national approach or principled framework to administer or recognise how the preservation of a court's document and records may also act as an archive of Australian jurisprudence, of Australian citizenship, and of Australian civic life.⁴⁸

- 11.45 The *State Records Act 1998* (NSW) ("*State Records Act*") governs the archiving of NSW state records. Every "public office", which includes courts and tribunals, is responsible for the safe custody and proper preservation of records in their possession.⁴⁹ However, certain principal record keeping and access obligations do not apply to "a court or tribunal, in respect of [its] judicial functions".⁵⁰ This includes the obligation to protect state records in their possession and to give the NSW State Archives and Records control of a state record after a certain amount of time.⁵¹
- 11.46 Critically, the application of an "open access period" does not apply to records of courts and tribunals. This period commences once the record is at least 30 years old.⁵² Any member of the public can apply for access to the record or "to series, groups or classes of records".⁵³
- 11.47 The NSW State Archives and Records still maintains a large body of historical records relating to courts. These records are generally available for inspection or have been

46. NSW Bureau of Crime Statistics and Research, "NSW Criminal Courts Statistics" (30 October 2020) <www.bocsar.nsw.gov.au/Pages/bocsar_court_stats/bocsar_court_stats.aspx> (retrieved 4 December 2020).

47. NSW Bureau of Crime Statistics and Research, *Information Service Policy* (2019) [12.2]–[12.3], [14.4].

48. UTS Faculty of Law, *Preliminary Submission PCI25*, 5.

49. *State Records Act 1998* (NSW) s 3(1) definition of "public office", s 11(1).

50. See, eg, *State Records Act 1998* (NSW) s 9(1)(c), s 26(1)(c), s 49(1)(c).

51. *State Records Act 1998* (NSW) s 11(1), (3).

52. *State Records Act 1998* (NSW) s 50.

53. *State Records Act 1998* (NSW) s 54(1).

digitised. What is sent to the NSW State Archives and Records depends on the court and the nature of the matter.⁵⁴

- 11.48 Records relating to criminal hearings in the Supreme Court, including case files, are open to the public 75 years after “file completion”. Any record less than 75 years old must be sought from the Supreme Court.⁵⁵ A fee of \$84 per file or box of files is payable where offsite retrieval is required.⁵⁶
- 11.49 Archive regimes vary elsewhere in Australia. Like NSW, court records are exempt from public access under Commonwealth law.⁵⁷ However, in Western Australia (“WA”), historical court records are publicly available, and courts are required to transfer their records to state records offices for public access after certain periods.⁵⁸ A significant proportion of the State Records Office of WA’s collection are court records.⁵⁹ In Victoria, “any record made or received by a court” is a public record that must be given to the Victorian Public Record Office, subject to certain exceptions.⁶⁰
- 11.50 One submission notes the value of historical court records to researchers. It says they are “rich records of public interest and importance”.⁶¹
- 11.51 There is currently no proposal to extend open public access to archived court records or to oblige courts to transfer its records to the NSW State Archives and Records. A review of the *State Records Act*, published earlier this year, does not recommend any reforms to the archiving of court records.⁶²

54. NSW State Archives and Records, “Courts” <www.records.nsw.gov.au/archives/collections-and-research/guides-and-indexes/courts/guides> (retrieved 8 December 2020).

55. NSW State Archives and Records, “Supreme Court Guide” <www.records.nsw.gov.au/archives/collections-and-research/guides-and-indexes/supreme-court-guide> (retrieved 8 December 2020).

56. *Criminal Procedure Regulation 2017* (NSW) sch 2 pt 1 item 9; *Civil Procedure Regulation 2017* (NSW) sch 1 pt 5 item 8.

57. *Archives Act 1983* (Cth) s 19(1), s 31(3)(b).

58. *State Records Act 2000* (WA) s 3(1) definition of “State organization”, definition of “government organization”, s 31–32, sch 1 item 7.

59. State Records Office of Western Australia, “Court Records: Historical” <www.sro.wa.gov.au/archive-collection/collection/court-records-historical> (retrieved 8 December 2020).

60. *Public Records Act 1973* (Vic) s 2(1) definition of “public record”, s 8A, s 9(1), s 10AA(1).

61. UTS Faculty of Law, *Preliminary Submission PCI25*, 5.

62. NSW, Legislative Council, Standing Committee on Social Issues, *State Records Act 1998 and the Policy Paper on its Review*, Report 57 (2020).

Researcher access to information under the Court Information Act

- 11.52 The uncommenced *Court Information Act 2010* (NSW) (“*Court Information Act*”) does not expressly cover researcher access to court information. Researchers would be treated in the same way as non-parties generally. As such, researchers would be entitled to access information classified as “open access information”, unless otherwise ordered in a particular case by the relevant court. Under the Act, researchers would not enjoy the same entitlement as news media organisations to access certain information classified as “restricted access information”. Like non-parties generally, they would only be able to access such information with leave of the court or if permitted by regulations.⁶³
- 11.53 The *Court Information Act* would allow courts to charge fees for providing access to court information under the Act. It would also allow regulations or the *Civil Procedure Act 2005* (NSW) to provide for:
- “the maximum fees that may be charged for providing access” to information under the Act, and
 - “the waiver, reduction or refund of any fee payable or paid for providing access”.⁶⁴
- 11.54 Depending on the type of research, researchers may wish to access transcripts from multiple proceedings, such as the directions given by judges to juries in trials of a class of offences. Similarly to the current schemes, collection of this data under the *Court Information Act* might be considerably expensive, depending on the fees charged.

Access schemes for researchers in other places

- 11.55 Elsewhere in Australia and overseas, there are specific policies for researcher access to court information. Most policies limit access to certain types of information and still require researchers to use the same channels as the public to access court files in specific proceedings.

Federal Court of Australia

- 11.56 The Federal Court has a specific policy for researcher access to court information. Researchers email their request directly to the Court. The Court generally assists with requests for statistical information readily generated by the Court’s case management

63. *Court Information Act 2010* (NSW) s 8(1), s 9(1), s 10(1).

64. *Court Information Act 2010* (NSW) s 15(1)–(2).

system. It also assists with more detailed research projects requiring access to court data, files or other records, or interviews with judges, parties or lawyers.⁶⁵

- 11.57 The Court will generally assist with requests from government agencies associated with legal services and policy development, and academic research projects sponsored and supervised by recognised tertiary institutions. The Court will only assist individuals or organisations if “it can be demonstrated that the research is of benefit to the Court or its users and is not of a commercial nature”. The Court may recoup costs for assistance.⁶⁶
- 11.58 Where proceedings are ongoing, the presiding judge must approve access to the court file or records. For closed files, the Chief Justice (or another judge or registrar nominated by the Chief Justice) can grant access.⁶⁷
- 11.59 Access to documents and transcripts relating to any proceedings before the Court will be granted in accordance with the relevant general practice note of the Court. As such, researchers might need to pay a fee for copies of transcripts or where the Court seeks to recover costs incurred in providing assistance.⁶⁸

Victoria

- 11.60 The County Court of Victoria Research Committee (“Research Committee”) considers applications for access to court information in the County Court for academic research.⁶⁹
- 11.61 The application process before the County Court involves applying to the Research Committee to obtain in principle support for the project, and to the Department of Justice’s Human Research Ethics Committee. Applications must include a detailed research proposal and methodology, including any proposed questionnaires. The Research Committee will consider, among other things, whether the research supports the Court’s aim in providing access to justice, will promote public trust and confidence in the judiciary, and will serve the public interest.⁷⁰

65. Federal Court of Australia, “Research Requests: Policy on Requests for Access to Court Data or Information for the Purposes of Research” (2016) <www.fedcourt.gov.au/services/research-requests> (retrieved 4 December 2020).

66. Federal Court of Australia, “Research Requests: Policy on Requests for Access to Court Data or Information for the Purposes of Research” (2016) <www.fedcourt.gov.au/services/research-requests> (retrieved 4 December 2020).

67. Federal Court of Australia, “Research Requests: Policy on Requests for Access to Court Data or Information for the Purposes of Research” (2016) <www.fedcourt.gov.au/services/research-requests> (retrieved 4 December 2020).

68. Federal Court of Australia, *Access to Documents and Transcripts Practice Note (GPN-ACCS)* (2016) [4.14].

69. County Court of Victoria, *Policy: Access to Court Records and Information* (2019) [46].

70. County Court of Victoria, *Research Requests Policy* (2020) [3]–[4], [13], [17].

England and Wales

- 11.62 In England and Wales, researcher access to court information is centrally governed by Her Majesty's Courts and Tribunals Service ("Service"). Researchers may request data, to interview staff or to access court files. The applicant must have funding, approval from a university's ethics committee and a sponsor at the relevant court or tribunal. A Data Access Panel will consider whether the research is feasible and will not disrupt the Services' activities.⁷¹
- 11.63 Data can be collected by examining case files, whether in person or by accessing the court electronic management systems. If the information is not publicly available, it will only be provided if details of every individual who will have access to the data collected and the case details are provided.⁷² Applicants must also set out what data they wish to access.⁷³
- 11.64 To access case files, a researcher must apply for a "Privileged Access Agreement".⁷⁴ The agreement may allow access, subject to various conditions.⁷⁵

New Zealand

- 11.65 Researchers seeking access to court records in New Zealand are generally subject to the same rules that apply to members of the public.⁷⁶ No special provision is expressly made for researchers.
- 11.66 The *Senior Courts (Access to Court Documents) Rules 2017* (NZ) ("*Senior Courts Rules*") govern access to information in the Supreme Court, Court of Appeal and the High Court. For civil and appeal cases, a person can access "the formal court record" as of right. In criminal cases, a person can access certain documents as a right, including permanent court records, a judge's sentencing notes and judgments or orders. Access

71. United Kingdom, HM Courts and Tribunals Service, "Guidance: Access to Courts and Tribunals for Academic Researchers" (19 June 2018) <www.gov.uk/guidance/access-to-courts-and-tribunals-for-academic-researchers> (retrieved 4 December 2020).

72. United Kingdom, HM Courts and Tribunals Service, "Guidance: Access to Courts and Tribunals for Academic Researchers" (19 June 2018) <www.gov.uk/guidance/access-to-courts-and-tribunals-for-academic-researchers> (retrieved 4 December 2020).

73. United Kingdom, Ministry of Justice and HM Courts and Tribunals Service, *Application Form for Secure Access to Data* (2020) 3.

74. United Kingdom, HM Courts and Tribunals Service, "Guidance: Access to Courts and Tribunals for Academic Researchers" (19 June 2018) <www.gov.uk/guidance/access-to-courts-and-tribunals-for-academic-researchers> (retrieved 4 December 2020).

75. United Kingdom, Ministry of Justice and HM Courts and Tribunals Service, *Data Sharing Guidance for Researchers Seeking Permission for Secure Access to Data* (2020) 18–19.

76. New Zealand, Ministry of Justice, Judicial Research Committee Guidelines, *Judicial Participation in Research Projects* (2016) 3.

to other documents in criminal cases, such as pre-trial judgments and electronically recorded documents of interview with a defendant, requires the court's permission.⁷⁷

- 11.67 Where a person is not entitled to access a document under the *Senior Courts Rules*, they may make a written request for access, which sets out matters including details of the document and the reasons for access. Parties can object to the application. When determining an access request, the judge must consider matters including the principle of open justice and the encouragement of fair and accurate comment on court hearings and decisions.⁷⁸
- 11.68 Researchers are encouraged to contact the Ministry of Justice for assistance in making access applications to the court.⁷⁹
- 11.69 A separate process applies where researchers seek the involvement of members of the judiciary in a research project. The Judicial Research Committee considers requests by researchers for judicial involvement of the Supreme Court, Court of Appeal, High Court and District Court (which includes the Family and Youth Courts).⁸⁰
- 11.70 In 2006, the New Zealand Law Commission recommended “a single entry point for all requests for access to court records by researchers” and that the criteria for granting access “be fully articulated and published”. It also recommended that a committee be set up by the Ministry of Justice to consider research proposals and to have the final say on granting access and imposing any conditions.⁸¹
- 11.71 The *Senior Courts Act 2016* (NZ) permits the Ministry of Justice to allow a person access to “case-level information” combined with police, corrections and other government agency data “to support ... research”.⁸² However, the recommendation for the Ministry of Justice to serve as a single entry point for researcher requests for access to court information does not appear to have been implemented.

Question 11.1: Researcher access to information

- (1) What changes, if any, should be made to the existing arrangements for providing researchers with access to court information?
- (2) In particular, what changes, if any, should be made in relation to:

77. *Senior Courts (Access to Court Documents) Rules 2017* (NZ) r 8(1), r 8(3)–(5).

78. *Senior Courts (Access to Court Documents) Rules 2017* (NZ) r 11(1)–(2), r 11(5), r 12.

79. New Zealand, Ministry of Justice, Judicial Research Committee Guidelines, *Judicial Participation in Research Projects* (2016) 3.

80. New Zealand, Ministry of Justice, Judicial Research Committee Guidelines, *Judicial Participation in Research Projects* (2016) 1.

81. New Zealand Law Commission, *Access to Court Records*, Report 93 (2006) [8.40]–[8.41] rec 27–28.

82. *Senior Courts Act 2016* (NZ) s 173(3), sch 2 pt B item 2.

- (a) a centralised scheme for giving researchers access to court information, including a research committee
- (b) the kinds of researchers who should be able to access court information
- (c) the kinds of research that court information should be available for
- (d) the other considerations that may be relevant to granting a researcher access to court information
- (e) the type of court information researchers should be able to access
- (f) the types of conditions that should be placed on researchers who are given access to court information
- (g) applicable fees and arrangements for fee waiver
- (h) access to archived court records, and
- (i) requests to collate data and/or statistics?

12. Digital technology and open justice

In Brief

In this Chapter, we explore the impact of digital innovation on open justice. We consider the challenges it brings to the task of identifying and enforcing compliance with prohibitions on publication and broadcast of court information. We also discuss its impact on accessing court information and proceedings.

Online courts	264
Virtual courtrooms.....	264
Recording and broadcasting their own proceedings.....	267
Electronic access to court information	269
Electronic access regimes in other jurisdictions.....	271
Advantages and disadvantages of electronic access to court information.....	272
Suppression and non-publication orders in the digital environment	274
The Pell case.....	274
The difficulties of enforcing breaches outside Australia.....	275
Options to prevent or remedy offending content being available overseas.....	276
Limit access to offending content published overseas.....	276
Take down notices.....	276
Diplomacy or international cooperation.....	278
Judge alone trials, permanent stays and the “fade factor”.....	278
Tweeting and posting in court	279

- 12.1 Technology brings opportunities for, but significant challenges to, open justice. Digital innovation can transform engagement with the justice system and offers opportunities to improve access to court information. With internet access we can search court files, peruse court lists, read important judgments and watch court proceedings live. Court information is instantly delivered on social media and via email.
- 12.2 News reports about court proceedings can be published simultaneously and shared throughout the world in one tweet. Social media, blogs and discussion forums reach millions seamlessly and instantly. The ease of information sharing brings challenges in controlling what the public knows and sees of court proceedings. Measures intended to protect the fairness of a trial may have little or no effect.

- 12.3 Digitising court information provides opportunities for efficient and cheap access. But this is not always delivered, with reliance still placed on physical attendance at registry offices to access or obtain copies of court information. Concerns over security of digital material can make registries apprehensive about sending files via email. Access to virtual courtrooms is often limited. People also have technological limits, so means of access is not equal.
- 12.4 In this Chapter, we consider how digital technology affects open justice. We focus on four key issues: the use of online courts or “virtual courtrooms”, opportunities to facilitate electronic access to court information, how effective suppression and non-publication orders are in the digital age, and some controversies surrounding digital technology use in courtrooms.

Online courts

Virtual courtrooms

- 12.5 Virtual courtrooms, a digital method of conducting proceedings without in-person attendance at court, have been a feature of the NSW justice system for some time. Committal proceedings can be conducted virtually in certain circumstances.¹
- 12.6 Courts are also used to witnesses giving evidence in remote locations through audio visual link (“AVL”).² It is not unusual for participants to appear by phone or audio-visual technology in virtual meeting rooms. The technologies used vary but include Microsoft Teams, Zoom, Cisco Webex and Skype.
- 12.7 The COVID-19 pandemic has increased the use of virtual courtrooms, at least in the short term. Public health legislation, passed at the start of the pandemic, amended:
- the *Court Security Act 2005* (NSW) (“*Court Security Act*”), to allow court security officers to conduct health checks and refuse a person entry to, or require them to leave, court premises if they show or report signs of COVID-19³
 - the *Evidence (Audio and Audio Visual Links) Act 1998* (NSW), to enable increased use of AVL in court proceedings,⁴ and

1. *Criminal Procedure Act 1986* (NSW) s 57(3).

2. See, eg, *Evidence (Audio and Audio Visual Links) Act 1998* (NSW) s 5B, s 5BB, s 7.

3. See *Court Security Act 2005* (NSW) pt 3 div 1A, inserted by *COVID-19 Legislation Amendment (Emergency Measures—Attorney General) Act 2020* (NSW) sch 1 [1.1].

4. See *Evidence (Audio and Audio Visual Links) Act 1998* (NSW) s 22C, inserted by *COVID-19 Legislation Amendment (Emergency Measures) Act 2020* (NSW) sch 2 [2.9]; NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 24 March 2020, 5.

- the *Criminal Procedure Act 1986* (NSW) (“*Criminal Procedure Act*”), to enable the use of pre-recorded evidence in certain circumstances and facilitate more judge alone trials.⁵
- 12.8 The effect was to require many courts to significantly reduce physical attendance at court premises.
- 12.9 Courts elsewhere in Australia have also adopted virtual courtrooms during the pandemic. For example, the County Court of Victoria (“County Court”) uses *Cisco Webex* for criminal proceedings and *Zoom* for most civil matters.⁶
- 12.10 The way in which people can access a virtual courtroom varies from court to court. While access links are usually provided to parties, the situation for non-parties is different. Non-parties interested in watching proceedings may need to request access details from the court.⁷ The Federal Court of Australia (“Federal Court”) sometimes publishes links to high-profile cases on daily lists.⁸ In the Victorian County Court, judges may allow non-parties to observe the hearing via *Webex*. Access by non-parties appears to be limited to family members, support persons of an accused person or complainant and accredited media representatives.⁹ The publicly available information is silent on general public access.
- 12.11 Recent technological developments have significantly improved the quality of the virtual courtroom experience. Earlier this year, the Land Court of Queensland conducted a six day hearing entirely by videoconferencing and using an electronic document database, in which there were 450 exhibits and up to 14 participants at times. The hearing proceeded as scheduled and without any delays.¹⁰ Justice Button of the NSW Supreme Court recently observed that “30 years ago AVL assessments were unsatisfactory

5. See *Criminal Procedure Act 1986* (NSW) ch 7 pt 5 inserted by *COVID-19 Legislation Amendment (Emergency Measures) Act 2020* (NSW) sch 1[1]; NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 24 March 2020, 5.

6. County Court of Victoria, “Virtual Hearings and Trials” (1 December 2020) <www.countycourt.vic.gov.au/going-court/virtual-hearings-and-trials> (retrieved 7 December 2020).

7. Sydney Morning Herald, *Preliminary Consultation PCI06*; NSW Civil and Administrative Tribunal, *Preliminary Consultation PCI13*.

8. See, eg, Federal Court of Australia, “Public Interest Cases (Online Files)” <www.fedcourt.gov.au/services/access-to-files-and-transcripts/online-files> (retrieved 9 December 2020).

9. County Court of Victoria, *Criminal Division Hearings: Webex Information Guide* (September 2020) [3.2], [3.5], [4.3].

10. Land Court of Queensland, *Annual Report 2019–20*, 12–13. See also *Pembroke Olive Downs Pty Ltd v Sunland Cattle Co Pty Ltd* [2020] QLC 27 [6].

simply because of the sheer poor quality of the sound and vision. But I think one has to accept that that has changed”.¹¹

- 12.12 Court and registry staff we spoke to acknowledged the efficiencies associated with the virtual courtroom, with some indicating they would continue some of the arrangements post-pandemic. However, they were also aware of downsides to moving online.¹²
- 12.13 The transition to virtual courtrooms requires a level of technology and resources that many courts and tribunals do not have. There is also a more fundamental question of whether virtual courtrooms are fair to participants in all types of cases. Routine procedural mentions, case management or applications fought solely on legal submissions without witnesses may be suited to the virtual courtroom; however, complex matters or matters where sensitive evidence is being given may not be.¹³
- 12.14 Even in civil matters, courts have expressed reservations. In a respondent application opposing a “virtual trial” in a civil dispute, Justice Perram of the Federal Court observed:
- Under ordinary circumstances, I would not remotely contemplate imposing such an unsatisfactory mode of a trial [a virtual trial] on a party against its will. But these are not ordinary circumstances and we have entered a period in which much that is around us is and is going to continue to be unsatisfactory. I think we must try our best to make this trial work. If it becomes unworkable then it can be adjourned, but we must at least try.¹⁴
- 12.15 Virtual courtrooms can also mean that many court operations are conducted out of the spotlight. Members of the public who do not have the technology to access virtual courtrooms lose the opportunity to observe proceedings altogether. It is also possible that without the physical courtroom to walk into, people who might otherwise attend proceedings will not do so online.
- 12.16 Courts and tribunals also lose some control over what observers do in a virtual courtroom. In consultations, we heard concerns that proceedings could be recorded.¹⁵ Examples were given of users recording virtual courtroom footage on their phone.¹⁶ The

11. *R v Ryan (No 2)* [2020] NSWSC 1420 [10].

12. Federal Court of Australia, *Preliminary Consultation PCI05*; Local Court of NSW, *Preliminary Consultation PCI12*; NSW Civil and Administrative Tribunal, *Preliminary Consultation PCI13*.

13. Local Court of NSW, *Preliminary Consultation PCI12*.

14. *Capic v Ford Motor Company of Australia Ltd* [2020] FCA 486 [25].

15. Federal Court of Australia, *Preliminary Consultation PCI05*; Local Court of NSW, *Preliminary Consultation PCI12*.

16. Federal Court of Australia, *Preliminary Consultation PCI05*.

risk of users recording proceedings is of particular concern in the Local Court, as sexual assault and domestic violence matters form a significant portion of its work.¹⁷

- 12.17 On the other hand, some noted that judicial officers have more control over who is “present”.¹⁸ Knowing attendees’ identities could, however, give rise to privacy concerns. The media recently published details of attendees at a virtual hearing in a high profile defamation case.¹⁹
- 12.18 In many virtual courtrooms or livestreams, users accept conditions of use, often including that the footage will not be recorded or broadcast.²⁰ There are also offences prohibiting the use of recording devices in court.²¹ Whether these apply to virtual courts is unclear.²² In any event, the threat of punishment for violations may not be enough to prevent serious damage being done to participants or the fairness of a trial, through broadcasting proceedings.
- 12.19 Journalists we consulted with noted generally positive experiences of virtual courtrooms, although some said that access requirements were not always practical (for example, the court needing 24 hours’ notice before providing a link to a virtual courtroom).²³ One noted that whether access would be granted at all sometimes depended on the judge or the type of matter.²⁴

Recording and broadcasting their own proceedings

- 12.20 Some courts in Australia have recently begun to make recordings of certain proceedings available to the public. This may reduce the risk of users exploiting access to virtual courtrooms, especially in high profile cases. For example, the High Court of Australia publishes recent audio-visual recordings of its full court hearings in Canberra.²⁵ In June 2017, the Supreme Court of Victoria (which includes the Court of

17. Local Court of NSW, *Preliminary Consultation PCI12*.

18. NSW Civil and Administrative Tribunal, *Preliminary Consultation PCI13*.

19. S Hutchinson and S Brook, “Defamation Case Draws a Crowd of Virtual Observers”, *Sydney Morning Herald* (9 December 2020) 4.

20. See, eg, Independent Commission Against Corruption, “Live Streaming of Public Inquiries” (2019) <www.icac.nsw.gov.au/investigations/live-streaming-of-public-inquiries> (retrieved 9 December 2020).

21. *Court Security Act 2005* (NSW) s 9(1), s 9A(1), s 9B(1).

22. See, eg, *Court Security Act 2005* (NSW) s 4 definition of “court premises”.

23. *Sydney Morning Herald*, *Preliminary Consultation PCI06*; 9News, *Preliminary Consultation PCI09*.

24. *Sydney Morning Herald*, *Preliminary Consultation PCI07*.

25. High Court of Australia, “Recent AV Recordings: Audio-Visual Recordings of Full Court Hearings Heard in Canberra” (2020) <www.hcourt.gov.au/cases/recent-av-recordings> (retrieved 7 December 2020).

Appeal) commenced a pilot program making recordings of certain hearings available through a portal that the media can access.²⁶

- 12.21 In exceptional cases, some courts in Australia have broadcast proceedings live (often with some delay) due to the public interest in a case.²⁷ The Federal Court was the first court in Australia to do so, in 1999.²⁸
- 12.22 In NSW, in only the most exceptional of cases are proceedings broadcast live or recordings made available to the public, other than by purchase in the form of a transcript. There have been occasions where the Supreme Court has published recordings of judgments in cases of intense public interest or urgency,²⁹ such as the recent ruling on the lawfulness of protests related to the Black Lives Matter movement. This was livestreamed on *YouTube*.³⁰
- 12.23 The NSW Supreme Court adopts a particularly open approach to representative proceedings, also known as class actions.³¹ In addition to publishing on its website statements of claim, defences, replies and cross-claims, orders, judgments, notices and questionnaires, the Court may livestream a selection of proceedings.³²
- 12.24 Since 2013, the Victorian Supreme Court often livestreams audio or audio-visual footage of sentencing proceedings as well as judgments in matters that have attracted significant public interest. These are also made available on its website. The reasons for doing so include “[t]o assist media who are unable to personally attend judicial proceedings to fairly and accurately report on those proceedings” and “[t]o allow schools, universities and legal training bodies to show judicial proceedings for educational purposes”.³³

26. Supreme Court of Victoria, “Court of Appeal Proceedings” (2020) <www.supremecourt.vic.gov.au/case-summaries/court-of-appeal-proceedings> (retrieved 9 December 2020).

27. See, eg, the hearing in *Pell v R* [2019] VSCA 186, 5 June 2019.

28. *Australian Olympic Committee Inc v Big Fights Inc* [1999] FCA 1042.

29. See, eg, YouTube, “Judgment: Queensland Floods Class Action” (29 November 2019) <www.youtube.com/watch?v=YJXVTEg7TT4> (retrieved 9 December 2020).

30. M Pelly, “Black Lives Matter hearing a supreme hit on YouTube” *Financial Review* (online 12 June 2020) <www.afr.com/companies/professional-services/black-lives-matter-hearing-a-supreme-hit-on-youtube-20200609-p550yu> (retrieved 11 December 2020).

31. See *Civil Procedure Act 2005* (NSW) pt 10.

32. See, eg, Supreme Court of NSW, “Dick Smith Holdings Class Actions” (25 November 2020) <www.supremecourt.justice.nsw.gov.au/Pages/sco2_classaction/Dick-Smith-Holdings-Class-Actions.aspx> (retrieved 7 December 2020).

33. Supreme Court of Victoria, “Court of Appeal Proceedings” (2020) <www.supremecourt.vic.gov.au/case-summaries/court-of-appeal-proceedings> (retrieved 7 December 2020).

- 12.25 Since 1 June 2017, the Victorian Supreme Court has also trialled the webcasting of a selection of its hearings. While the pilot was for an initial period of six months, it was extended. Recordings of proceedings were typically made available “a few business days after the hearing” to allow any editing or to avoid the publication of information that should not be published.³⁴ The Court continues to publish certain recordings of sentencing judgments, and appeal hearings and judgments on its website.³⁵

Question 12.1: Online courts

If virtual courtrooms are to be available, what provision, if any, should be made to ensure that:

- (a) open justice principles are given effect to, where possible, and
- (b) risks of prohibited disclosure or publication are managed effectively?

Electronic access to court information

- 12.26 Electronic access to court information and documents is commonplace for parties to proceedings. In many cases, parties can file originating documents, applications, notices, submissions and exhibits online through the NSW Online Registry. Most forms under the *Uniform Civil Procedure Rules 2005* (NSW) can be filed online. Subpoenas can be issued online, and documents produced in response can be accessed by parties through a portal. Courts upload sealed copies of documents, publish judgments and list future hearings for parties to view and download.
- 12.27 NSW Online Registry also allows parties access to all forms and documents that have been filed; contents of documents; a list of judgments and orders that can be requested; details of proceedings; listing details and a list of subpoenaed items, exhibits and other items in evidence.³⁶
- 12.28 Court information for the media and general public on digital platforms administered by NSW courts and tribunals is less available. As we discuss in Chapter 10, media access

34. Supreme Court of Victoria, “Notice to the Profession: Pilot Streaming of Proceedings” (April 2017) <www.supremecourt.vic.gov.au/law-and-practice/practice-notes/notice-to-the-profession-pilot-streaming-of-proceedings-0> (retrieved 9 December 2020).

35. See Supreme Court of Victoria, “Webcasts and Podcasts” (2020) <www.supremecourt.vic.gov.au/about-the-court/webcasts-and-podcasts> (retrieved 7 December 2020).

36. NSW Online Registry: Courts and Tribunals, “Legal Professionals: What you can do in the Online Registry” *Lawlink NSW* <www.onlineregistry.lawlink.nsw.gov.au/content/legal-professionals> (retrieved 11 December 2020).

to documents in criminal proceedings under the *Criminal Procedure Act* requires in-person attendance to “inspect” hard copies of documents.³⁷

- 12.29 In consultations, some media representatives noted changes during the COVID-19 pandemic in accessing court information digitally. For example, some court documents in the Local Court were sent to media applicants by email. However, this approach is not so common now, since social distancing restrictions have been eased.³⁸ It was noted that the Federal Court may email documents rather than requiring physical attendance, and the Supreme Court may provide copies of facts in criminal cases by email.³⁹
- 12.30 One submission supports electronic access to court information. It argues that, because court documents are created, filed and managed electronically, it is difficult to justify limiting the method of accessing court documents to a physical inspection. It also says “[t]echnological solutions exist to provide electronic access ... without comprising the security of the court file”.⁴⁰
- 12.31 The Office of the Director of Public Prosecutions (“ODPP”) notes certain examples where information about proceedings was readily available to the public, largely owing to the public’s interest in the matters. It notes the Lindt Cafe Siege Inquest, the Folbigg Inquiry and the Royal Commission into Institutional Child Sexual Abuse used “web sites and new media” to provide “a lot of information in real time”. However, the ODPP also notes these inquiries were resourced to provide information in this way, dealt with specific subject matters, and were conducted in one courtroom. It would be difficult “to replicate this kind of service in busy courts”.⁴¹
- 12.32 In consultations, we heard some concerns about digitising court information for media and public consumption. In addition to the limitations to inspecting documents in criminal proceedings, control of digital information is lost if the files can be downloaded. Other concerns about digitising all material filed by parties in proceedings included data limits and cyber security.⁴²

37. *Criminal Procedure Act 1986* (NSW) s 314(1); [10.15]–[10.16].

38. Sydney Morning Herald, *Preliminary Consultation PCI06*.

39. Sydney Morning Herald, *Preliminary Consultation PCI06*; 9News, *Preliminary Consultation PCI09*.

40. J Johnston, P Keyzer, A Wallace, and M Pearson, *Preliminary Submission PCI26*, 9.

41. NSW, Office of the Director of Public Prosecutions, *Preliminary Submission PCI12*, 11.

42. NSW Civil and Administrative Tribunal, *Preliminary Consultation PCI13*.

Electronic access regimes in other jurisdictions

- 12.33 Several jurisdictions within Australia and overseas now provide some level of electronic access to court information.⁴³
- 12.34 For example, a person can search for certain information about cases initiated in the Federal Court and Federal Circuit Court, through “Federal Law Search” on the Commonwealth Courts Portal (“CCP”). They do not need to register, and can find out information such as:
- the name of each participant in a case
 - the file number
 - the date the case commenced
 - the type of each document filed in the case and the date it was filed
 - past and future hearing dates
 - the current status of the case, and
 - where available, the text of orders made.⁴⁴
- 12.35 The contents of a filed document are not publicly available on CCP. A non-party must still attend the relevant registry and pay the prescribed fee to inspect a document. Access to certain documents also requires leave of the court. Case information or documents subject to a suppression order will not be displayed in CCP.⁴⁵
- 12.36 The Victorian County Court provides a free, online case information search tool called “Court Connect”. It can be accessed via the court website, and via computers available in the court registry in Melbourne.⁴⁶

43. See, eg, High Court of Australia, “Digital Lodgment System Information” <www.hcourt.gov.au/digital-lodgment-system/information> (retrieved 3 December 2020); United States Courts, “What can we Help you Accomplish?” *PACER: Public Access to Court Electronic Records* <pacer.uscourts.gov/> (retrieved 3 December 2020).

44. Federal Court of Australia, *Access to Documents and Transcripts Practice Note (GPN-ACCS)* (2016) [3.3]; Australia, “Disclaimer”, *Commonwealth Courts Portal* <www.comcourts.gov.au/public/eseach/disclaimer> (retrieved 3 December 2020).

45. Australia, “Disclaimer”, *Commonwealth Courts Portal* <www.comcourts.gov.au/public/eseach/disclaimer> (retrieved 3 December 2020).

46. County Court of Victoria, *Policy: Access to Court Records and Information* (2019) [14]; County Court of Victoria, “Court Connect” (3 April 2019) <www.countycourt.vic.gov.au/case-information/court-connect> (retrieved 3 December 2020).

- 12.37 Court Connect allows users to search for information about cases currently before the court, as well as past cases. For cases in the Commercial and Common Law Division, users can search for information such as case numbers, party names, documents filed and future hearing dates. For cases in the Criminal Division, users can search for the names of accused persons, indictment numbers, and information about upcoming hearings.⁴⁷
- 12.38 Where the court has made a suppression order, the case details generally will not appear in Court Connect.⁴⁸
- 12.39 In the United States (“US”), court information about federal cases can be searched and accessed by the public using the Public Access to Court Electronic Records (or PACER) system. Access includes court opinions and other case documents. However, fees (US\$0.10 per page) are often payable to access certain documents, which has been criticised and subject to litigation.⁴⁹

Advantages and disadvantages of electronic access to court information

- 12.40 Electronic access to court information could enhance access to justice and promote public understanding of the judicial process.⁵⁰ Members of the public could become better informed about the workings of the court through their own searches.⁵¹ It could also improve the accuracy of media reports.⁵²
- 12.41 Such access could also make searching easier, cheaper and more convenient. A person who wishes to search a document would no longer have to attend the court registry in person, during office hours, and know in advance the documents they wish to inspect. Some commentators observe that “[t]he inconvenience, time and expense involved in physically attending a court registry has acted as a disincentive to all but the most persistent searchers”.⁵³

47. County Court of Victoria, *Policy: Access to Court Records and Information* (2019) [15]–[17].

48. County Court of Victoria, *Policy: Access to Court Records and Information* (2019) [18].

49. See, eg, J Schwartz, “An Effort to Upgrade a Court Archive System to Free and Easy” *New York Times* (online, 12 February 2009) <www.nytimes.com/2009/02/13/us/13records.html> (retrieved 25 November 2020).

50. J Bellis, “Public Access to Court Records in Australia: An International Comparative Perspective and some Proposals for Reform” (2010) 19 *Journal of Judicial Administration* 197.

51. D A Butler and others, *Australian Media Law* (Thomson Reuters, 5th ed, 2015) [5.710].

52. J Bellis, “Public Access to Court Records in Australia: An International Comparative Perspective and some Proposals for Reform” (2010) 19 *Journal of Judicial Administration* 197, 229.

53. D A Butler and others, *Australian Media Law* (Thomson Reuters, 5th ed, 2015) [5.710].

- 12.42 A key disadvantage of electronic public access is the increased risk to privacy and security interests,⁵⁴ and the possibility that personal information will be used improperly or criminally.⁵⁵ However, there may be some ways to mitigate these risks. These include:
- Permitting electronic access to certain court documents (such as judgments and orders) and restricting access to other types of documents (such as affidavits). The CCP takes this approach.⁵⁶
 - Permitting electronic access to documents in certain types of cases, but not others. For example, matters relating to protection visas and child support are currently unavailable on CCP.⁵⁷
 - Parties, or their legal representatives, redacting personal information from an electronic version of the court document that can be made public.⁵⁸
 - Limiting electronic access to some categories of user (such as the media).⁵⁹
- 12.43 We note the substantial capital cost of developing a new case management system to allow public electronic searches. The cost could be offset to some extent by charging users a search fee. There may also be some savings for users, who would be able to obtain documents online instead of paying more for hard copies.⁶⁰

Question 12.2: Electronic access to court information

- (1) What arrangements, if any, should be made for electronic access to court information?
- (2) In particular, what should the arrangements be in relation to:
 - (a) the type of information that can be accessed
 - (b) who can access the information, and
 - (c) any necessary protections against unauthorised disclosure or publication of such information?

54. J Bellis, "Public Access to Court Records in Australia: An International Comparative Perspective and some Proposals for Reform" (2010) 19 *Journal of Judicial Administration* 197, 199.

55. D A Butler and others, *Australian Media Law* (Thomson Reuters, 5th ed, 2015) [5.20].

56. Federal Court of Australia, *Preliminary Consultation PCI05*.

57. Federal Court of Australia, *Preliminary Consultation PCI05*.

58. New Zealand Law Commission, *Access to Court Records*, Report 93 (2006) [6.64].

59. J Bellis, "Public Access to Court Records in Australia: An International Comparative Perspective and some Proposals for Reform" (2010) 19 *Journal of Judicial Administration* 197, 230.

60. NSW, Attorney General's Department, *Review of the Policy on Access to Court Information* (2006) 49.

Suppression and non-publication orders in the digital environment

- 12.44 As we note in Chapter 10, consumption of news in Australia is changing.⁶¹ As more people access news and other information online, controlling content available to them is increasingly difficult.
- 12.45 Controlling access to court information is not about censorship. Rather, it is about ensuring a fair trial, avoiding miscarriages of justice, preserving the safety of witnesses and protecting confidential information. It is for these reasons that controlling what is published is a crucial responsibility of the justice system.
- 12.46 The digital environment has made the task increasingly difficult. The Supreme Court has observed that “unlike radio broadcasts or even the distribution of newspapers, there is no geographical limit to material available on the internet”.⁶²
- 12.47 A number of recent high profile cases call into question the effectiveness of statutory and court-ordered restrictions and prohibitions on publishing and broadcasting court information in NSW. However, some submissions argue that courts should not abandon efforts to limit the spread of information.⁶³

The Pell case

- 12.48 The *Pell* case raises the question of how effective suppression and non-publication orders are if an order made by a state court can be disregarded by international media.⁶⁴
- 12.49 In this case, an order from the County Court suppressed publication of information about a trial in which Cardinal George Pell was the defendant, until after a second trial which was to involve Cardinal Pell had ended. The judge making the order conceded that, given Cardinal Pell’s high status in the Roman Catholic church and the consequential interest in the case, “international exposure has the capacity to undermine, to some degree, the efficacy of any order that I make”. The judge also acknowledged that courts “can only do so much” to protect the fairness of a trial.

61. See [10.137].

62. *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125, 83 NSWLR 52 [74].

63. NSW Council for Civil Liberties, *Preliminary Submission PCI29*, 6–7; Law Society of NSW, *Preliminary Submission PCI31*, 4; NSW, Public Defenders, *Preliminary Submission PCI33*, 12.

64. See, eg, J Bosland and M Douglas, “We Knew George Pell was Guilty of Child Sex Abuse. Why couldn’t we say it until now?” *The Conversation* (online, 26 February 2019) <www.findanexpert.unimelb.edu.au/news/3115-we-knew-george-pell-was-guilty-of-child-sex-abuse.-why-couldn%27t-we-say-it-until-now%3F> (retrieved 7 December 2020); F Kunc, “Victorian Suppression Orders and the International Media” (2019) 93 *Australian Law Journal* 79, 80.

Nevertheless, after weighing up the likely interest from international media, the judge concluded it did not mean the order was unnecessary.⁶⁵

- 12.50 International media including *The Washington Post* and *The Daily Beast* reported Cardinal Pell's convictions following the first trial, in breach of the suppression order. These reports were shared on social media and other digital platforms, including *Twitter, Facebook, Reddit, Wikipedia* and *Google*,⁶⁶ which meant information about the case could be accessed within Australia.⁶⁷
- 12.51 The *Pell* case is not isolated. In another Victorian case, Wikileaks' publication of the details of the suppression order was so widely circulated by Australian and overseas media that it meant the orders were ineffective.⁶⁸

The difficulties of enforcing breaches outside Australia

- 12.52 As we discuss in Chapter 5, NSW laws generally cannot be enforced against people who are outside Australia.⁶⁹ Where material is published online by an international entity, in breach of a suppression or non-publication order, there may not be an Australian distributor or representative to hold liable.⁷⁰ While Australia can assert that its laws apply overseas and attempt to enforce them,⁷¹ their extra-territorial reach is complex and controversial.⁷²
- 12.53 Publication on the internet is no longer the reserved domain of journalism; a fact noted in many submissions.⁷³ The ODPP notes that online platforms that allow for comment have "greatly expanded the potential for prejudicial pretrial publication" and have "made controlling the content of publications harder to achieve".⁷⁴
- 12.54 One commentator observes that "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

65. *DPP (Vic) v Pell* [2018] VCC 905 [59].

66. M Dobbie, *The War on Journalism: The MEAA Report into the State of Press Freedom in Australia in 2020* (2020) 56.

67. University of Sydney, Policy Reform Project, *Preliminary Submission PCI11* [7.3].

68. *DPP (Cth) v Brady* [2015] VSC 246 [77]–[79].

69. See [5.75].

70. Victorian Law Reform Commission, *Contempt of Court*, Consultation Paper (2019) [10.75]–[10.76].

71. See, eg, Victorian Law Reform Commission, *Contempt of Court*, Consultation Paper (2019) [10.78]–[10.79].

72. See generally D Ireland-Piper, "Extraterritorial Criminal Jurisdiction: Does the Long Arm of the Law Undermine the Rule of Law?" (2012) 13 *Melbourne Journal of International Law* 122.

73. See, eg, University of Sydney, Policy Reform Project, *Preliminary Submission PCI11* [3.1], [5.1]; NSW, Office of the Director of Public Prosecutions, *Preliminary Submission PCI12*, 9.

74. NSW, Office of the Director of Public Prosecutions, *Preliminary Submission PCI12*, 9.

the jury system”.⁷⁵ Another potential consequence of suppressing mainstream publishers’ material is that articles from “less responsible outlets” could be given more prominence.⁷⁶

Options to prevent or remedy offending content being available overseas

- 12.55 There are some options to prevent or remedy offending content made available online outside Australia. We consider measures that courts can take to ensure juries remain impartial in criminal trials in the digital environment in Chapter 13.⁷⁷

Limit access to offending content published overseas

- 12.56 Any device a person uses to access the Internet is assigned a numerical label known as an Internet Protocol (“IP”) address. IP addresses can be used to determine where the person accessing the website is physically located. One submission notes that, within 24 hours of his conviction, around half of the visitors to online articles in the US about the *Pell* case were based in Australia.⁷⁸
- 12.57 One option is to ask overseas media organisations, publishers and internet content hosts to restrict access to certain content to IP addresses located in Australia as a way to prevent access to the offending material. Such geo-blocking (frequently done, for example, by subscription services that post on *YouTube*) would require the cooperation of the overseas organisations.
- 12.58 Another limitation of this approach is the existence of widely available technologies that can be used to circumvent geo-location, such as Virtual Private Networks (“VPNs”). Any attempt by overseas publishers or website hosts to block Australian-based users based on IP addresses could be circumvented by individuals using VPNs.⁷⁹ By using a VPN, an internet user can appear as though they are located in a different jurisdiction to Australia.

Take down notices

- 12.59 As we discuss in Chapter 5, courts, justice and prosecuting authorities regularly contact publishers within Australia and ask them to remove published material that breaches a court order or other prohibition.⁸⁰ Social media and other platforms overseas similarly could be monitored for offending content and requests made for that content to be

75. R Ackland, “Legal Frictions: The Law has Failed to Keep Pace with Modern Journalism and Risks Becoming a Drag on Democracy” *The Walkley Magazine* (online, 24 July 2018) <medium.com/the-walkley-magazine/legal-frictions-96ee2b03b983> (retrieved 7 December 2020).

76. *News Digital Media Pty Ltd v Mokbel* [2010] VSCA 51, 30 VR 248 [86].

77. See [13.35]–[13.74].

78. University of Sydney, Policy Reform Project, *Preliminary Submission PCI11* [4.2].

79. University of Sydney, Policy Reform Project, *Preliminary Submission PCI11* [4.2].

80. See [5.57].

removed.⁸¹ As one submission notes, Commonwealth laws that may hold “internet content hosts” liable for content posted on their sites require, at the very least, that hosts to be made aware that there is offending content on their site.⁸²

- 12.60 Some other submissions note that the effectiveness of take down orders varies, and often depends on the cooperation and goodwill of internet content hosts located outside Australia.⁸³
- 12.61 There are also serious practical limitations. Courts risk overreaching by imposing requirements on overseas hosts to remove content. For example, Twitter declined to appear in proceedings brought against it in the NSW Supreme Court after confidential information and threats against the plaintiff were published in tweets. While Twitter said it was prepared to investigate reports of offending material brought to its attention, the scope of the orders that sought to compel it to monitor content and ban users from its services went too far.⁸⁴
- 12.62 The ODPP also points to the resource implications in asking overseas publishers and content hosts to take offending material down. They note it is an “increasingly ... onerous task that falls outside what might be traditionally considered the role of a prosecuting agency”. In one case, the ODPP wrote complex letters to a number of publishers both in Australia and overseas detailing what needed to be amended and why.⁸⁵ While court registries could play a role in this process, they are likely to face similar resourcing issues.
- 12.63 Information published on the internet might also remain accessible in cached form. In other words, even if an article is taken down, the information can be accessed by retrieving previous versions of the website on which it originally appeared. Courts in several cases have alluded to this problem.⁸⁶ In relation to the effectiveness of orders generally, Justice Basten said:

As a matter of principle, to make the order effective, [offending] material must either be removed from any web site globally to which access can be had from New South Wales or there must be an ability to prevent access by

81. University of Sydney, Policy Reform Project, *Preliminary Submission PCI11* [6.1].

82. University of Sydney, Policy Reform Project, *Preliminary Submission PCI11* [5.3]. See *Broadcasting Services Act 1992* (Cth) sch 5 cl 91(1)(a), cl 91(1)(c).

83. Office of the General Counsel, Department of Justice, *Preliminary Submission PCI15*, 3; Law Society of NSW, *Preliminary Submission PCI31*, 4.

84. *X v Twitter Inc* [2017] NSWSC 1300, 95 NSWLR 301 [25]–[27].

85. NSW, Office of the Director of Public Prosecutions, *Preliminary Submission PCI12*, 10.

86. See, eg, *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125, 83 NSWLR 52 [78]; *R v Qaumi (No 16)* [2016] NSWSC 319 [33].

people living in New South Wales ... [E]ither of these was [not] a realistic possibility.⁸⁷

- 12.64 Whether an order fails the “necessity” test in the *CSNPO Act*,⁸⁸ or under the common law, because the order would be futile in preventing continued publication of offending information, depends on each case. Courts consider a range of factors, including how easily the information can be found, how recent any coverage is, and prospects of enforcement against parties not based in NSW. For example, an order may be considered futile where the information appears in search results.⁸⁹

Diplomacy or international cooperation

- 12.65 Submissions also note the possibility of international cooperation for mutual recognition and enforcement of suppression and non-publication orders. Law ministers from Commonwealth countries have canvassed the idea of an international system of mutual recognition of enforcement of suppression and non-publication orders.⁹⁰ This could improve the effectiveness of orders and the increased removal of offending content from the internet. Establishing and administering this system would be a substantial undertaking with significant logistical complexities.⁹¹

Judge alone trials, permanent stays and the “fade factor”

- 12.66 Further options include judge alone trials,⁹² which we discuss further in Chapter 13,⁹³ and permanently staying proceedings. The latter lies at the “extreme end of the remedial spectrum”,⁹⁴ and requires a very high threshold to be met.⁹⁵
- 12.67 Australian courts may rely on what some commentators refer to as the “fade factor”. A judge may relocate a trial venue or delay its commencement, so that time diminishes the availability of online information that may compromise the fairness of a trial. Such an approach also increases costs and produces undesirable delays in the administration of justice.

87. *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125, 83 NSWLR 52 [79].

88. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 8(1).

89. *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125, 83 NSWLR 52 [76]–[78].

90. Meeting of Commonwealth Law Ministers and Senior Officials, “Outcome Statement” (Colombo, Sri Lanka, 4–7 November 2019) [20]–[21].

91. Victorian Law Reform Commission, *Contempt of Court*, Consultation Paper (2019) [10.86].

92. See, eg, University of Sydney, Policy Reform Project, *Preliminary Submission PCI11* [9.5].

93. See [13.67]–[13.74].

94. R Burd and J Horan, “Protecting the Right to a Fair Trial in the 21st Century: Has Trial by Jury Been Caught in the World Wide Web?” (2012) 36 *Criminal Law Journal* 103, 118.

95. See *Dupas v R* [2010] HCA 20, 241 CLR 237.

Question 12.3: Suppression and non-publication orders in the digital environment

- (1) What, if anything, can be done to deal with situations where suppression and non-publication orders under NSW law are breached outside Australia?
- (2) In particular, what, if anything can be done to minimise the risk of offending content affecting the fairness of a trial?

Tweeting and posting in court

- 12.68 The use of technology by the public and media in court is a growing concern. The use of technology in courts is mainly regulated by the *Court Security Act*. This Act applies to most courts and tribunals in NSW.⁹⁶ Many courts also issue guidance on using technology and social media in court.⁹⁷
- 12.69 The *Court Security Act* was amended in 2013.⁹⁸ Generally speaking, a person cannot use a “recording device to record sound or images” in court. This captures using a phone to record proceedings. There are exceptions for journalists preparing media reports.⁹⁹
- 12.70 The *Court Security Act* further prohibits transmitting “sounds, images or information” from court. This covers sending that information to another person or posting on social media either during or after the proceedings.¹⁰⁰ The then Attorney General said adding this offence would

address recent security incidents in courts that have highlighted the fact that the existing legislation does not capture the capability of recent technology – for example, people in court transmitting witness evidence by smartphone to another witness waiting outside the court to give evidence.¹⁰¹

- 12.71 The media are exempted under regulations,¹⁰² on open justice grounds.¹⁰³

96. See *Court Security Act 2005* (NSW) s 4 definition of “court”.

97. See, eg, Local Court of NSW, “Courtroom Technology and Security” (13 May 2020) <www.localcourt.nsw.gov.au/local-court/help-and-support/courtroom-technology-and-security.html> (retrieved 9 December 2020).

98. *Court Security Act 2005* (NSW) s 9A, inserted by *Courts and Other Legislation Further Amendment Act 2013* (NSW) sch 1 item 8.1.

99. *Court Security Act 2005* (NSW) s 9(1), s 9(2)(d), s 6(2).

100. *Court Security Act 2005* (NSW) s 9A(1).

101. NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 21 November 2012, 17244.

102. *Court Security Act 2005* (NSW) s 9A(2)(f); *Court Security Regulation 2016* (NSW) cl 6(a).

- 12.72 In general, journalists can live tweet from court in NSW. The *Court Security Act* does not in terms allow judges to restrict journalists doing so, although judges have done so in some cases. This is likely pursuant to a court’s inherent power to control proceedings before it. The Supreme Court policy on the use of mobile telephones by the media, which permits use only for “electronic note-taking, text messaging or emailing”, pre-dates the legislative changes.¹⁰⁴
- 12.73 Regulation of Twitter and other social media use in court by journalists or the public is not consistent across Australia. Most Queensland courts have specific, consistent policies on “real-time text-based communications and social media” use by journalists. It is generally permitted, if not encouraged, provided it does not interrupt proceedings. Policies note that it is the publishers’ responsibility to comply with laws on contempt, suppression and non-publication.¹⁰⁵
- 12.74 In South Australia, journalists can tweet from court, but where there is evidence or a submission, they must wait 15 minutes in case the court chooses to suppress the information or an objection is made.¹⁰⁶ In the Victorian County Court, journalists must identify themselves before using electronic devices “for note taking or publishing purposes”.¹⁰⁷ In the Supreme Court of Victoria, “blogging, twittering and similar” are allowed, but blogging must not allow public comment. Journalists are reminded not to publish material shown in a jury’s absence. Members of the public need permission from the judge to use electronic devices.¹⁰⁸
- 12.75 In England and Wales, journalists can tweet from court without permission.¹⁰⁹ In one case, the judge imposed a ban on tweeting from the courtroom where a reporter

103. NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 21 November 2012, 17244.

104. Supreme Court of NSW, *Use of Mobile Telephones or Personal Digital Assistance (PDAs) in Courtrooms* (2008).

105. Supreme Court of Queensland, *Electronic Devices in Courtrooms*, Amended Practice Direction No 8 of 2014 (2018) [8]–[9]; District Court of Queensland, *Electronic Devices in Courtrooms*, Amended Practice Direction No 10 of 2014 (2018) [8]–[9]; Magistrates Court of Queensland, *Electronic Devices in Courtrooms*, Practice Direction No 1 of 2014 (amended) (2018) [8]–[9].

106. Courts Administration Authority, Media and Communications Office, *A Guide for Media Reporting in South Australian Courts* (2020) 8.

107. County Court of Victoria, *County Court of Victoria Media Guidelines* (2018) 4.

108. Supreme Court of Victoria, *Media Policies and Practices* (2016) 8.

109. Lord Chief Justice of England and Wales, *Practice Guidance: The Use of Live Text-Based Forms of Communication (Including Twitter) from Court for the Purposes of Fair and Accurate Reporting* (2011) [10].

tweeted a juror's identity and a new jury had to be sworn in.¹¹⁰ This has also happened in the US.¹¹¹

12.76 Practice has been mixed in some places. In a Federal Court copyright trial, Justice Cowdroy allowed journalists to live-tweet proceedings "in view of the public interest in the proceeding", noting also the subject matter of the proceedings.¹¹² One submission notes the controversy over media reporting of Oscar Pistorius' trial in South Africa and "the challenges of achieving open justice" where court information is a valuable commodity for the media.¹¹³

12.77 Several competing factors are relevant to whether real time coverage of court proceedings should be allowed. On the one hand:

- it can enhance open justice by delivering news and information on proceedings as they happen to people who cannot attend court
- the public gets an insight into the reporting process, and
- reaction and debate in real time can improve education and public awareness of the justice system.¹¹⁴

12.78 On the other hand:

- the brevity of tweets impairs defences of fair and accurate reporting for journalists
- Twitter can sensationalise a trial, trivialising the process for those involved including victims and the accused
- there is no editorial oversight or consideration by lawyers for media organisations before something is published

110. "Reporter May be Charged over Tweet at Redknapp Trial" *Independent* (9 February 2012) <www.independent.co.uk/news/uk/crime/reporter-may-be-charged-over-tweet-redknapp-trial-6676529.html> (retrieved 8 December 2020).

111. "Reporter's Twitter Photo Results in Mistrial in Kansas Murder Case" *CBS News* (12 April 2012) <www.cbsnews.com/news/reporters-twitter-photo-results-in-mistrial-in-kansas-murder-case/> (retrieved 8 December 2020).

112. *Roadshow Films Pty Ltd v iiNet Ltd (No 3)* [2010] FCA 24 [4].

113. UTS Faculty of Law, *Preliminary Submission PCI25*, 14.

114. C Paver, "The Courts v Twitter: The Future of Live Court Reporting in NSW" (2013) 32(1) *Communications Law Bulletin* 6, 8. See also J Bosland and J Townend, "Open Justice, Transparency and the Media: Representing the Public Interest in the Physical and Virtual Courtroom" (2018) 23 *Communications Law* 183, 188.

- information tweeted may later be suppressed, its publication restricted or found to be prejudicial as the evidence unfolds and the information may never be retracted if re-tweeted or shared more widely, and
- tweets give only a piecemeal selection of evidence and proceedings, and a fuller picture and proper reflection on the complexity of the criminal trial gleaned from a more comprehensive article is lost.¹¹⁵

Question 12.4: Tweeting and posting in court

- (1) Are current provisions regulating use of social media by the media and public in court adequate? Why or why not?
- (2) What changes, if any, should be made to the existing provisions?

115. C Paver, "The Courts v Twitter: The Future of Live Court Reporting in NSW" (2013) 32(1) *Communications Law Bulletin* 6, 8. See also R Hews and N Suzor, "'Scum of the Earth': An Analysis of Prejudicial Twitter Conversations during the Baden-Clay Murder Trial" (2017) 40 *UNSW Law Journal* 1604, 1612.

13. Other proposals for change

In Brief

We have heard suggestions for some alternative ways of ensuring adherence to the open justice principle and compliance with prohibitions on the publication and disclosure of court information. In this Chapter, we consider the possible benefits of a register for suppression and non-publication orders, establishing an open justice advocate, and various education initiatives. We also discuss possible ways of keeping prejudicial information from jurors without resorting to non-publication and suppression orders.

A register of suppression and non-publication orders	284
An open justice advocate	286
Education initiatives	289
Media education	289
Public education	290
Educating participants	290
Avoiding juror prejudice	291
The juror oath or affirmation	291
The offence of making inquiries	292
Jury directions	293
Questions from the jury	295
Educating jurors	296
Pre-trial questioning of the jury	297
Judge alone trials	298

- 13.1 In previous chapters, we have largely considered the existing laws that seek to balance open justice with other important principles such as the right to a fair trial. In this Chapter, we consider some ideas for new arrangements that could complement and reinforce the existing frameworks.

A register of suppression and non-publication orders

- 13.2 In Chapter 5, we discuss the challenges of enforcing breaches of suppression and non-publication orders. These include the difficulty of proving that the person who breached an order was aware of the order. Knowledge of the order must generally be proved to establish that the person committed an offence.¹
- 13.3 This issue arises most often when a member of the public breaches the order. Parties to proceedings will usually know if an order is made in the court matter they are involved in. Media organisations are typically notified of orders (particularly in high profile cases) through mailing lists maintained by courts,² although notification can be inconsistent.³
- 13.4 Unless a member of the public has watched court proceedings to hear a suppression or non-publication order being made, or been told about it by someone connected to the proceedings, it is unlikely they will know it exists. If they unknowingly breach the order, it is difficult to successfully prosecute them.
- 13.5 One possible solution is to place all suppression and non-publication orders made by NSW courts on a publicly accessible database. Several submissions suggest this.⁴
- 13.6 The Standing Committee of Attorneys-General, when developing the Model Law, considered a national register of suppression and non-publication orders,⁵ but it was never adopted.
- 13.7 A number of states and territories maintain a register of suppression orders, including South Australia (“SA”), Western Australia, Tasmania and the Northern Territory (“NT”).⁶

1. See [5.12], [5.92]–[5.93].

2. NSW Department of Communities and Justice, *Preliminary Consultation PCI01*; Sydney Morning Herald, *Preliminary Consultation PCI06*; Sydney Morning Herald, *Preliminary Consultation PCI07*; 9News, *Preliminary Consultation PCI09*.

3. K Schwarz, “Secret’s Out: The Storm around Suppression Orders” (2019) 55 *Law Society Journal* 30, 32.

4. University of Sydney, Policy Reform Project, *Preliminary Submission PCI11*, 10; K Duggan, *Preliminary Submission PCI20*, 6–7; Banki Haddock Fiora, *Preliminary Submission PCI27*, 6; NSW Council for Civil Liberties, *Preliminary Submission PCI29*, 4; Legal Aid NSW, *Preliminary Submission PCI39*, 9; NSW, Public Defenders, *Preliminary Submission PCI33*, 13. See also Australia’s Right to Know Media Coalition, *Preliminary Submission PCI13*, 3.

5. NSW, *Parliamentary Debates*, Legislative Assembly, Agreement in Principle Speech, 29 October 2010, 27197.

6. *Evidence Act 1929* (SA) s 69A(9)–(12); Supreme Court of Western Australia, *Guidelines for the Media: Reporting in Western Australian Courts*, 10–11 (retrieved 27 November 2020); Supreme Court of Tasmania, “For the Media: Suppression Orders” <www.supremecourt.tas.gov.au/the-court/media/suppression-orders/> (retrieved 1 December 2020); Supreme Court of the Northern Territory, “Suppression Orders” (2020) <supremecourt.nt.gov.au/forms-and-publications/suppression-orders> (retrieved 1 December 2020).

Not all are publicly available. For example, only accredited media have access to the WA register and people can only access the NT register if they know the file number of the related proceedings.⁷

- 13.8 The 2017 review of the *Open Courts Act 2013* (Vic) (“*Open Courts Act*”) recommended establishing a central, publicly accessible register of all suppression orders made by Victorian courts and tribunals. The review also recommended that the register contain details of the terms and duration of the orders.⁸ The Victorian government supported this recommendation in principal.⁹
- 13.9 In SA, once an order is entered on the register, the news media and general public are taken to know about the order and its terms.¹⁰ Adopting such an approach in NSW could make it easier to prove that a person was aware of the order.¹¹
- 13.10 Submissions argue that a publicly accessible database of suppression and non-publication orders may have several other benefits. These include:
- Increased transparency.¹² NSW courts do not currently record or publish how many orders are made each year. A register would make this information available.
 - Improved awareness of orders that are in force. This may increase general compliance with orders and reduce the number of breaches.¹³
 - Better opportunities for data analysis. It would allow trends in the number of orders being made to be measured and analysed.¹⁴
 - Potential reduction in the number of unnecessary or excessive orders made, as public scrutiny may encourage more considered making of orders.¹⁵

7. Supreme Court of Western Australia, *Guidelines for the Media: Reporting in Western Australian Courts*, 10 (retrieved 1 December 2020); Supreme Court of the Northern Territory, “Suppression Orders” (2020) <supremecourt.nt.gov.au/forms-and-publications/suppression-orders> (retrieved 27 November 2020).

8. F Vincent, *Open Courts Act Review* (2017) rec 7.

9. Victorian Government, *Proposed Government Response to the Recommendation of Open Courts Act Review* (2018).

10. *Evidence Act 1929* (SA) s 69A(12).

11. K Duggan, *Preliminary Submission PCI20*, 6; Legal Aid NSW, *Preliminary Submission PCI39*, 9.

12. University of Sydney, Policy Reform Project, *Preliminary Submission PCI11*, 10.

13. K Duggan, *Preliminary Submission PCI20*, 6–7; Banki Haddock Fiora, *Preliminary Submission PCI27*, 6; Legal Aid NSW, *Preliminary Submission PCI39*, 9.

14. K Duggan, *Preliminary Submission PCI20*, 6–7; Legal Aid NSW, *Preliminary Submission PCI39*, 9.

15. University of Sydney, Policy Reform Project, *Preliminary Submission PCI11*, 10.

- 13.11 One submission suggests that the grounds and duration of an order could be included in the register. This may reduce the number of applications to amend, revoke or set aside orders.¹⁶
- 13.12 There are obvious challenges in setting up such a register. It would require significant resources not just to build, but to maintain and update, including funding staff and information technology infrastructure. It may also be difficult in some cases to frame entries in a way that shows an order has been made but does not breach the order itself by providing too much information.

Question 13.1: A register of orders

- (1) Should there be a publicly accessible register of suppression and non-publication orders made by NSW courts? Why or why not?
- (2) If so:
- (a) who should be able to access the register,
 - (b) what details should be included in the register, and
 - (c) who should build and maintain the register?

An open justice advocate

- 13.13 In Chapter 10, we discuss the right of news media organisations to appear and be heard in applications for suppression and non-publication orders.¹⁷ While the court can also allow any other person who has a “sufficient interest” to appear,¹⁸ this is at its discretion and rarely occurs. The result is that, if the media is unwilling or unable to appear, there is commonly no one to oppose or act as “contradictor” to the application.
- 13.14 Some submissions recommend appointing a contradictor in NSW to be heard in such situations. One submission suggests a “public interest monitor” could appear if requested by a judge, to help frame the scope of the suppression or non-publication order.¹⁹ It suggests interested parties could also refer their concerns to the monitor, who could then intervene to review or appeal the order.²⁰

16. Banki Haddock Fiora, *Preliminary Submission PCI27*, 6.

17. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 9(2)(d). News media organisations also have the right to apply for and appear in reviews of an order: *Court Suppression and Non-publication Orders Act 2010* (NSW) s 13(2)(d).

18. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 9(2)(e).

19. NSW Council for Civil Liberties, *Preliminary Submission PCI29*, 5.

20. NSW Council for Civil Liberties, *Preliminary Submission PCI29*, 5.

- 13.15 Another submission recommends appointing an independent “open justice advocate” “who could be called on to assist the court when required, or review orders once made, in the public interest”.²¹
- 13.16 Some media representatives acknowledge the media can be an “afterthought” in the application process: if they are not present, the media relies on the court to properly consider the public interest in open justice.²² Representatives expressed some in principle support for the appointment of an independent advocate.²³
- 13.17 A comparable position exists at the federal level in relation to “journalist information warrants”. This type of warrant authorises the Director-General of the Australian Security and Intelligence Organisation to obtain information or documents from a journalist, including for the purpose of enforcing the criminal law.²⁴ The Commonwealth Public Interest Advocate can make submissions to the Attorney-General and other authorities who issue the warrants. Advocates address decisions to issue, refuse or impose conditions on warrants where a law enforcement or intelligence agency wishes to access the telecommunications data of journalists.²⁵ The role was deemed necessary partly to address the absence of a contradictor or affected party appearing on the application.
- 13.18 A federal joint parliamentary committee recently recommended expanding the Public Interest Advocate’s role to make submissions to issuing authorities of different warrants under federal law affecting journalists in investigations of unauthorised disclosure of government information. The Advocate can make submissions on the public interest in preserving confidentiality of journalist sources and facilitating exchange of information relevant to reporting public interest stories.²⁶
- 13.19 Those issuing warrants must often consider certain factors when exercising their discretion, such as the interests of justice and the interests of the affected party. However, without a party assisting the decision-maker to navigate relevant case law and legal principles, there may be no one to advocate for the public interest or affected parties’ interests.
- 13.20 The need for an independent public interest advocate in NSW is arguably less clear. The media can act as contradictor if it chooses to. The “affected” person is more

21. NSW Law Society, *Preliminary Submission PCI31*, 4.

22. Sydney Morning Herald, *Preliminary Consultation PCI07*.

23. Sydney Morning Herald, *Preliminary Consultation PCI07*; 9News, *Preliminary Consultation PCI09*.

24. *Telecommunications (Interception and Access) Act 1979* (Cth) ch 4 pt 4–1 div 4C.

25. *Telecommunications (Interception and Access) Act 1979* (Cth) s 180X.

26. Australia, Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the Impact of the Exercise of Law Enforcement and Intelligence Powers on the Freedom of the Press*, Report (2020) [3.139] rec 2.

obscure, being the public at large. We did not receive any submissions suggesting that courts are paying insufficient attention to safeguarding the public interest as required under s 6 of the *Court Suppression and Non-publication Orders Act 2010* (NSW) (“*CSNPO Act*”).

- 13.21 The media is sometimes unable to appear when it wants to, due to limited resources or the fact that appearances may be required in regional areas where it is impossible to attend at short notice.²⁷ This issue could be remedied by making technology allowing the media to appear remotely more widely available.
- 13.22 If NSW was to appoint a public interest advocate in suppression and non-publication order applications, the role’s responsibilities could include:
- assisting the decision-maker on the relevance of the public interest in open justice²⁸
 - reviewing orders once made to determine whether they are in the public interest and whether their terms are clear,²⁹ and
 - reporting to the Attorney General on the operation of the *CSNPO Act*, including reporting the number of orders made, the duration and scope of orders, and any opportunities for reform.³⁰
- 13.23 Other decisions about the scope of the role would need to be considered. For example:
- the circumstances in which the advocate would appear in an application
 - whether the advocate would be notified of all proposed applications in advance
 - whether applications would be deferred if advance notice is not possible, and
 - whether the advocate should be able to review the terms of all interim and final orders and seek review under s 13 of the *CSNPO Act*.
- 13.24 There are also questions about what issues an advocate should be allowed to address. Possibilities include:
- the proposed terms of an order
 - whether the order should be made at all

27. Sydney Morning Herald, *Preliminary Consultation PCI07*.

28. Law Society of NSW, *Preliminary Submission PCI31*, 4.

29. Law Society of NSW, *Preliminary Submission PCI31*, 4.

30. A similar recommendation was made in relation to the Public Interest Advocate in Victoria: see F Vincent, *Open Courts Act Review* (2017) [536]–[538] rec 18(4).

- the public interest in open justice, and
 - the protection of parties where their interests are not adequately represented.
- 13.25 The 2017 review of the *Open Courts Act* recommended appointing an open justice advocate:

What is required is the creation of a system for the independent monitoring of the process and the availability of an independent contradictor who could be called upon to assist the court when required or review orders, once made, in the public interest.³¹

- 13.26 No role has yet been established.

Question 13.2: An open justice advocate

- (1) Is there a need for an advocate to appear and be heard in applications for suppression and non-publication orders? Why or why not?
- (2) If so, what responsibilities should the advocate have?

Education initiatives

- 13.27 If the rules of open justice and how associated prohibitions and restrictions operate were better understood, it is likely that breaches would be less common and confidence in the justice system would increase. Below, we suggest some possible ways to provide education about the relevant laws.

Media education

- 13.28 The media appears to have a good understanding of its obligations to fairly and accurately report on court proceedings and the circumstances when court orders or prohibitions prevent the publication of court information. Breaches do occur but are reportedly uncommon and usually successfully resolved by way of a take down notice. The education of individual media representatives on the relevant laws, procedures and practices is largely the domain of the news organisation employers, and perhaps this is appropriate.
- 13.29 Several codes, guidelines and standards for the media apply in NSW,³² although many have Australia-wide application. There is potential for further information about

31. F Vincent, *Open Courts Act Review* (2017) [536].

32. See, eg, Media, Entertainment and Arts Alliance, "Journalist Code of Ethics" (2020) <www.meaa.org/meaa-media/code-of-ethics/> (retrieved 1 December 2020). Others are published by

contempt law, as well as legislative orders, prohibitions and restrictions that impact on open justice to be included in these instruments.

- 13.30 Similar instruments elsewhere provide this type of guidance. For example, the Independent Press Standards Organisation regulates most United Kingdom (“UK”) newspapers and magazines. The Editors’ Code of Practice provides rules on reporting crime and referring to victims of sexual assault, children and children in sexual assault cases. It also sets out what is understood as the public interest.³³

Public education

- 13.31 Several submissions suggest public education should be improved to ensure suppression and non-publication orders and other automatic prohibitions are adhered to.³⁴ People who, for example, post about court cases on social media in breach of an order or prohibition often do not appreciate the consequences of their actions or even turn their mind to the consequences.³⁵
- 13.32 Following a review in the UK last year, a dedicated website was set up that gives the public a simple and concise summary of contempt law, with examples of actions that could constitute an offence.³⁶ A similar initiative could be adopted in NSW.

Educating participants

- 13.33 It is essential that participants in the court process, including witnesses, complainants and their families, understand what they can and cannot talk about, especially because they may wish to speak publicly about their case.³⁷
- 13.34 Just as important is ensuring that vulnerable participants understand the protections available to them. It is therefore important that witness assistance services, lawyers, judges and court staff receive continuous education about the prohibitions that exist so they can provide accurate information to participants.³⁸

Free TV Australia, Commercial Radio Australia, Community Broadcasting Association of Australia and Australian Community Television Alliance.

33. Independent Press Standards Organisation, “Editors’ Code of Practice” (2019) <www.ipso.co.uk/editors-code-of-practice/> (retrieved 1 December 2020).

34. See, eg, Legal Aid NSW, *Preliminary Submission PCI39*, 7; University of Sydney, Law Reform Research Project, *Preliminary Submission PCI44*, 3, 7; NSW, Public Defenders, *Preliminary Submission PCI33*, 13.

35. UK, Attorney General’s Office, *Response to Call for Evidence on the Impact of Social Media on the Administration of Justice* (2019) [3.4], [3.6].

36. See UK Government, “Contempt of Court” <www.gov.uk/contempt-of-court> (retrieved 27 November 2020).

37. See, eg, Mental Health Review Tribunal, *Preliminary Submission PCI23*, 3.

38. Rape and Domestic Violence Services Australia, *Preliminary Submission PCI36*, 10.

Question 13.3: Education initiatives

- (1) What education initiatives could be implemented to improve people's understanding of open justice and associated prohibitions on publishing or disclosing information?
- (2) Who should be responsible for delivering those initiatives?

Avoiding juror prejudice

- 13.35 Trial by jury is a central feature of the NSW criminal justice system. Although jury trials make up a relatively small proportion of the total number of criminal trials in NSW, they generally involve the determination of serious criminal charges, which carry a potential sentence of imprisonment.³⁹
- 13.36 A key imperative for making suppression or non-publication orders is the desire to protect jurors from potentially prejudicial information.⁴⁰ If jurors make decisions based on this information, rather than the information that has been presented and tested at the trial, this jeopardises the accused person's right to a fair trial.⁴¹
- 13.37 The effectiveness of such orders is open to question, particularly in the digital environment, given that:
- there is a greater availability of potentially prejudicial information
 - it is easy for jurors to search for such information, and
 - it is difficult to detect and enforce breaches of suppression and non-publication orders.⁴²
- 13.38 There are other options for managing the risk of juror exposure to extraneous or prejudicial information. We outline some of these options below.

The juror oath or affirmation

- 13.39 In NSW, jurors take an oath or affirmation to "give a true verdict according to the evidence".⁴³ This implicitly requires that jurors not seek out or rely on extraneous information about the case.

39. NSW Law Reform Commission, *Jury Directions*, Report 136 (2012) [0.1].

40. J Johnston, P Keyzer, A Wallace and M Pearson, *Preliminary Submission PCI26*, 6.

41. New Zealand Law Commission, *Reforming the Law of Contempt of Court: A Modern Statute*, Report 140 (2017) [12].

42. See [5.68], [5.74]–[5.78], [12.52].

43. *Jury Act 1977* (NSW) s 72A.

- 13.40 One option for reform is to amend the oath and affirmation so that jurors explicitly agree to base their verdict solely on the evidence presented in court and not to seek, or rely on, other information. This could help ensure jurors turn their minds to this issue.⁴⁴
- 13.41 Law reform bodies elsewhere have made similar recommendations.⁴⁵ However, this reform may not be necessary in NSW, given that judges can already direct jurors that seeking or relying on extraneous information would breach their oath or affirmation.⁴⁶

The offence of making inquiries

- 13.42 The *Jury Act 1977* (NSW) (“*Jury Act*”) makes it an offence for jurors to “make an inquiry for the purpose of obtaining information about the accused, or any matters relevant to the trial”.⁴⁷ There are similar offences in some other Australian states.⁴⁸
- 13.43 The NSW offence specifies that “making an inquiry” includes “conducting any research, for example, by searching an electronic database for information (such as by using the Internet)”.⁴⁹ The maximum penalty for making inquiries is two years’ imprisonment, a fine of 50 penalty units, or both.⁵⁰
- 13.44 A judge may examine a juror on oath to determine whether they have made inquiries.⁵¹ If it is found that they did, they must be discharged.⁵²
- 13.45 Some commentators have questioned the effectiveness and appropriateness of the offence, for reasons including:
- There are still instances of jurors conducting research, despite the introduction of the offence.⁵³ In several NSW cases, for example, jurors have been discharged because of internet searches.⁵⁴

44. New Zealand Law Commission, *Reforming the Law of Contempt of Court: A Modern Statute*, Report 140 (2017) [4.45].

45. Law Commission of England and Wales, *Contempt of Court (1): Juror Misconduct and Internet Publications*, Report 340 (2013) [5.35]; New Zealand Law Commission, *Reforming the Law of Contempt of Court: A Modern Statute*, Report 140 (2017) [4.45]; Victorian Law Reform Commission, *Contempt of Court*, Report (2020) [9.54]–[9.55] rec 71.

46. See [13.52].

47. *Jury Act 1977* (NSW) s 68C.

48. *Juries Act 2000* (Vic) s 78A; *Jury Act 1995* (Qld) s 69A.

49. *Jury Act 1977* (NSW) s 68C(5)(b).

50. *Jury Act 1977* (NSW) s 68C(1).

51. *Jury Act 1977* (NSW) s 55DA(1).

52. *Jury Act 1977* (NSW) s 53A(1)(c), s 53A(2)(a).

53. See, eg, E Green and J O’Leary, “Ensuring a Fair Trial for an Accused in a Digital Era: Lessons for Australia” in P Keyzer, J Johnston and M Pearson (ed), *The Courts and the Media: Challenges in the*

- There are few prosecutions of the offence.⁵⁵ Courts appear to be reluctant to refer cases for potential prosecution, which may reflect a view that jurors should not be punished where they are genuinely trying to do their best.⁵⁶

13.46 In its 2020 report, the Victorian Law Reform Commission (“VLRC”) recommended increasing the penalty of the Victorian offence to 600 penalty units or five years imprisonment. It considered this appropriate given the seriousness of the potential consequences of making inquiries, which include discharging the entire jury or a retrial.⁵⁷ However, it recognised that offences are only one part of managing juror behaviour, and that other measures, such as education, are also needed.⁵⁸

Jury directions

13.47 Jury directions are often used to manage the impact of potentially prejudicial information in criminal trials. They supplement the juror oath and the offence of making inquiries.

13.48 In NSW, the *Criminal Trial Courts Bench Book* (“*Bench Book*”) includes a suggested direction for the beginning of the trial. Among other things, a judge can advise the jury that they:

- should ignore any media publicity of the proceedings, and
- are prohibited from making inquiries outside the courtroom.⁵⁹

13.49 Courts generally assume that juries can follow directions, and make decisions based only on the evidence in court, even if they have been exposed to extraneous or prejudicial material.⁶⁰ Some submissions consider that directions can be effective in ensuring trials are fair and jurors are not tainted by prejudicial information.⁶¹ One

Era of Digital and Social Media (Halstead Press, 2012) 101, 110; J Horan, *Juries in the 21st Century* (Federation Press, 2012) 164.

54. See, eg, *R v JP (No 1)* [2013] NSWSC 1678; *R v JP (No 2)* [2013] NSWSC 1679; *R v Sio (No 3)* [2013] NSWSC 1414; *R v JH (No 3)* [2014] NSWSC 1966.

55. J Horan, *Juries in the 21st Century* (Federation Press, 2012) 153.

56. J Johnston and others, *Juries and Social Media: A Report Prepared for the Victorian Department of Justice* (2013) [4.15].

57. Victorian Law Reform Commission, *Contempt of Court*, Report (2020) [9.28]–[9.29] rec 68.

58. Victorian Law Reform Commission, *Contempt of Court*, Report (2020) [9.30].

59. Judicial Commission of NSW, *Criminal Trial Courts Bench Book* [1-490] (retrieved 1 December 2020).

60. See, eg, *John Fairfax Publications Pty Ltd v District Court of NSW* [2004] NSWCA 324, 61 NSWLR 344 [103]; *Skaf v R* [2008] NSWCCA 303 [27]–[28]; *Dupas v R* [2010] HCA 20, 241 CLR 237[21]–[22], [34].

61. NSW, Office of the Director of Public Prosecutions, *Preliminary Submission PCI12*, 10; NSW Council for Civil Liberties, *Preliminary Submission PCI29*, 6.

submission says directions “can play an important part in reducing the need to rely on suppression orders”.⁶²

13.50 The extent to which jurors obey directions and avoid extraneous information is difficult to determine. However, research and cases show:

- Jurors do not always understand directions.⁶³ For example, research involving real jurors in the UK found that 23% of jurors were confused about the rule about using the internet.⁶⁴
- Directions to avoid or ignore media coverage of proceedings and other prejudicial information may have limited effectiveness.⁶⁵
- Jurors have been known to disobey directions and conduct their own inquiries.⁶⁶ They may do so because they believe it will help them reach the right verdict.⁶⁷

13.51 The effectiveness of directions may depend on factors such as timing, form and content.⁶⁸ One submission supports improvements to the jury directions about making inquiries.⁶⁹ A 2013 report recommended, among other things, that the directions should:

- be both written and oral, and in plain language
- refer specifically to social media
- clearly explain the rationale for the prohibition on conducting their own research and the consequences of disobeying it, and
- be repeated to jurors daily.⁷⁰

62. J Johnston, P Keyzer, A Wallace and M Pearson, *Preliminary Submission PCI26*, 6.

63. See, eg, W Young, N Cameron and Y Tinsley, *Juries in Criminal Trials Part Two: A Summary of the Research Findings*, Preliminary Paper 37 (New Zealand, Law Commission, 1999) vol 2 [7.3]; C Thomas, *Are Juries Fair?* (United Kingdom Ministry of Justice, 2010) 35–40.

64. C Thomas, “Avoiding the Perfect Storm of Juror Contempt” (2013) 6 *Criminal Law Review* 483, 488.

65. See, eg, M Chesterman, J Chan and S Hampton, *Managing Prejudicial Publicity: An Empirical Study of Criminal Jury Trials in NSW* (Law and Justice Foundation of NSW, 2001) [368]–[369].

66. See, eg, *R v K* [2003] NSWCCA 406, 59 NSWLR 431; *R v Skaf* [2004] NSWCCA 37, 60 NSWLR 86; *Folbigg v R* [2007] NSWCCA 371; *R v Wood* [2008] NSWSC 817.

67. See, eg, M Chesterman, J Chan and S Hampton, *Managing Prejudicial Publicity: An Empirical Study of Criminal Jury Trials in NSW* (Law and Justice Foundation of NSW, 2001) [202]–[211]; C Thomas, *Are Juries Fair?* (United Kingdom Ministry of Justice, 2010) 43; C Thomas, “Avoiding the Perfect Storm of Juror Contempt” (2013) 6 *Criminal Law Review* 483, 492.

68. J Horan, *Juries in the 21st Century* (Federation Press, 2012) 187.

69. J Johnston, P Keyzer, A Wallace and M Pearson, *Preliminary Submission PCI26*, 7.

- 13.52 Many of these matters are covered in the suggested *Bench Book* directions. Among other things, the suggested oral directions:
- explain the reason for the prohibition on making inquiries, which is that it would result in a miscarriage of justice
 - outline the consequences of making inquiries, which include the verdict being set aside on appeal, breaching the juror oath and committing a criminal offence, and
 - suggest that the judge, if appropriate, also mention that the jury should keep away from the internet and social media platforms such as Facebook.⁷¹
- 13.53 The *Bench Book* also recommends that written directions be given to the jury at the opening of the trial, which can be left with them. The suggested written directions explain the prohibition against making inquiries outside the courtroom and that the jury should ignore media reports of the trial.⁷²
- 13.54 The *Bench Book* does not, however, suggest that judges give further oral directions about these matters, beyond the opening of the trial. In a 2017 report, the New Zealand Law Commission (“NZLC”) recommended that jurors be reminded throughout the trial of the prohibition on making inquiries.⁷³ Research also indicates that repeating directions at different times during the trial can help jurors understand them.⁷⁴

Questions from the jury

- 13.55 One reason why jurors may make their own inquiries is because they have queries or concerns about the case. In NSW, juries can submit written questions to the judge during the trial. The suggested *Bench Book* direction for the opening of the trial advises jurors that if they have “any questions about the evidence or the procedure during the trial”, or “any concerns whatsoever about the course of the trial or what is taking place”, they should direct them to the judge.⁷⁵

70. J Johnston and others, *Juries and Social Media: A Report Prepared for the Victorian Department of Justice* (2013) [5.2] rec 1.

71. Judicial Commission of NSW, *Criminal Trial Courts Bench Book* [1-490] (retrieved 2 December 2020).

72. Judicial Commission of NSW, *Criminal Trial Courts Bench Book* [1-480] (retrieved 2 December 2020).

73. New Zealand Law Commission, *Reforming the Law of Contempt of Court: A Modern Statute*, Report 140 (2017) [4.52].

74. See, eg, M Weinberg and others, *Simplification of Jury Directions Project: A Report to the Jury Directions Advisory Group* (Judicial College of Victoria, 2012) [1.44] citing J A Tanford, “The Law and Psychology of Jury Instructions” (1990) 69 *Nebraska Law Review* 71, 84.

75. Judicial Commission of NSW, *Criminal Trials Court Bench Book* [1-490] (retrieved 2 December 2020).

13.56 The *Bench Book* does not specify the kinds of questions that can be asked, or when juries will have the opportunity to ask them. One option for reform is further guidance for judges and jurors about these matters.⁷⁶

13.57 In a 2020 report, the VLRC recommended that legislation expressly enable the jury foreperson to submit written questions to the judge on behalf of a juror or jurors. It considered that “[i]f the law made clear that jurors could ask the judge questions, it would help dissuade jurors from looking outside the courtroom for answers to their questions”.⁷⁷ The VLRC also recommended guidance and training for judges about:

- how and when to prompt a jury to ask questions during a trial, and
- how to encourage jurors to ask questions more often, including examples of the types of questions juries may seek answers to.⁷⁸

Educating jurors

13.58 In NSW, jurors are provided with some information about the trial process and their duties and responsibilities. Sheriff’s Officers have standing orders at all court houses to screen a video entitled “Welcome to Jury Service” to prospective jurors before they are empanelled.⁷⁹ A booklet, “Welcome to Jury Service”,⁸⁰ is also available at all court houses, and may be distributed to jury members after empanelment, if the presiding judge agrees.⁸¹

13.59 Among other things, the booklet specifies that:

- the jury’s decision must be made after considering the evidence, the lawyers’ addresses and the judge’s directions about the law, and nothing else, and
- it is illegal for a juror to carry out their own investigations during a trial, which means they must not use any material or research tool, such as the internet, to access material relating to a matter arising in the trial.⁸²

13.60 One option is to expand the information and guidance provided to jurors. The booklet could, for example, explain the reason for the prohibition on jurors making their own

76. Victorian Law Reform Commission, *Contempt of Court*, Report (2020) [9.68].

77. Victorian Law Reform Commission, *Contempt of Court*, Report (2020) [9.69].

78. Victorian Law Reform Commission, *Contempt of Court*, Report (2020) [9.68]–[9.69] rec 73.

79. Judicial Commission of NSW, *Criminal Trials Court Bench Book* [1-475] (retrieved 9 December 2020).

80. NSW, Department of Communities and Justice, Office of the Sherriff, “Welcome to Jury Service” <juror.nsw.gov.au/brochure/empanelled> (retrieved 25 November 2020).

81. Judicial Commission of NSW, *Criminal Trials Court Bench Book* [1-475] (retrieved 9 December 2020).

82. NSW, Department of Communities and Justice, Office of the Sheriff, “Welcome to Jury Service” <juror.nsw.gov.au/brochure/empanelled> (retrieved 9 December 2020).

inquiries and the potential consequences of doing so. For example, in Queensland, the *Juror's Handbook* provides:

Do not make your own inquiries about the case. It would be unfair for you to act on information that is not part of the evidence and which the parties have not had the opportunity to test. For that reason, you must not use the internet or other material to conduct research about the case, or seek or receive information about the accused person or about other witnesses or other people associated with the case.⁸³

13.61 The NZLC recommends that educational information for jurors should cover:

- the reasons why doing their own research poses a risk to a fair trial, including that the material will not have been put to the accused person or tested in court, and
- the consequences of undertaking research, including that the judge may have to discharge the jury and abandon the trial.⁸⁴

Pre-trial questioning of the jury

13.62 In NSW, a judge can examine a juror during the trial about their exposure to prejudicial publicity.⁸⁵ One option for reform is to allow judges to conduct such questioning at the pre-trial stage, before the jury is selected.

13.63 For example, in the United States, prospective jurors are questioned about possible biases or prejudices in a process called “voir dire”.⁸⁶ In the UK, judges can issue questionnaires about prejudicial media coverage to potential jurors in high profile cases.⁸⁷

13.64 Legislation in Queensland allows a judge, on application of a party, to authorise questioning of potential jurors if satisfied there are “special reasons for enquiry”. Prejudicial pre-trial publicity is included as an example of a “special reason”.⁸⁸ However, this power is rarely invoked.⁸⁹

83. Queensland Courts, *Juror's Handbook* (retrieved 10 December 2020) 13.

84. New Zealand Law Commission, *Reforming the Law of Contempt of Court: A Modern Statute*, Report 40 (2017) [4.32].

85. *Jury Act 1977* (NSW) s 55DA.

86. Victorian Law Reform Commission, *Jury Empanelment*, Report (2014) [3.39].

87. Law Commission of England and Wales, *Contempt of Court (1): Juror Misconduct and Internet Publications*, Report 340 (2013) [2.184].

88. *Jury Act 1995* (Qld) s 47(1).

89. Tasmania Law Reform Institute, *Jurors, Social Media and the Right of an Accused to a Fair Trial*, Final Report 30 (2020) [3.7.7].

- 13.65 The VLRC has recommended that the courts develop standard questions for potential jurors to answer about their exposure to prejudicial material, during the stage of proceedings in which jurors can ask to be excused.⁹⁰ The NZLC has rejected the use of a “mandatory questionnaire”, and instead recommended a “standard practice” in high profile cases for judges to question jurors about pre-trial exposure to information about the case.⁹¹
- 13.66 While pre-trial questioning of the jury may give judges the chance to identify prejudice among potential jurors, it may also intrude on jurors’ privacy, and add to the cost and length of a criminal trial.⁹² It could even be counterproductive, in that it could bring prejudicial publicity to the attention of jurors.

Judge alone trials

- 13.67 Some commentators consider that judge alone trials are the best option for ensuring a fair trial in the era of digital and social media.⁹³ In NSW, the *Criminal Procedure Act 1986* (NSW) (“*Criminal Procedure Act*”) allows judge alone trials in some circumstances.
- 13.68 Under s 132 of the *Criminal Procedure Act*, either the prosecution or the accused can apply for a judge alone trial. If both parties agree, the court must allow the application. The court must not order a judge alone trial if the accused person does not agree. If the prosecution does not agree, the court can still order such a trial if it is in the interests of justice.⁹⁴
- 13.69 In March 2020, in response to the COVID-19 pandemic, another provision was introduced to the *Criminal Procedure Act* “to facilitate more judge only trials”.⁹⁵ Section 365 allows a court, on its own motion, to order a judge alone trial if:
- the accused person consents to a judge alone trial or, in the case of a joint trial, all accused persons consent to this

90. Victorian Law Reform Commission, *Contempt of Court*, Report (2020) [10.47].

91. New Zealand Law Commission, *Reforming the Law of Contempt of Court: A Modern Statute*, Report 140 (2017) [4.40] rec 21.

92. See, eg, Victorian Law Reform Commission, *Jury Empanelment*, Report (2014) [3.220]; Tasmania Law Reform Institute, *Jurors, Social Media and the Right of An Accused to a Fair Trial*, Final Report 30 (2020) [3.6.20].

93. E Greene and J O’Leary, “Ensuring a Fair Trial for an Accused in a Digital Era: Lessons for Australia” in P Keyzer, J Johnson and M Pearson (ed), *The Courts and the Media: Challenges in the Era of Digital and Social Media* (Halstead Press, 2012) 101, 119.

94. *Criminal Procedure Act 1986* (NSW) s 132(1)–(4).

95. NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 24 March 2020, 5.

- the prosecutor does not agree to a judge alone trial, but the court considers it is in the interests of justice, and
 - the court is satisfied the accused person has sought and received advice from an Australian legal practitioner about the effect of an order for a judge alone trial.⁹⁶
- 13.70 Section 365 applies despite any other provision of the *Criminal Procedure Act*, including s 132.⁹⁷ It will be repealed on 26 March 2021.⁹⁸
- 13.71 There have been several NSW cases where a party has applied for a judge alone trial under s 132 based on potential prejudice arising from media publicity about the proceedings, or the risk that a jury may access information online. Courts generally consider that the potential prejudice can be addressed by jury directions.⁹⁹
- 13.72 One submission suggests amending s 132 of *Criminal Procedure Act* to expressly allow courts to consider “the level of publicity in the matter” when determining a party’s application for a judge alone trial.¹⁰⁰ Another submission suggests an amendment to allow parties in “wide public interest” matters to apply for a judge alone trial, where there is a risk that the jury may access information online and not be impartial.¹⁰¹
- 13.73 One approach that NSW could consider is that taken in Queensland. There, trials may be heard by a judge alone where “there has been significant pre-trial publicity that may affect jury deliberations”.¹⁰² Specifying that courts can order judge alone trials in these circumstances could encourage them to do so more often.
- 13.74 However, the use of judge alone trials has been criticised for reasons including that:
- they may not guarantee an impartial decision-maker, as judges may also be influenced by prejudicial publicity¹⁰³

96. *Criminal Procedure Act 1986* (NSW) s 365(1)–(2), inserted by *COVID-19 Legislation Amendment (Emergency Measures) Act 2020* (NSW) sch 1 [1] div 4.

97. *Criminal Procedure Act 1986* (NSW) s 365(3), inserted by *COVID-19 Legislation Amendment (Emergency Measures) Act 2020* (NSW) sch 1 [1] div 4.

98. *Criminal Procedure Regulation 2017* (NSW) cl 120.

99. See, eg, *R v King* [2013] NSWSC 448 [65]; *R v Abrahams* [2013] NSWSC 729 [54]–[56]; *R v McNeil* [2015] NSWSC 357 [79]; *R v Qaumi (No 14)* [2016] NSWSC 274 [87], [120].

100. NSW Bar Association, *Preliminary Submission PCI41*, [6].

101. University of Sydney, Policy Reform Project, *Preliminary Submission PCI11*, [9.5].

102. *Criminal Code* (Qld) s 615(4)(c).

103. See, eg, R Burd and J Horan, “Protecting the Right to a Fair Trial in the 21st Century: Has Trial by Jury Been Caught in the World Wide Web?” (2012) 36 *Criminal Law Journal* 103, 121; R McEwen and J Eldridge, “Judges, Juries and Prejudicial Publicity: Lessons from Empirical Legal Scholarship” (2016) 41 *Alternative Law Journal* 110, 112–114.

- they may open judges to more scrutiny and allegations of bias,¹⁰⁴ and
- removing juries would deny the community the opportunity to participate in the administration of justice.¹⁰⁵

Question 13.4: Other ways to avoid juror prejudice

- (1) Could the juror oath and affirmation be amended to better ensure jurors appreciate, and take seriously, the obligation not to seek or rely on potentially prejudicial information? If so, how could they be improved?
- (2) Is the current *Jury Act 1977* (NSW) offence of making inquiries effective? If not, how could it be improved?
- (3) Are the current jury directions about avoiding media publicity and making inquiries about the case appropriate? If not, what reforms are required?
- (4) Could improving the way that juror questions are managed better ensure jurors do not conduct their own inquiries? If so, what improvements could be made?
- (5) Could more educational guidance be provided to jurors about avoiding media publicity and making inquiries prior to the trial? If so, what should this guidance say?
- (6) Could pre-trial questioning of jurors be used more effectively to determine which potential jurors have been exposed to prejudicial information? If so, how?
- (7) Should NSW adopt the Queensland approach of allowing judge alone trials where there has been significant pre-trial publicity that may affect jury deliberations? Why or why not?
- (8) Are there any other ways in which current law or practice can be improved to prevent jurors from being influenced by potentially prejudicial information?

104. A Marusevich, "Suppression Orders: Old but not Obsolete" (2019) 251 *Ethos* 22, 26–27.

105. R Burd and J Horan, "Protecting the Right to a Fair Trial in the 21st Century: Has Trial by Jury Been Caught in the World Wide Web?" (2012) 36 *Criminal Law Journal* 103, 122, citing *R v Jamal* [2008] NSWCCA 177, 72 NSWLR 258 [24].

Appendix A

Preliminary submissions

- PCI01** Confidential (8 March 2019)
- PCI02** Ben Fordham (4 April 2019)
- PCI03** Debra Gibson (4 April 2019)
- PCI04** Dawn Carr (4 April 2019)
- PCI05** Cheryl Lee (4 April 2019)
- PCI06** Gregory Wade (5 April 2019)
- PCI07** Carolyn O’Loughlin (6 April 2019)
- PCI08** Confidential (17 May 2019)
- PCI09** Portable (18 May 2019)
- PCI10** Howard Brown (24 May 2019)
- PCI11** University of Sydney Policy Reform Project (24 May 2019)
- PCI12** Office of the Director of Public Prosecutions (24 May 2019)
- PCI13** Australia’s Right to Know Media Coalition (28 May 2019)
- PCI14** Professor Luke McNamara and Associate Professor Julia Quilter (28 May 2019)
- PCI15** Office of the General Counsel, Department of Justice (29 May 2019)
- PCI16** Sex Workers Outreach Project (29 May 2019)
- PCI17** Kate Jackson (30 May 2019)
- PCI18** Michael Douglas (30 May 2019)
- PCI19** Rachael Hannan (30 May 2019)
- PCI20** Keely Duggan (30 May 2019)
- PCI21** Chris and Mandy Burgess (30 May 2019)
- PCI22** Lachlan Patey (31 May 2019)
- PCI23** Mental Health Review Tribunal (31 May 2019)
- PCI24** NSW Information Commissioner and NSW Privacy Commissioner (31 May 2019)
- PCI25** UTS Faculty of Law (31 May 2019)
- PCI26** Associate Professor Jane Johnston, Professor Patrick Keyzer, Professor Anne Wallace and Professor Mark Pearson (31 May 2019)
- PCI27** Banki Haddock Fiora (31 May 2019)
- PCI28** National Association of People with HIV Australia and HIV/AIDS Legal Centre (31 May 2019)
- PCI29** NSW Council of Civil Liberties (31 May 2019)
- PCI30** Women’s Domestic Violence Court Advocacy Service NSW (31 May 2019)
- PCI31** Law Society of NSW (3 June 2019)
- PCI32** Victims of Crime Assistance League NSW (3 June 2019)
- PCI33** Public Defenders (4 June 2019)
- PCI34** Paula Simmons (5 June 2019)

- PCI35** knowmore (7 June 2019)
- PCI36** Rape and Domestic Violence Services Australia (13 June 2019)
- PCI37** NSW Young Lawyers Criminal Law Committee (14 June 2019)
- PCI38** No to Violence (17 June 2019)
- PCI39** Legal Aid NSW (20 June 2019)
- PCI40** Chief Magistrate, Local Court of NSW (24 June 2019)
- PCI41** NSW Bar Association (26 June 2019)
- PCI42** Domestic Violence NSW (27 June 2019)
- PCI43** Workers Compensation Commission (27 February 2019)
- PCI44** Law Students, University of Sydney Law School (17 July 2019)

Appendix B

Preliminary consultations

NSW Department of Communities and Justice (PCI01)

6 October 2020

Mr Angus Huntsdale, Director of Digital, Media and Events

Commonwealth Director of Public Prosecutions (PCI02)

8 October 2020

Ms Caroline Steel, Witness Assistance Manager

NSW, Office of the Director of Public Prosecutions (PCI03)

9 October 2020

Ms Anna Cooper, Media Liaison and Communications Officer

Women's Legal Service NSW (PCI04)

20 October 2020

Ms Liz Snell, Law Reform and Policy Coordinator

Federal Court of Australia (PCI05)

22 October 2020

Mr Scott Tredwell, Acting Deputy Principal Registrar

Sydney Morning Herald (PCI06)

26 October 2020

Ms Georgina Mitchell, Court Reporter

Sydney Morning Herald (PCI07)

26 October 2020

Ms Michaela Whitbourn, Legal Affairs and Investigative Reporter

Children's Court of NSW (PCI08)

27 October 2020

Ms Rosemary Davidson, Executive Officer

9News (PCI09)

29 October 2020

Ms Kelly Fedor, Court Reporter

Mental Health Review Tribunal (PCI10)

29 October 2020

Ms Anina Johnson, Deputy President

Ms Alisa Kelley, Registrar

Supreme Court of NSW (PCI11)

29 October 2020

Ms Stephanie Chia, Deputy Registrar

Local Court of NSW (PCI12)

30 October 2020

Ms Louise Blazejowska, Director, Courts, Tribunals and Service Delivery, NSW
Department of Communities and Justice

Ms Brooke Delbridge, Policy Officer, Local Court of NSW

Ms Jacinta Haywood, Executive Officer, Local Court of NSW

Ms Alison Passé-de Silva, Senior Project Officer, Courts, Tribunals and Service
Delivery, NSW Department of Communities and Justice

NSW Civil and Administrative Tribunal (PCI13)

6 November 2020

The Hon Justice Lea Armstrong, President

Ms Cathy Szczygielski, Executive Director and Principal Registrar

**NSW, Office of the Director of Public Prosecutions, Witness Assistance Service
(PCI14)**

10 November 2020

Ms Leanne Kelly, Witness Assistance Service Manager

**Office of the General Counsel, NSW Department of Communities and Justice
(PCI15)**

16 November 2020

Mr Bernhard Ripperger, Director, Community Protection

Ms Vicki Hughes, Senior Solicitor

Confidential (PCI16)

17 November 2020

Child Protection Law Unit, Department of Communities and Justice (PCI17)

27 November 2020

Ms Kathy Williamson, Acting Director

