OPEN JUSTICE

Court and tribunal information: access, disclosure and publication

149

New South Wales
Law Reform Commission

REPORT

May 2022

NSW
GOVERNMENT

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27 May 2022

Hon M Speakman SC MP
Attorney General
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Dear Attorney

Open justice: Court and tribunal information: access, disclosure and publication

We make this report – Report 149: *Open justice: Court and tribunal information: access, disclosure and publication* – pursuant to the reference to this Commission received on 27 February 2019.

Yours sincerely

Alan Cameron AO

Chairperson

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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]*

Chairperson's foreword

I am delighted to commend this report to the reader. This is not a summary of the report and its main findings and recommendations – an executive summary follows shortly. Rather, I shall address the length and complexity of this report, and the time taken in its preparation, which may surprise some readers.

The surprise may be because the subject is deceptively simple. Surely, you might think, everyone should be able to know what happens in our courts. Not only does that accord with the general view that justice must be delivered in public in order to be "justice" – it matches some of the rhetoric employed in cases in Australia and the United Kingdom over very many years.

This report demonstrates that open justice is, in fact, very complex. Open justice needs to be understood as a principle of law, not a rule of law. It is a touchstone against which legislation and practice in the justice system can be framed and tested. There are likely to be competing interests at play whenever open justice is being discussed.

There are also many limitations on the concept of open justice that have grown over time, sometimes with little consistency of language or logic. Here are just a few examples of what we call "exceptions to open justice" that are dealt with in a range of legislation, law and practices:

- Defendants in criminal trials have the right to a fair trial – so prejudicial material about them ought not to be publicised in a way which jeopardises that right.
- A child involved in a criminal court case as a victim, witness or defendant, should not have their identity disclosed, to avoid the stigma that can arise from their involvement in events when they were young.
- Details of those involved in court proceedings have traditionally not been published and processes have been put in place to remove the public from court proceedings to protect vulnerable people, such as victims of sexual offences and domestic violence, those involved in adoption and surrogacy proceedings, and those with a cognitive impairment or mental illness.
- No-one would argue that courts should not be closed, and/or information prohibited from disclosure, when necessary to protect national security, informants or undercover police, even though when and how that happens may be robustly contested from time to time.

There are many more examples discussed at some length in this report. As you will discover in reading this report, it is not easy or straightforward to balance the competing interests, between the public's legitimate expectation that they should have a right to know what happens in court, on the one hand, and on the other, the need to protect the equally valid interest in matters such as the fair and efficient administration of justice, privacy and protecting vulnerable victims and witnesses.

The Commission has sought to balance these competing interests and values. Some complexity, and length, has been the inevitable result. For example, our work and consultations persuaded us that replacing all the existing legislation with a single statute is not likely to work, but that consistent terminology would help the public and the media to understand the meaning and effect of different types of exceptions to open justice. We also recommend a general statute containing each of the different types of exceptions to open justice, expanding on the existing *Court Suppression and Non-publication Orders Act 2010* (NSW), to provide a robust framework for courts in NSW.

In developing our recommendations, we have also kept in mind the special role of the media in reporting on what happens in court proceedings. We have sought to ensure that, where possible and appropriate, the media are able to remain in proceedings where the public may have been excluded and publish stories. However, there are some situations where the media's special role should be counter-balanced with other considerations. In those circumstances, we have sought to ensure that there is a mechanism for the court to consider these competing interests.

The other important element of this reference was access to material held on court files. The starting point for many readers may well be that they, and the media, ought to be able to see everything filed by a party in a court case; courts are public institutions, so why should everything filed in court not be public? The Commission also started from this position, particularly with respect to the media because they are acting for the public in reporting what they find.

The question of access to court files was dealt with by Parliament in the *Court Information Act 2010* (NSW). However, this Act never commenced because of continuing concerns about its content and impact. As a result, each court has a different system in place to manage access to court records.

We have been mindful to address these concerns and to ensure that what we recommend can be brought into effect. We have also been mindful that even in the 10 years or so since then, technology has progressed rapidly, so that electronic access to material and indeed remote access to the proceedings themselves, is far greater.

Our recommended framework for access to records on a court file is intended to improve and simplify access arrangements and to promote consistency across the courts. We also sought to balance some competing considerations to open justice, including ensuring that access to court records does not impact the integrity of court proceedings, that the court's orders in relation to publication and disclosure are considered, and that a person's privacy is protected (where appropriate).

As for the time taken to produce this report, I need to emphasise not only the width and complexity of the matters covered by the reference, but also that the research and consultations for this reference were conducted during the last two years, during the COVID-19 pandemic. Staff were working from home, and face-to-face meetings with numerous stakeholders among the judiciary, the profession, the media and the community had to give way to virtual sessions.

This will be, almost certainly, the final report which I will sign as chair of the Commission. It has been an honour and a pleasure to serve in this role. I want to thank the Attorneys who appointed and reappointed me, the staff of the Secretariat who worked hard to produce the research and ideas which underlay the successive reports issued during my time, and my fellow Commissioners, including on this reference, Ms Anna Mitchelmore SC, now the Hon Justice Anna Mitchelmore, who was appointed to the Commission in September 2021 as we were working to complete this report.

I hope I will be nevertheless forgiven for mentioning three people in particular. First the former head of the Secretariat, Erin Gough, and her successor Alex Sprouster – their skill, dedication and professionalism made them both a delight with whom to work.

And finally, I must highlight the role of my Deputy Chairperson, the Hon Justice Paul Brereton AM RFD, for whom that Deputy role is an add-on to his daily work as a Judge of Appeal and in the military. Despite those other burdens, his contribution has been extraordinary, especially to this report but also in each other report on which we have worked together, and I am very grateful.

Alan Cameron AO

Chairperson, NSW Law Reform Commission

27 May 2022

Glossary of terms

Apprehended domestic violence order (ADVO): A type of **apprehended violence order** made to protect a person from another person where a domestic relationship exists between them.

Apprehended personal violence order (APVO): A type of **apprehended violence order** made to protect a person from another person where there is no domestic relationship between them.

Apprehended violence order (AVO): A court order that seeks to protect a person from another person who causes them to fear for their safety.

Care and protection proceedings: Proceedings concerning the safety and welfare of children and young people.

Closed court order: See recommendation 3.1(4) and [3.20]–[3.21].

Cognitive impairment: Under the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW), a person has a cognitive impairment if:

- they have an ongoing impairment in adaptive functioning
- they have an ongoing impairment in comprehension, reason, judgment, learning or memory, and
- the impairments result from damage to or dysfunction, developmental delay or deterioration of the person's brain or mind that may arise from certain conditions (such as an intellectual disability, dementia or autism spectrum disorder) (chapter 4).

Complainant: In this report, this means a person against whom a **prescribed sexual offence** or **domestic violence offence** is alleged to have been committed (chapters 4, 10 and 11).

Contempt of court: Conduct that interferes with the proper administration of justice by the courts. Types of contempt that are relevant to this review include **disobedience contempt**, **contempt by publication** and **contempt in the face of the court** (chapters 1 and 13).

Contempt by publication: Publishing information that interferes with or prejudices proceedings. It is also known as sub judice contempt (chapters 1 and 13).

Contempt in the face of the court: Misconduct in or near the courtroom that disrupts or interferes with proceedings (chapters 1 and 13).

Coronial jurisdiction: The jurisdiction exercised by magistrates to investigate and make findings about sudden, violent, suspicious, unnatural or unexpected deaths (or suspected deaths, in the case of missing persons), or fires and explosions (chapter 15).

Court file: See recommendation 4.4(1)(a).

Defendant: A person against whom criminal or civil proceedings are being conducted.

Discretion to make an order: See [3.10].

Disobedience contempt: Refusing or failing to comply with a court order (chapters 1 and 13).

Domestic violence offence: A personal violence offence, another offence occurring from the same circumstances as a personal violence offence, or another offence committed to coerce, control or intimidate the victim, which is committed against a

person with whom the offender has or has had a domestic relationship (chapters 4 and 11)**.**

Drug Court: A specialist court, established under the *Drug Court Act 1998* (NSW), that provides an alternative to prison for eligible participants with drug dependencies who have committed certain crimes (chapter 15).

Ex tempore judgment: When a judgment is made immediately at the time of the hearing.

Exceptions to open justice: See [3.3]–[3.4].

Exclusion order: see recommendation 3.1(3) and [3.18]–[3.19].

Inherent jurisdiction or **inherent powers:** The powers of a **superior court** to regulate its proceedings or control its own processes, which derive from the nature of the court as a superior court of law (chapter 2).

Indictable offence: An offence that must or may be tried on indictment. Indictable offences are generally serious crimes and, when tried on indictment, are subject to a significant maximum penalty. In NSW, indictable offences are dealt with by the District Court and Supreme Court.

Inferior court: Any court that is not a superior court and, therefore, has **implied powers**. This includes the District Court and Local Court.

Interlocutory proceedings: These proceedings deal with specific issues that require a decision and are incidental to the principal object of the matter before the court. An interlocutory proceeding may involve an application for a non-publication or non-disclosure order, for example.

Implied powers: The powers of an **inferior court** that enable it to do what is necessary to exercise its statutory functions and control its own processes. They are more limited that the inherent powers of a **superior court**, and arise only in cases of necessity (chapter 2).

Jury directions: The instructions the trial judge provides to a jury that explains the factual findings they must make to decide whether a defendant is guilty and so much of the law as is necessary to help them make the determination.

Leave of the court or tribunal: The permission of a court or tribunal to do something (for example, access a particular record on the court file or publish certain information).

Lifting mechanism: In this report, this means a mechanism for lifting a statutory prohibition on publication or disclosure by consent of the **person protected by the prohibition** or **leave of the court or tribunal** (chapter 8).

Mental health impairment: Under the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW), a person has a mental health impairment if:

- they have a temporary or ongoing disturbance of thought, mood, volition, perception or memory
- the disturbance would be regarded as significant for clinical diagnostic purposes, and
- the disturbance impairs the emotional wellbeing, judgment or behaviour of the person (chapter 4).

Mental Health Review Tribunal: A specialist **tribunal** established under the *Mental Health Act 2007* (NSW). It has a wide range of powers enabling it to conduct mental

health inquiries, make and review orders, and to hear some appeals, about the treatment and care of people with a mental illness (chapter 15).

New Act: The Act recommended in this report (chapters 4–7).

Non-disclosure order: See recommendation 3.1(2) and [3.15]–[3.16].

Non-publication order: See recommendation 3.1(1) and [3.13]–[3.14].

NSW Civil and Administrative Tribunal (NCAT): A **tribunal** established under the *Civil and Administrative Tribunal Act 2013* (NSW) that decides certain civil and administrative cases in NSW ranging from tenancy issues and building works, to decisions on guardianship and administrative review of government decisions (chapter 15).

Open justice: The principle that the administration of justice should take place in public. Elements of open justice include open court proceedings, fair and accurate reports of proceedings and access to court records (chapter 2).

Person protected by a prohibition: In this report, this means a person whose identity is prohibited from being published or disclosed under a **statutory prohibition on publication** or **statutory prohibition on disclosure**.

Personal identification information: See recommendation 4.4(1)(b).

Practice note: Guidance issued by a court about particular aspects of the court or tribunal's practice and procedure. Practice notes may complement particular legislation or **rules of court.**

Prescribed sexual offence: An offence defined as such in s 3(1) of the *Criminal Procedure Act 1986* (NSW) including sexual assault, sexual touching, recording and distributing intimate images, child prostitution, incest, and female genital mutilation (chapters 4 and 10).

Protected person: The person for whose protection an **apprehended violence order** is sought or made (chapters 4 and 11).

Protective jurisdiction: The Supreme Court's inherent jurisdiction to protect people who are unable to act on their own behalf. It is often invoked for children and people with mental illness (chapter 2).

Pseudonym order: In this report, this means an order used to protect a person's identity by requiring that they are to be referred to by another name or initials. Using a pseudonym is one way to give effect to a **non-publication order** or **non-disclosure order** (chapter 6).

Registrar: A court official, with some limited judicial powers, who is responsible for administrative functions according to the statute constituting the court that they serve.

Regulation: A type of subordinate legislation that is made by the government under the authority of an Act of Parliament.

Requirement to make an order: See [3.9].

Rules committee: The committee of a court or tribunal that has responsibility (under the legislation establishing the court or tribunal) for making the rules (usually referred to as **rules of court**) that regulate the practice and procedure of the court or tribunal

Rules of court: Rules that regulate the practice and procedure of a court.

Standing: The right of a person to appear and be heard in proceedings before a court (chapter 7).

Statutory closed court provision: see recommendation 4.3(1)(k) and [3.8], [3.20]–[3.21].

Statutory exclusion provision: see recommendation 4.3(1)(j) and [3.8], [3.18]–[3.19].

Statutory prohibition on disclosure: see recommendation 4.3(1)(i) and [3.8], [3.15]–[3.16].

Statutory prohibition on publication: see recommendation 4.3(1)(h) and [3.8], [3.13]–[3.14].

Subject-specific legislation: In this report, this means legislation that has a specific subject matter, or applies in specific contexts, rather than being of general application (chapters 8–12).

Summary offence: An offence that is not an **indictable offence**. Summary offences are generally less serious and have lower maximum penalties. An offence that is permitted or required to be dealt with summarily is usually dealt with by the Local Court.

Superior court: A superior court of record is a court that has **inherent jurisdiction.** In NSW, the superior courts are the Supreme Court (including the Court of Appeal and Court of Criminal Appeal) and the Land and Environment Court.

Suppression effect: The associated prohibition on disclosing (including by publication) information from the closed part of proceedings (chapter 3). Both a **closed court order** and a **statutory closed court provision** have a suppression effect.

Take down order: An order requiring removal of material that has already been published on the internet (chapter 6).

Tribunal: A decision-making body set up by statute that exercises judicial, quasi-judicial or administrative functions (chapter 15).

Executive summary

0.1 The Attorney General has asked us to review and report on the laws that govern open and closed courts and the publication and disclosure of information held by courts and tribunals. This includes the laws that determine who can access such information and in what circumstances.

0.2 Our report deals with legislative "exceptions to open justice", which is a catch-all term that we use to refer to provisions that:

- enable the court to be closed entirely or certain people to be excluded, and/or
- prevent certain information from being published or disclosed.

0.3 It also deals with access to records on the court file, as a means by which open justice can be facilitated.

Introduction (chapter 1)

0.4 The principle of open justice – that the administration of justice must take place in public – is central to this review. Our review has provided an opportunity to consider how laws relating to open justice operate, and what, if anything, needs to change. Some key issues that form a background to this review include:

- changes in the way people access and share information, including the increased ability to share information across geographical boundaries
- new technologies which provide opportunities to facilitate open justice, such as livestreaming proceedings
- changes in the legal landscape, including increased reliance on documentary evidence, and
- the existing regimes for access to court records in NSW courts are not consolidated and are not always consistent or easy to understand.

0.5 Our review involved consultation with a wide range of different stakeholders, including judicial officers, legal practitioners, academics, community groups, the media and government agencies. We received written submissions from these stakeholders on our consultation paper and draft proposals. We also consulted in person and remotely with people across NSW. In addition, we released an online survey to encourage people who wouldn't normally engage with law reform processes to have their say.

0.6 We adopted a set of guiding principles for this review. These guiding principles are:

1. Open justice is fundamental to the integrity of and confidence in the administration of justice.

2. Any exception to open justice should be to the minimal extent necessary.
3. Exceptions to open justice are appropriate where they are necessary to protect certain sensitive information, vulnerable people and the administration of justice.
4. The power and discretion of the judicial officer to control court proceedings and to determine open justice issues, in accordance with the circumstances of each case, should be preserved to the maximum extent possible.
5. Legislation that contains exceptions to open justice should (so far as practicable) be uniform and consistent.
6. Any exception to open justice should (so far as practicable) be applied in a way that is transparent, accessible and subject to scrutiny.

0.7 In addition to promoting open justice, our aims of reform include to promote consistency (where appropriate) in legislation, promote confidence and certainty in the system, and increase transparency. We also aim to enhance or extend some protections for certain categories of vulnerable people, and empower people to tell their stories, should they wish (subject to some necessary limits). Finally, we aim to promote the efficient and effective operation of courts and tribunals by avoiding unreasonable burdens on those who must administer them, including through effective regimes for compliance and enforcement and for access to records on the court file.

The principle of open justice (chapter 2)

0.8 The three elements of the principle of open justice are:

- open court proceedings
- fair and accurate reporting of court proceedings, and
- access to court records.

These elements combine to ensure that justice is administered in public.

0.9 The courts have recognised some circumstances where open justice must give way to other interests, for example, where they exercise their protective jurisdiction (in relation to wardship and mental health), where the case involves a secret process where publicity would render the litigation futile, or where cases involve national security.

0.10 There are also categories of cases where not adhering to open justice is necessary to secure the proper administration of justice. Two particularly relevant features of the administration of justice are:

- that criminal trials are fair, and
- that people who can assist in the justice process are encouraged to do so.

0.11 These outcomes can be supported by, for example, preventing potential jurors from having access to prejudicial material, encouraging the reporting of offences and supporting access to justice for vulnerable people who might be deterred by publicity.

Classification framework and uniform definitions (chapter 3)

A new framework for classifying exceptions to open justice

0.12 There is currently no consistent framework for classifying legislative exceptions to open justice. Many existing provisions use different terminology, which causes confusion about their effect and operation.

0.13 In our report, we have developed a new framework for classifying exceptions to open justice. The framework is intended to assist in understanding and differentiating between the types of exceptions, and their purpose and effect.

0.14 We classify exceptions to open justice according to the type of exception, and the action or behaviour restricted, prohibited or required by the exception.

0.15 The types of exception are:

- a statutory prohibition or statutory provision: a legislative provision that operates automatically without the need for a court to make an order
- a requirement to make an order: a legislative provision that requires the court to make an order, and
- a discretion to make an order: a legislative provision that gives the court discretion to make an order.

0.16 The types of action or behaviour restricted, prohibited or required are:

- non-publication: a restriction or prohibition on publishing certain information
- non-disclosure: a restriction or prohibition on disclosing certain information by any means, including by publication
- exclusion: the exclusion of a particular person or class of people, or all people other than those whose presence is necessary, from the whole or any part of proceedings, and
- closing the court: the exclusion of all people from the whole or any part of proceedings, other than those whose presence is necessary, which also has the effect of prohibiting disclosure (including by publication) of information from the closed part of proceedings.

The effect of closing the court

0.17 There is currently confusion about whether closing the court also has a suppression effect (that is, information from closed proceedings cannot be published or disclosed).

0.18 We have dealt with this ambiguity by creating two distinct classifications: “exclusion” and “closed court”. Only closing the court will have the effect of suppressing information from the closed proceedings.

0.19 Given the broad effect of closing courts, we consider they should only be closed in limited situations, where it is necessary to preserve confidentiality.

Uniform definitions of key terms

0.20 Uniform definitions should be used where appropriate. This includes in the new Act that we recommend (chapters 4–7) and in existing subject-specific legislation containing exceptions to open justice (chapters 8–12).

0.21 There should be uniform definitions of various terms, including:

- “non-publication order”, “non-disclosure order”, “exclusion order” and “closed court order” (**rec 3.1**)
- “publish” and “disclose” (**rec 3.2**)
- “information tending to identify” a person (**rec 3.3**)
- “contact information” (**rec 3.4**)
- “journalist”, “news media organisation” and “news medium” (**rec 3.5**), and
- “official report of proceedings” (**rec 3.6**).

The new Act: Introduction (chapter 4)

0.22 A new Act should be introduced, to replace certain existing legislation.

0.23 One division of the new Act would set out a framework for access to records on the court file in various courts. Access to court records is an important aspect of open justice, as it can assist in scrutinising the courts and producing fair and accurate reports of proceedings. However, the current access regimes are complex, inconsistent and difficult to navigate.

0.24 The access framework would replace the *Court Information Act 2010* (NSW) (*Court Information Act*) and some other existing access provisions (**rec 4.1**). The *Court Information Act* was enacted over a decade ago in an attempt to consolidate the access regimes, but it has never commenced due to practical concerns. The new access framework seeks to address these concerns.

0.25 Another division of the new Act would contain general powers to make non-publication, non-disclosure, exclusion and closed court orders. This division would replace the *Court Suppression and Non-publication Orders Act 2010* (*CSNPO Act*) (**rec 4.1**).

0.26 The *CSNPO Act* currently provides general powers to make orders prohibiting or restricting publication or disclosure only. It establishes a regime for making, reviewing, appealing and enforcing these orders. The new Act builds on the *CSNPO Act* and introduces new types of orders and provisions.

0.27 The new Act should apply to NSW courts, with the exception of some specialised courts, but not to tribunals.

0.28 The new Act should also specify the objects of the Act, including to:

- recognise and promote open justice, subject to necessary exceptions
- provide clarity about the effect and operation of exceptions to open justice, and
- promote transparency of decision-making under the Act (**rec 4.2**).

The objects should assist courts in interpreting and applying the Act and provide a benchmark against which to assess its implementation.

0.29 The new Act should adopt the uniform definitions of key terms recommended in chapter 3 (**rec 4.3–4.5**). There would also be additional definitions of terms used across the new Act (**rec 4.3**), as well as those that relate to the access framework only (**rec 4.4**) and terms that relate only to orders (**rec 4.5**).

0.30 Certain preliminary provisions in the new Act should include a clarification that the Act does not limit or otherwise affect any inherent jurisdiction or any powers that a court has to regulate its proceedings or deal with a contempt of the court (**rec 4.6**).

0.31 In relation to the access framework, the new Act should clarify that it does not prevent or otherwise interfere with giving access to records on the court file as permitted or required under other laws (**rec 4.7**).

0.32 In relation to general powers to make orders, the new Act should provide that only a judicial officer can make orders, unless otherwise provided by rules of court (**rec 4.8**). This is because orders made under the new Act would have consequences for open justice and require the application of complex legal decision-making. Further, the new Act should clarify that other legislative exceptions to open justice are not affected, and require courts to consider these other provisions before making an order (**rec 4.9–4.10**). This may avoid unnecessary orders being made under the new Act.

0.33 Finally, the new Act should also contain powers to make regulations and rules of court that supplement, but are not inconsistent with, the Act (**rec 4.11–4.12**). The rules committee of a court could, for example, make rules that expand on the new Act, where it is necessary to take account of operational or procedural factors that are unique to that court.

The new Act: Framework for access to records on the court file (chapter 5)

0.34 The recommended access framework seeks to:

- improve and simplify access to court records by clarifying what records are available to particular classes of applicant
- promote greater consistency across different courts and types of proceedings, and
- provide that important countervailing interests, such as privacy, are consistently and effectively protected.

0.35 The access framework also recognises the importance of providing flexibility to courts and takes account of differences between jurisdictions by allowing them to make rules of court, not inconsistent with the legislative framework.

Access dependent on the category of applicant and type of record

0.36 The recommended framework takes a different approach to that of the uncommenced *Court Information Act*, which would have outlined access rules based on the type of information so that:

- information categorised as "open access information" would have been accessible to anyone as of right, unless the court ordered otherwise, and
- information categorised as "restricted access information" would have been accessible with leave of the court.

0.37 Under our recommended framework, certain types of records would be accessible as of right, and others would be accessible only with leave, depending on the category of applicant.

0.38 Under the access framework:

- parties and their legal representatives would be entitled to access any record on the court file for the proceedings
- journalists and researchers would be entitled to access certain records on the court file as of right, and be required to seek leave of the court to access other records, and
- members of the public would be required to seek leave to access almost all records on the court file, except those prescribed in court rules as accessible as of right (**rec 5.1–5.2**).

0.39 We outline the list of records that would be accessible to certain applicants as of right or by leave, as well as those that would be entirely prohibited from access in **rec 5.1–5.3**.

0.40 The category of applicant also impacts:

- the available methods of access: for example, parties would be entitled to obtain copies of court records, whereas journalists, researchers and members of the public would only be able to obtain copies with leave of the court (**rec 5.7**)

- the types of information that must be included in access requests: for example, researchers would have to provide additional information to assist the court in determining whether the request is for research purposes (**rec 5.6**), and

- the payment of any prescribed access fees: for example, a complainant or victim in a criminal proceeding, and a protected person in an apprehended violence order (AVO) proceeding, would be exempt from paying fees (**rec 5.10**).

0.41 The access framework recognises that certain applicants have a greater interest in accessing records, require access more frequently and are subject to professional and/or ethical constraints. Journalists should have specific access entitlements because they play an important role in facilitating open justice by reporting on court proceedings. This helps to promote public knowledge and understanding of specific cases and the justice system in general.

0.42 Researchers should have particular access entitlements because research is an important part of open justice, insofar as it involves investigating areas of the law and the operation of the courts, which can highlight shortcomings and lead to improvements. Researchers and journalists are subject to professional conduct and ethics requirements, which should reduce the risk of their disclosing, publishing or misusing personal identification information contained in court records.

0.43 Members of the public do not share the same interest in access and are not bound by similar constraints. Further, a significant proportion of court records contain personal identification information. Allowing such information to be readily available to the public could lead to identity theft, or people being targeted for commercial or other purposes.

Considerations in granting leave for access

0.44 Where access to a record is by leave of the court, the access framework should specify certain considerations for granting leave, such as:

- the public interest in open justice

- the impact on the administration of justice

- the impact on individual privacy or safety, and

- reasons for which access is sought (**rec 5.5**).

Outlining such considerations should help to guide decision-makers in exercising their discretion and assist applicants in framing access requests.

0.45 A key consideration is whether it is reasonably practicable to delete or remove personal identification information from a court record (**rec 5.5(1)(i)**). This provides the court with

the option of redacting personal information from court records, in order to protect against misuse, but does not require it to do so in every case. This is intended to ensure redaction of records is within the court's control, having regard to whether it is reasonably practicable in the circumstances.

0.46 Another key consideration is whether the record contains information that is subject to a statutory prohibition on publication or a non-publication order (**rec 5.5(1)(j)**). Such records should not be prohibited from access entirely, but rather an applicant should have to seek leave to access them. The court should be required to consider the existence of a publication restriction since they are generally imposed to protect sensitive or potentially prejudicial information.

0.47 The access framework should also clarify that a publication restriction does not, of itself, operate to prevent an applicant from accessing the record or the court from providing an applicant with access to it (**rec 5.5(2)**). This should alleviate any uncertainty about whether access can be provided to a record that is subject to a publication restriction.

Access subject to certain matters, including fees and conditions

0.48 Access to records should be subject to any fees prescribed by regulation. This should, for example, allow courts to recover the cost of redacting personal identification information. However, there would be a guiding principle for setting fees: that they must not exceed what is reasonably necessary to cover the cost of providing access or deleting or removing personal identification information. This is to ensure fees are kept to a minimum (**rec 5.4, 5.9**).

0.49 The new Act should also provide that some types of applicants are exempt from paying any prescribed fee (such as an accused person or offender in a criminal proceeding), and that the court may waive or reduce fees in certain situations (such as where a member of the public is experiencing financial hardship) (**rec 5.10**).

0.50 Where access to a record is by leave of the court, such access should be subject to any conditions imposed on access or use (**rec 5.8**). Allowing the court to impose conditions enables specific risks or issues to be addressed. Where, for example, it is not reasonably practicable to redact personal identification information from a record, a court could impose conditions preventing misuse of such information.

0.51 Courts should retain a residual discretion to control access to a record. It should, therefore, be made clear that access would also be subject to any order that restricts or otherwise affects access to the record that a court has made, on application, in the particular case (**rec 5.4**).

Liability protections

0.52 There are a number of areas of potential civil and criminal liability that require modifying to ensure that appropriate access can be facilitated. There should, therefore, be provisions to ensure that:

- no action for defamation or breach of confidence can be brought against courts, court officers, or authors of documents that are accessed under the framework (**rec 5.11**)
- there is no criminal liability for a court officer who makes a decision in good faith to provide a document in accordance with the framework (**rec 5.12**), and
- there is no civil liability for a court officer or anyone acting under their direction, who act in good faith for the purposes of executing the access framework (**rec 5.13**).

Offence of unauthorised disclosure of personal identification information in court records

0.53 The access framework should make it an offence for an applicant who is given access to a record on the court file to use or disclose (including by publication) any personal identification information in it, unless the court or the person to whom the information relates permits this use or disclosure (**rec 5.14**).

0.54 This is intended to provide some protection for personal identification information contained in all court records, including those that are accessible to an applicant as of right. It is also intended to deter the use of personal identification information for identity theft or to target people for commercial, criminal or other purposes.

The new Act: Powers to make orders – powers, grounds and scope (chapter 6)

0.55 The new Act should set out a clear framework for general powers to make non-publication and non-disclosure orders, as well as exclusion and closed court orders. This division of the new Act would replace the *CSNPO Act*.

Powers to make non-publication and non-disclosure orders

0.56 The powers to make non-publication and non-disclosure orders should be similar to the *CSNPO Act*, with some amended and additional categories of information (**rec 6.2(1)**). These amendments are intended to address issues with the current scope of powers in the *CSNPO Act*. A court should be able to make a non-publication or non-disclosure order in relation to:

- information tending to identify a party to or witness in proceedings, or any other person who is related to or associated with a party or witness
- information, whether or not received into evidence, given in proceedings before the court, and
- information that comprises evidence that may be adduced or given in proceedings.

0.57 As with the *CSNPO Act*, a court would continue to have a limited statutory power to make an order in relation to extraneous prejudicial material.

Powers to make exclusion and closed court orders

0.58 Unlike the *CSNPO Act,* the new Act should contain powers to make exclusion and closed court orders (**rec 6.2(2)–(3)**). Currently, powers to make such orders are derived from inherent or implied powers of the court and provisions in subject-specific legislation. We consider it appropriate that there is a clear statutory framework setting out general powers to make exclusion and closed court orders. This should provide clarity around how and when such orders can be made.

Consideration of the public interest in open justice

0.59 When considering whether to make an order under the new Act, a primary consideration is safeguarding the public interest in open justice (**rec 6.1**). This recognises the importance of open justice, while not preventing consideration of other matters, where necessary.

Clear grounds for making different types of orders

0.60 The new Act should set out clear grounds for making the different types of orders, prefaced with the requirement that the order must be "necessary" (**rec 6.4–6.6**).

0.61 The different types of orders should have some common grounds, for example, where the order is necessary to prevent prejudice to the proper administration of justice.

0.62 We also recommend additional grounds that are unique to certain types of orders, for example, where an exclusion order is necessary to support a child or person with a mental health or cognitive impairment to give evidence.

Scope of orders must be confined

0.63 Orders made under the new Act should be defined and confined in scope.

0.64 In relation to a non-publication or non-disclosure order, a court would be required to:

- specify the information to which the order applies and ensure that an order does not apply to any more information than is reasonably necessary to achieve the purpose of the order (**rec 6.7**)
- specify where the order would apply (which could be any place inside, or outside, the Commonwealth) and have regard to what is necessary for achieving the purpose of the order (**rec 6.8**), and
- specify the duration of the order (with reference to a fixed or ascertainable period or the occurrence of a specified future event) and ensure that the order does not operate longer than is reasonably necessary to achieve the purpose of the order, although an order could be made to operate indefinitely in exceptional circumstances or where it is not reasonably practicable to specify a duration (**rec 6.9**).

0.65 In relation to an exclusion or closed court order, a court should be required to specify the proceedings or part of the proceedings to which the order applies and ensure that the order operates for no longer than is reasonably necessary to achieve its purpose

(**rec 6.10**). Since closed court orders also have a suppression effect, they will have, by default, an indefinite duration. This is appropriate, given that information from proceedings held in closed court is meant to remain confidential.

Orders may be subject to exceptions and conditions

0.66 The new Act should enable a court to make an order subject to such exceptions and conditions it sees fit and specifies in the order (**rec 6.11**).

0.67 The new Act should also include standard exceptions for journalists when an exclusion order is made (**rec 6.12**) and allow certain disclosures in particular circumstances when a non-disclosure or closed court order is made (**rec 6.13**). However, the new Act should not include other standard exceptions. In most cases, a court should determine what exceptions and conditions are appropriate in the circumstances of the case.

The new Act: Powers to make orders – procedures (chapter 7)

0.68 The new Act should include procedures for:

- making a non-publication, non-disclosure, exclusion or closed court order (**rec 7.1**)
- reviewing a non-publication, non-disclosure or closed court order (**rec 7.2**), or an exclusion order (**rec 7.3**), and
- appealing a non-publication, non-disclosure, exclusion or closed court order (**rec 7.5**).

0.69 Clear procedures should enable consistency and transparency in decision-making. In relation to applications for orders, only a party to proceedings or any other person that the court considers has sufficient interest should be able to apply (**rec 7.1**).

0.70 However, a broader range of persons (including a journalist, news media organisation and government or government agency) should be entitled to:

- apply for a review of an order (except in the case of an exclusion order) (**rec 7.2–7.3**)
- apply for leave to appeal an order (**rec 7.5**), and
- appear and be heard by a court on an application for an order, a review of an order (except an exclusion order), and an appeal of an order (**rec 7.1–7.3, 7.5**).

0.71 Setting out such procedures should provide clear avenues for challenging and reassessing orders. Reviews would be heard by the court that made the original order, whereas an appeal of an order would be heard by a higher court and would only be by leave.

Recognition of the voice of the person who is, or would be, protected by an order

0.72 A court should be required to consider the views of the person who is, or would be, protected by an order**,** when making a decision under the new Act (**rec 7.6**). This is intended to ensure that courts and prosecutors take a proactive approach to determining and considering such a person's views.

0.73 Where a person (who is a complainant or victim in a sexual offence or domestic violence offence, or protected person in an AVO proceeding) is protected by a non-publication or non-disclosure order, and they make an application for review, a court should be required to revoke the order (subject to some limitations) (**rec 7.4**). Given that sexual assault and domestic violence are crimes based around power and control, this recommendation is intended to ensure that a victim's voice is at the centre of the process, by allowing them to decide whether an order that has been made over their identity should continue to operate.

Requirement to give reasons on request

0.74 The new Act should require a court to give reasons for decisions relating to orders when requested to do so by certain persons, and subject to some exceptions (**rec 7.7**). This should promote transparency about decision-making and support the media and others in deciding whether they want to apply for a review or appeal of an order.

Costs awardable in certain circumstances

0.75 In applications for, and reviews of, orders, a court should be able to make a costs order against a person only if that person's involvement in the application or review is frivolous or vexatious. In relation to appeals, there should be no limit on a court's power to make an order for costs (**rec 7.8**).

Breaches of orders punishable

0.76 The new Act should set out the elements of the offence of breaching an order, and state that a breach may be punished as a statutory offence or contempt (but not both) (**rec 7.10**). The new Act should also include maximum penalties for the offence (**rec 7.11**) and provide that breaches of non-publication and non-disclosure orders that occur overseas could be punished as offences in NSW (**rec 7.12**).

0.77 In order to prevent an inadvertent breach of a closed court order, the new Act should require a court to post notice of the order, whether the proceedings are held in a courtroom or accessed remotely (**rec 7.9**).

Exceptions to open justice in other legislation: Introduction (chapter 8)

0.78 We have applied our classification framework (outlined in chapter 3) to exceptions to open justice in subject-specific legislation. To ensure consistency across provisions with the same classification, there should be a standard approach to certain issues (for example, lifting mechanisms for statutory prohibitions). In other cases, we do not

recommend standard approaches (for example, procedural provisions in discretions to make non-publication, non-disclosure, exclusion and closed court orders).

0.79 Specific recommendations for each legislative context are outlined in chapters 9–12.

Duration of statutory prohibitions

0.80 Several statutory prohibitions should have an indefinite duration, including statutory prohibitions on publication applying to the identity of children and young people.

Mechanisms for lifting statutory prohibitions

0.81 "Lifting mechanism" refers to provisions enabling the court to grant leave or the person protected by the prohibition to consent to publication or disclosure, in relation to a statutory prohibition. Our standard approach to lifting mechanisms seeks to balance a number of considerations, including the need to enable people to tell their stories and to protect the integrity of ongoing court proceedings.

0.82 A court should:

- be the only mechanism for lifting a prohibition when proceedings are ongoing
- be able to grant leave for publication or disclosure where the person protected by the prohibition is alive or deceased, and
- be required to take into account certain considerations when deciding whether to grant leave to lift the statutory prohibition (which differ depending on whether the person is alive or deceased).

0.83 A person protected by the prohibition should:

- be able to consent to lifting the prohibition if:
  - they are aged 18 or over, or
  - they are aged 16 or 17, after receiving advice from an Australian legal practitioner about the implications of consenting
- not be able to consent to publication of their identity if:
  - the proceedings are ongoing, and/or
  - this would also identify another person protected by the prohibition who has not consented to publication or disclosure or who is under 16.

0.84 Neither the court should be able to grant leave to lift a prohibition when the person protected by the prohibition is alive, nor should the person be able to consent, where the person is under 16. This is because of the lack of maturity of children under 16, the risk of their being subject to undue influence and the potential long-term consequences of allowing publication of their identity.

0.85 In some cases, a person's identifying information may be protected by both a statutory prohibition on publication and a closed court order. This is because a closed court order has the effect of both excluding people from proceedings and prohibiting disclosure of information from the closed proceedings.

0.86 Where a mechanism to lift a statutory prohibition is used, it should have the effect of lifting both:

- the statutory prohibition on publication, and
- the suppression effect of the closed court order (that is, the associated prohibition on disclosing information from the closed part of proceedings) to the extent that it overlaps with the statutory prohibition.

0.87 This is necessary to give effect to the lifting mechanism. If it only lifted the statutory prohibition, publication of the person's identity would still be prohibited under the closed court order.

Exception to statutory prohibitions for official reports of proceedings

0.88 Some, but not all, statutory prohibitions should have an exception to allow publication of the relevant information in an official report of proceedings.

Exceptions for journalists when the public is excluded

0.89 In proceedings where the public have been excluded, there should be a limited exception for journalists in:

- prescribed sexual offence proceedings (including the part of proceedings in which the victim reads a victim impact statement)
- domestic violence offence proceedings
- apprehended domestic violence order (ADVO) proceedings concerning adults, and
- AVO proceedings involving young people.

0.90 This limited exception seeks to balance the need for media access to, and reporting of, proceedings relating to sexual offences and domestic violence with the need to minimise distress to those involved.

0.91 Exceptions for the media to remain in proceedings when the public is excluded in certain proceedings involving children should be retained. They are important to enable the media to report on, and the public to learn about, these proceedings.

Limited changes to discretions to make orders

0.92 Discretions to make orders should not include standard provisions relating to:

- procedures for making, reviewing or appealing orders
- where an order applies

- a requirement to give reasons on request
- costs, and
- a requirement to consider the public interest in open justice.

Such provisions would introduce complexity into provisions that operate in only a small number of matters, in specific contexts, where there is no demonstrated need for reform.

0.93 The main exception is our recommendation to include a standard provision relating to the duration of non-publication orders in some provisions in subject-specific legislation.

Legislation relating to children and young people (chapter 9)

0.94 There are a range of exceptions to open justice in subject-specific legislation relating to children and young people, including in criminal and diversionary proceedings, care and protection proceedings, and proceedings relating to parentage and guardianship.

0.95 Protections for children involved in court proceedings are intended to shield children's identities in order to reduce distress and trauma and avoid stigmatisation.

0.96 All existing exceptions to open justice relating to children should be retained. We make a number of recommendations to improve these protections, including:

- Uniform terminology should be adopted, where appropriate (**rec 9.1, 9.8, 9.14–9.15, 9.19–9.20, 9.24**).
- The prohibition on identifying a child involved in criminal proceedings should apply to the publication of a person's identity in a way that connects them with a criminal investigation (**rec 9.2**). This is intended to protect children at the earliest point of their involvement with the criminal justice system.
- There should also be an exception to the prohibition on identifying a child involved in criminal proceedings, to allow for the publication of the identity of a child victim of an alleged homicide, where there has been prior lawful publication of the child's identity (**rec 9.3**). This is to enable the public to learn the outcome of a case.
- All statutory prohibitions relating to children and young people, including the prohibition on identifying a child involved in criminal proceedings, and other prohibitions concerning children and young people (**rec 9.9**), should apply even if the person is deceased. This is to protect them from stigmatising events that occurred when they were young and to ensure consistency.
- There should be clear and consistent mechanisms to lift the prohibitions to allow for publication or disclosure, where appropriate (**rec 9.4–9.7, 9.10–9.13, 9.17–9.18**).

- The public should be excluded from criminal proceedings against children and from care and protection proceedings. The court should also be able to make an exclusion order in relation to other people, in certain circumstances (**rec 9.20–9.21**).

- There should be a requirement to make a closed court order in certain civil proceedings relating to children, including adoption, surrogacy, parentage and guardianship of infants proceedings (**rec 9.24**). This would incidentally prohibit disclosure of information in the closed proceedings.

0.97 These recommendations acknowledge that participation in proceedings may be particularly stressful for a child and the proceedings themselves are sensitive in nature.

Legislation relating to sexual offence proceedings (chapter 10)

0.98 There are several exceptions to open justice that apply in relation to sexual offence proceedings. In general, these protections seek to avoid stigmatisation of, and distress to, complainants and encourage reporting of sexual offences.

0.99 One such protection is the statutory prohibition on publishing the identity of a complainant under s 578A of the *Crimes Act 1900* (NSW). We recommend several amendments to this prohibition, including:

- Adopting uniform terminology (**rec 10.1**).

- Extending the prohibition to apply to the period before proceedings have commenced, from the time that a complaint is made to police (**rec 10.2**). This is intended to protect the identity of the complainant as soon as they become involved with the criminal justice system and encourage reporting.

- Amending the prohibition to apply to a complainant's identity even if they are deceased (**rec 10.3**). This recognises the ongoing impact of sexual offences on the complainant's family and the prospect that being identified after death could deter reporting.

- An exception so that the prohibition does not apply where the victim of the sexual offence is also the victim of an associated homicide (**rec 10.4**). This recognises the public interest in the reporting of such crimes.

- Revised mechanisms for lifting the prohibition with leave of the court and with the complainant's consent, consistent with our standard lifting mechanisms (**rec 10.5–10.8**).

0.100 Other protections that apply in relation to sexual offence proceedings include:

- s 291 of the *Criminal Procedure Act 1986* (NSW) (*Criminal Procedure Act*), which we classify as a requirement to make an exclusion order excluding all people, other than

those whose presence is necessary, from the part of proceedings in which the court hears the complainant give evidence or a recording of their evidence

- s 291A of the *Criminal Procedure Act,* which we classify as a discretion to make an exclusion order in any other part of sexual offence proceedings, or the entire proceedings, and
- s 30I of the *Crimes (Sentencing Procedure) Act 1999* (NSW), which we classify as a requirement to make an exclusion order excluding all people, other than those whose presence is necessary, when a victim impact statement is read out.

0.101 These provisions should adopt uniform terminology consistent with the classifications (**rec 10.10–10.11**). There should also be a limited exception for journalists that gives them access to the proceedings subject to an exclusion order, provided that:

- the complainant or victim is aged over 18 and consents
- the complainant or victim is aged 16 or 17 and consents after receiving advice from an Australian legal practitioner about the implications of consenting, or
- the complainant or victim is aged over 16 and the court is satisfied that the public interest in allowing the journalist to view or hear the proceedings significantly outweighs the complainant's wishes (**rec 10.12**).

0.102 This exception should facilitate media access to and reporting of sexual offence proceedings, which may help generate public awareness and discussion of sexual offending, encourage reporting of offences and reduce stigma. To avoid causing distress to the complainant or victim, arrangements would need to be made so that journalists may access the proceedings without being present in the place where the complainant's evidence is given, or the victim impact statement is read.

0.103 Another protection is s 291B of the *Criminal Procedure Act,* which we classify as a requirement to make a closed court order in incest proceedings. The provision should adopt uniform terminology consistent with this classification (**rec 10.13**).

Legislation relating to domestic violence proceedings (chapter 11)

0.104 There are several exceptions to open justice that apply in domestic violence offence and AVO proceedings. These exceptions reflect increasing recognition that people who have experienced domestic violence may need additional protection, to improve victim attendance rates and the finalisation of matters in court.

0.105 Specific protections for children and young people involved in AVO proceedings are similar to those available for children and young people in other types of court proceedings and recognise their particular vulnerability.

0.106 One such protection is the statutory prohibition on publishing the name of a child involved in an AVO proceeding under s 45(1) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) (*Crimes (Domestic and Personal Violence) Act*). Several amendments should be made to this prohibition, including:

- Adopting uniform terminology (**rec 11.1**).
- Extending the prohibition also to apply to information tending to identify a young person (aged 16 or 17) involved in AVO proceedings (**rec 11.2**). This would apply the same protection for children and young people.
- Extending the prohibition to apply to the identity of a child or young person, even if they are deceased (**rec 11.3**). This is due to the potential for long-term stigma.
- Revised mechanisms for lifting the prohibition with leave of the court or with the person protected by the prohibition's consent, consistent with our standard lifting mechanisms (**rec 11.4–11.7**).

0.107 Another protection that applies in AVO proceedings is s 45(2) of the *Crimes (Domestic and Personal Violence) Act*. We classify it as a discretion to make a non-publication order over the identify of a person involved in the proceedings (other than a child). We recommend amendments to this provision, including:

- the adoption of uniform terminology (**rec 11.1**)
- a requirement for courts to specify the duration of an order (**rec 11.9**), and
- specific procedures for applying for and reviewing orders (**rec 11.10**).

0.108 Additional protections are found in s 41, s 41AA and s 58 of the *Crimes (Domestic and Personal Violence) Act,* which require the public to be excluded from AVO proceedings involving children or young people, unless the court directs otherwise. We classify these provisions as statutory exclusion provisions, which apply automatically, without the court needing to make an order. These provisions should adopt uniform terminology consistent with this classification (**rec 11.11**).

0.109 There are also some protections that apply in domestic violence offence proceedings including:

- s 289U of the *Criminal Procedure Act*, which we classify as a requirement to make an exclusion order excluding all people, other than those whose presence is necessary, from the part of proceedings in which the complainant gives evidence or a recording of their evidence is heard, and
- s 289UA of the *Criminal Procedure Act,* which we classify as a discretion to make an exclusion order in other parts of proceedings, or the entire proceedings.

0.110 Section 289U of the *Criminal Procedure Act* also applies in ADVO proceedings that involve the same defendant and victim (referred to as the person in need of protection)

as those in criminal proceedings for a domestic violence offence. New provisions, based on s 289U and s 289UA of the *Criminal Procedure Act,* involving a protected person aged 18 or over, should be inserted into the *Crimes (Domestic and Personal Violence) Act* (**rec 11.12, 11.14**). This applies the same protection to all ADVO proceedings, whether or not they are associated with domestic violence offence proceedings.

0.111 Section 289U and s 289UA of the *Criminal Procedure Act,* and the equivalent provisions in the *Crimes (Domestic and Personal Violence) Act,* should adopt uniform terminology consistent with their classifications (**rec 11.13, 11.15**).

0.112 Finally, there should be a limited exception for journalists that should enable them to view or hear domestic violence related proceedings from which the public are excluded (**rec 11.16**). This exception is consistent with our recommendations in relation to sexual offence proceedings, above. The approach balances the need for media reporting, which may improve public awareness and understanding of domestic violence, with the need to minimise distress to those involved in the proceedings.

Other legislation containing exceptions to open justice (chapter 12)

0.113 A number of exceptions to open justice in subject-specific legislation do not fall within the topics covered in chapters 9–11. These provisions should adopt uniform terminology consistent with their classifications (**rec 12.1, 12.6, 12.8, 12.9, 12.11, 12.14**).

0.114 Where appropriate we recommend other amendments to some of these provisions, such as introducing:

- an exception to some statutory prohibitions enabling publication in an official report of proceedings (**rec 12.2**)
- revised mechanisms for lifting some statutory prohibitions (**rec 12.4–12.5**), and
- a standard duration provision for some non-publication orders (**rec 12.7**).

Dealing with breaches (chapter 13)

0.115 We make several recommendations to achieve greater consistency in respect of statutory offences. These recommendations apply to statutory prohibitions, statutory provisions and orders in subject-specific legislation, and are reflected in the offence in the new Act. However, they do not apply to provisions relating to tribunals or specialised courts.

0.116 To resolve inconsistencies among provisions, we recommend all breaches be punishable as statutory offences. To provide flexibility, it should be possible, where relevant, for a breach to be punished as a contempt instead. However, it should not be possible to punish an offender both for contempt and an offence for the same conduct (**rec 13.1**).

0.117 All statutory offences for breach should contain standard elements that:

- require the offender to have contravened the prohibition, provision or order (**rec 13.2**)
- set out relevant mental elements (**rec 13.3–13.4**), and
- provide that directors of corporations may be personally liable in some cases (**rec 13.5**).

0.118 However, other aspects of the offences should not be standardised, such as exceptions to offences and maximum penalties.

0.119 The time limit for prosecutions of breaches should be extended so that proceedings would be commenced within two years of the alleged offence (**rec 13.6**). This is necessary because it is difficult to obtain the evidence required within the six-month period that usually applies to summary offences.

0.120 Exceptions to open justice arise in a range of contexts and the appropriate agency to investigate and deal with breaches differs. The Department of Communities and Justice should form a working group to improve communication and coordination between agencies and monitor the operation of the system (**rec 13.7**).

0.121 There should be a register of non-publication, non-disclosure and closed court orders (**rec 13.8**). This should improve awareness of, and compliance with, orders. It would also improve data collection.

Technology and related issues (chapter 14)

0.122 While digital innovation has transformed engagement with the courts, it has also presented challenges in controlling the accessibility of information. We have aimed to ensure that open justice is supported, and not adversely affected, by technology.

0.123 Open justice principles should apply to proceedings with remote access in the same way as they do to proceedings conducted entirely in person. We recommend some reforms to facilitate and promote remote access to court and tribunal proceedings, while retaining the ability of the courts to control those proceedings (**rec 14.1**).

0.124 In order to facilitate accurate reporting, journalists should be able to make audio recordings of proceedings, having notified the court of such an intention, unless the court orders otherwise. Such recordings should only be used to prepare an accurate report of proceedings (**rec 14.2**).

0.125 There should be no changes to the law in the areas of electronic access to court files, court and tribunal decisions and court lists, and live reporting by journalists on social media.

Tribunals and specialised courts (chapter 15)

0.126 There should be a unique approach to specialised courts and tribunals.

0.127 We have excluded the Drug Court, the coronial jurisdiction, the Personal Injury Commission and the Industrial Relations Commission from all recommendations in this report.

0.128 We have also excluded the NSW Civil and Administrative Tribunal (NCAT) and the Mental Health Review Tribunal (MHRT) from the new Act and our standard recommendations about dealing with breaches.

0.129 However, we do make some specific recommendations in relation to NCAT and the MHRT.

0.130 In relation to NCAT, our recommendations include:

- clarifying the application of the statutory prohibition on publishing the identity of people involved in NCAT proceedings (**rec 15.2**) and including guidance on the factors NCAT must consider when deciding whether to grant leave to publish the identity of a person involved in proceedings (**rec 15.3**)
- NCAT should be required to specify the duration of non-publication and non-disclosure orders made under s 64 of the *Civil and Administrative Tribunal Act 2013* (NSW) (*Civil and Administrative and Tribunal Act*) (**rec 15.4**), and
- outlining how breaches of the statutory prohibition and orders made under s 64 of the *Civil and Administrative Tribunal Act* should be dealt with (**rec 15.5**).

0.131 In relation to the MHRT, our recommendations include:

- clarifying the application of the statutory prohibition on publishing the identity of people involved in MHRT proceedings (**rec 15.6**) and including guidance on the factors the MHRT must consider when granting leave to publish (**rec 15.8**)
- extending the statutory prohibition on publication to apply in related Supreme Court proceedings (**rec 15.7**)
- the MHRT should be required to specify the duration of non-publication and non-disclosure orders made under s 151(4) of the *Mental Health Act 2007* (NSW*)* (*Mental Health Act*) (**rec 15.9**)
- there should be pathways for review and appeals of non-publication or non-disclosure orders made under s 151(4) of the *Mental Health Act*, and decisions about whether to lift the prohibition on publication (**rec 15.10**), and
- outlining how breaches of the provisions in the *Mental Health Act* should be dealt with (**rec 15.11**).

Education about open justice and implementation of reforms (chapter 16)

0.132 While our recommendations aim to increase clarity and consistency in the laws relating to open justice, there is also a need to improve awareness and understanding.

0.133 Education about existing laws relating to open justice and any reforms arising from this report should be provided for the courts, lawyers, other participants in the justice system (such as parties, victims and witnesses), the media and the community (**rec 16.1–16.5**). This should help to ensure the reforms achieve their intended impact.

0.134 The new Act should include a statutory review mechanism (**rec 16.6**). This is to ensure that the impact of the new Act, and any potential issues, can be identified.

0.135 A number of our recommendations will likely have resource implications, including the new legislative framework for accessing records on the court file and the register of non-publication, non-disclosure and closed court orders. The Government should provide appropriate resourcing, including to the courts, to implement any reforms resulting from this report (**rec 16.7**).

1. Introduction

In Brief

The background to this review includes societal and technological changes, as well as changes in the media landscape, that have impacted the way the legal system and legislation deals with open justice. The recommendations in this report were informed by submissions, consultations and responses to an online survey. A number of principles and aims also guided our approach to the review. The scope of the recommendations has been limited to legislation relating to open justice, with some exclusions.

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1.1 The NSW Law Reform Commission is an independent statutory body that provides independent, expert law reform advice to the Government on matters referred by the Attorney General.

1.2 On 27 February 2019, the Attorney General asked us to review and report on the laws relating to open justice in courts and tribunals.

1.3 This is our report on that review. We make over 150 recommendations for reform to provide a more consistent approach to open justice in NSW. A list of our recommendations is at appendix A to this report.

Background to our review

1.4 The principle of open justice – that the administration of justice must take place in public – is central to this review. We discuss the principle further in chapter 2.

1.5 The *Court Suppression and Non-publication Orders Act 2010* (NSW) (*CSNPO Act*), which is the main statute governing suppression and non-publication orders, commenced in 2011. Since then, developing technologies have significantly changed the media landscape and the way people access and share information.

1.6 The internet has supplanted traditional forms of publication. It facilitates the delivery of current news as well as giving users easy access to news archives. Social media platforms allow individuals and organisations to publish instantly, meaning that a person in a courtroom can share the details of a case as it unfolds and reach audiences across the world. This has had a significant impact on frameworks that historically depended on spatial and geographic boundaries, such as exceptions to open justice.

1.7 A well-known example occurred in 2018 when the suppression order of a Victorian court failed to prevent overseas media outlets publishing details about the conviction (subsequently overturned) of Cardinal George Pell, allowing people in Australia to access that information and frustrating the intention of the order. We discuss this case further in chapter 2.

1.8 Changes to the way the legal system operates have also affected open justice. Material that was once provided to the court orally is more often tendered in documentary form. This makes it more difficult for people observing a case to follow its details. Obstacles to accessing documents admitted in evidence may make it difficult for the media to produce fair and accurate reports of cases.

1.9 There is no consolidated regime for access to court records in NSW courts. The *Court Information Act 2010* (NSW) (*Court Information Act*), which was enacted at the same time as the *CSNPO Act*, remains uncommenced. The several different regimes governing access to court records are not always consistent or easy to understand.

1.10 New technologies have also provided opportunities to facilitate open justice and access to court records. Many courts use websites to publish judgments and livestream some cases. The COVID-19 pandemic has prompted other innovations with implications for open justice, such as increased remote access to proceedings. We discuss these developments in more detail below.

1.11 Our review has provided an opportunity to consider how the laws relating to open justice operate in contemporary society and what, if anything, needs to change to address these evolving landscapes.

How we conducted this review

1.12 We consulted widely by:

- inviting submissions from a wide range of different stakeholders, including judicial officers, legal practitioners, academics, community groups, the media and government agencies
- conducting face-to-face and virtual consultations, and
- conducting an online survey.

1.13 We thank everyone who spoke or wrote to us to share their experiences and insights. Lists of submissions and consultations are at appendices C–F.

Preliminary submissions and consultations

1.14 To help us identify issues relevant to the review, we invited submissions on our terms of reference. We received 45 preliminary submissions.

1.15 Between October and November 2020, we undertook 17 preliminary consultations with a range of people and agencies.

Consultation paper

1.16 In December 2020, we released a consultation paper that invited comment on the issues we had identified and whether the laws relating to open justice needed to change.[1] We received 33 submissions in response.

1. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Consultation Paper 22 (2020).

Consultations

1.17 Between January and August 2021, we conducted 21 consultations with a wide range of people and groups. These included judicial officers, court and tribunal administrative staff, legal practitioners, government representatives, journalists, community organisations and academics.

Online survey

1.18 In March 2021, we published an online survey to encourage people who otherwise might not participate in a law reform process to have their say about issues relating to open justice. We received 189 responses.

1.19 The survey questions related to key issues concerning open justice, such as:

- when courts should be closed to the public
- when information should be kept from the public
- what information about a case the media should be able to access, and
- how social media use in the courtroom should be regulated.

1.20 The survey offered members of the public a quick and easy way to participate in the review. They could share their ideas without having to prepare a formal submission or engage with the more technical and legally complex questions raised in the consultation paper.

1.21 The responses to our survey are outlined in a supplementary research report.[2]

Draft proposals

1.22 In June 2021, we released our draft proposals and invited public responses.[3] We received 29 submissions in response.

Additional consultations

1.23 Between September and November 2021, we consulted with members of the Supreme Court, the Land and Environment Court, the Drug Court, the Local Court, the Children's Court, the NSW Civil and Administrative Tribunal (NCAT), the Mental Health Review Tribunal (MHRT), and the Courts, Tribunals and Service Delivery Division of the Department of Communities and Justice.

1.24 These consultations helped us to resolve issues that had been identified with our draft proposals and to finalise our recommendations.

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2. *Open Justice: Survey Results*, Research Report 16 (NSW Law Reform Commission, 2022).
3. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021).

Data

1.25 Over the course of the review, we obtained data about the use of non-publication and non-disclosure orders in NSW and in other Australian jurisdictions. We are grateful for the assistance of stakeholders in this exercise.

1.26 However, there were substantial limitations in the available data, which made it difficult to identify the overall volume of orders made by different courts in NSW. It was also difficult to compare NSW data with data from other states and territories, as there are significant differences in the legal and practical arrangements between jurisdictions and in how orders are recorded.

1.27 In chapter 13, we recommend that a register of orders be established. One of the benefits of a register would be to improve understanding of the number and type of orders made by NSW courts each year.

Our principles and aims

Guiding principles

1.28 The guiding principles we have adopted are:

1. Open justice is fundamental to the integrity of and confidence in the administration of justice.
2. Any exception to open justice should be to the minimal extent necessary.
3. Exceptions to open justice are appropriate where they are necessary to protect certain sensitive information, vulnerable people and the administration of justice.
4. The power and discretion of the judicial officer to control court proceedings and to determine open justice issues, in accordance with the circumstances of each case, should be preserved to the maximum extent possible.
5. Legislation that contains exceptions to open justice should (so far as practicable) be uniform and consistent.
6. Any exception to open justice should (so far as practicable) be applied in a way that is transparent, accessible and subject to scrutiny.

Aims of reform

1.29 The aims of the recommendations in this report are to:

- promote open justice, subject to necessary exceptions
- update legislation in response to societal and technological changes

- promote consistency (where appropriate) across statutes through uniformity in terminology and definitions
- promote confidence and certainty in the system by clarifying the effect and operation of exceptions to open justice
- increase transparency by providing mechanisms for review and appeal of discretionary exceptions to open justice (in the new Act)
- recognise special circumstances by retaining unique provisions in existing subject-specific legislation
- enhance or extend some protections for certain categories of vulnerable people
- empower people to tell their stories, should they wish to (subject to some necessary limits)
- create an effective regime for access to records on the court file
- create an effective regime for compliance and enforcement, and
- promote the efficient and effective operation of courts and tribunals by avoiding unreasonable burdens on those who must administer them.

Our approach

1.30 Our approach to reform has been guided by the principles and aims set out above.

Open justice is fundamental to the administration of justice

1.31 Open justice is the principle that the administration of justice should take place in public.

1.32 The first of our guiding principles provides that open justice is fundamental to the integrity of and public confidence in the justice system.

1.33 Open justice serves several important purposes including:

- the public knows what is happening in the courts and how justice is administered
- the courts are subject to scrutiny and kept accountable, and
- public confidence in the administration of justice is preserved.

1.34 By promoting public confidence in the administration of justice, open justice helps to maintain the courts' legitimacy.[4] People may be more willing to submit to a court's authority, obey court orders and accept outcomes, even when they are unfavourable, controversial or unpopular.[5] This is critical for preserving the rule of law and stability of society.[6]

1.35 We consider that open justice is made up of three key elements:

- Court proceedings must be open to observation and scrutiny, subject to limited exceptions.
- Fair and accurate reports of proceedings should be published, unless otherwise provided, to allow those who are not present in court to be informed.
- Access to records on the court file should be facilitated to assist with scrutinising court proceedings and producing fair and accurate reports of proceedings.

1.36 While open justice is a fundamental principle, it is not a "right" and is not absolute. There are sometimes competing interests that must be balanced against open justice. Particular categories have been recognised in the common law (chapter 2). Over time, legislation has been introduced that both affirms and goes beyond the traditional categories at common law. We refer to these categories and types of cases as "exceptions to open justice".

1.37 Our report focuses on statutes that contain exceptions to open justice. We deal with the general powers to make orders relating to open justice contained within the *CSNPO Act*, which we recommend be contained within a new (and expanded) Act (chapters 4, 6 and 7), separately to other legislative provisions contained in subject-specific statutes (chapters 8–12).

Legislation relating to open justice should be uniform and consistent

1.38 One of the themes that emerged from submissions and consultations is the lack of consistency across statutes that contain exceptions to open justice. Our fifth guiding principle provides that any legislation that contains exceptions to open justice should (so far as practicable) be uniform and consistent.

1.39 This principle underpins a number of our aims of reform, including promoting consistency (where appropriate) across statutes and achieving confidence and certainty in the system. It is a feature of several aspects of the report, including:

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4. B McLachlin, "Courts, Transparency and Public Confidence: To the Better Administration of Justice" (2003) 8 *Deakin Law Review* 1, 6–7, 9.
5. 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.
6. See, eg, *Re S (A Child)* [2004] UKHL 47, [2005] 1 AC 593 [30]; *Hogan v Hinch* [2011] HCA 4, 243 CLR 506 [20].

- a new framework for classifying exceptions to open justice and uniform definitions to reflect these classifications, which inform our recommendations in relation to the new Act and existing subject-specific legislation (chapter 3), and

- standard approaches to dealing with exceptions to open justice in subject-specific legislation, for example, standard mechanisms to allow for publication or disclosure where a statutory prohibition otherwise applies (chapter 8).

Exceptions to open justice are appropriate in certain circumstances

1.40 We have identified several categories of exceptions to open justice that are justified. Our third guiding principle recognises that exceptions to open justice are appropriate where they are necessary to protect certain sensitive information, vulnerable people and the administration of justice. Some of these categories are long established (such as the need to protect children and young people), and others have emerged more recently (such as the need to protect victims of domestic violence). These categories are discussed in more detail below.

1.41 In some cases, we have recommended expanding the application, scope or duration of existing exceptions to open justice. However, recognising that open justice is a fundamental principle, our second guiding principle provides that any exception to open justice should be to the minimal extent necessary. We only recommend expanding exceptions to open justice where there are clear reasons for doing so.

1.42 We believe our recommendations, taken as a whole, strike the right balance between the public's legitimate interest in understanding what happens in our courts and tribunals and other important considerations such as the public's interest in ensuring that justice is administered, protecting vulnerable people and maintaining individual privacy.

1.43 While we have aimed for uniformity and consistency, over the course of the review, it has become clear that it would not be appropriate to consolidate all legislation containing exceptions to open justice into a single statute (chapter 4). Recognising the appropriateness of laws that have developed over time to address special circumstances, one of our aims is retaining unique provisions in existing subject-specific legislation.

Protections for children and young people

1.44 Protections for children involved in court proceedings are meant to reduce distress and trauma and avoid stigmatisation. Publicising a child's involvement in criminal proceedings can lead to stigma in the community, psychological distress for the child and may damage a child defendant's rehabilitation and reintegration prospects. Some civil proceedings involving children are also particularly sensitive, such as adoption proceedings.

1.45 Our recommendations relating to children and young people in criminal proceedings, diversionary proceedings and certain civil proceedings aim to improve existing protections and introduce new protections for this vulnerable cohort. For example:

- All existing statutory prohibitions in subject-specific legislation relating to children and young people should be retained and, in some cases, expanded (chapter 9).
- The new Act should enable a court to make a non-publication or non-disclosure order in any criminal or civil proceeding if necessary to avoid causing undue distress or embarrassment to a child party or witness (chapter 6).
- There should be limited public access to criminal proceedings and care and protection proceedings (chapter 9), and the new Act should enable a court to make an exclusion order where necessary to support a child to give evidence (chapter 6).

Protections for people involved in sexual offence proceedings

1.46 The public policy reasons for limiting public access to, and publication of information about, sexual offence complainants, include:

- protecting complainants of sexual offences from stigma, distress and humiliation, and
- encouraging reporting of sexual offences and participation in the justice system by complainants.

1.47 We recommend retaining existing protections for complainants of sexual offences and expanding them in some instances. For example:

- The prohibition on publishing the identity of a complainant in prescribed sexual offence proceedings should commence when a complaint has been made to police and should continue to apply even when the complainant is deceased (chapter 10). However, there should be an exception to allow for publication of the identity of the victim of a sexual offence, where they are also the victim of an associated homicide (chapter 10).
- The new Act should enable a court to make a non-publication or non-disclosure order where necessary to avoid causing undue distress or embarrassment to a party or witness (including a victim or complainant) in any criminal or civil proceeding that involves, or relates to, a prescribed sexual offence (chapter 6).
- The court should be required to make an order excluding all people other than those whose presence is necessary from criminal proceedings involving a sexual offence when a complainant is giving evidence or when a victim impact statement is read out (chapter 10).
- The court should be required to make a closed court order, which would also prohibit disclosure of information, in proceedings involving incest (chapter 10).

Protections for people involved in domestic violence proceedings

1.48 There are existing protections in subject-specific legislation for complainants in domestic violence offence proceedings and for people involved in apprehended violence order (AVO) proceedings. AVO proceedings includes applications for an

apprehended domestic violence order (ADVO) and applications for an apprehended personal violence order.

1.49 There is increasing recognition that people experiencing domestic violence may need additional protection, and that many of the public policy reasons for protecting sexual offence complainants also apply to victims of domestic violence. This includes preventing stigma and distress and encouraging reporting of offences and participation in the justice system. Children involved in domestic violence proceedings are particularly vulnerable. Our recommendations reflect this. For example:

- The prohibition on publishing the identity of a child involved in AVO proceedings should be extended from children under the age of 16 to children under the age of 18 (chapter 11). All people other than those whose presence is necessary must be excluded from certain AVO proceedings involving a child or young person, unless the court orders otherwise (chapter 11).
- A court should continue to be able to make a non-publication order in relation to the identity of an adult involved in AVO proceedings (chapter 11).
- The new Act should enable a court to make a non-publication or non-disclosure order where necessary to avoid causing undue distress or embarrassment to a party or witness (including a victim or protected person) in any criminal or civil proceeding that involves, or relates to, a domestic violence offence (chapter 6).
- There should be a new discretion for the court to make an exclusion order in relation to ADVO proceedings where the protected person is an adult (chapter 11).

Protections for other vulnerable cohorts

1.50 Proceedings involving people with mental health issues often involve very personal and sensitive information, and people with mental health issues frequently experience ongoing stigma. We consider that current protections for this category of vulnerable people should be retained and, in some cases, extended (chapter 15).

1.51 We also recommend that the new Act should enable a court to make an exclusion order where necessary to support a person with a mental health or cognitive impairment to give evidence (chapter 6).

1.52 Proceedings concerning guardianship of adults and community welfare legislation may also be particularly sensitive and potentially stigmatising. We recommend that there should continue to be a prohibition on publishing the identity of people involved in guardianship and community welfare proceedings in NCAT, although we make some recommendations to modify this prohibition (chapter 15).

Protecting the right to a fair trial

1.53 A defendant's right to a fair trial is integral to the criminal justice system. One element of the right to a fair trial is ensuring that the jury decides the case solely on evidence

presented and tested in court. Potential jurors should not be exposed to possibly prejudicial information about a defendant.

1.54 Courts should continue to be empowered to make a non-publication or non-disclosure order, as well as an exclusion or closed court order, where necessary to prevent prejudice to the proper administration of justice (chapter 6).

1.55 Other protections should be retained, including the existing prohibitions on the publication of certain information in proceedings following acquittals (chapter 12).

Protection for police operations and national security

1.56 Another recognised category of exception to open justice is where the proceedings involve sensitive information about police operations or national or international security. This may include information about, for example, the identity of an undercover police officer, an informer, or investigation and surveillance techniques.

1.57 A court should be able to make a non-publication, non-disclosure, exclusion or closed court order where necessary to protect the safety of a person (for example, a police informer) and in relation to national or international security (chapter 6).

1.58 We have excluded all of the subject-specific statutes that fall into this category from our review because they are specialised and many of them form part of a model law framework or arrangement with other jurisdictions (appendix B).

A new Act should be introduced

1.59 In chapters 4–7 we recommend the introduction of a new Act setting out a legislative framework for access to records on the court file, and general powers to make orders.

Clear and consistent procedures for general powers to make orders

1.60 The new Act should set out general powers to make orders that would replace the *CSNPO Act*. Unlike the *CSNPO Act*, we recommend the new Act should contain powers to make exclusion and closed court orders, as well as non-publication and non-disclosure orders (chapters 4 and 6).

1.61 The new Act should emphasise the importance of open justice, by requiring courts to consider that a primary consideration when making an order is the public interest in open justice. The statement that open justice is a primary consideration makes it clear that, while open justice is important, it is not absolute, and must yield to other considerations in some circumstances (chapter 6).

1.62 The new Act should set out clear grounds for making orders, which are all prefaced with a requirement that the order is “necessary”. The type of order that is most appropriate would depend on the intended purpose and effect of the order, and the circumstances of the case (chapter 6).

1.63 A number of features of the new Act are consistent with our sixth guiding principle that exceptions to open justice should (so far as practicable) be applied in a way that is transparent, accessible and subject to scrutiny. These include:

- Requiring a court to specify the scope of orders and consider what is necessary to achieve the purpose of the order. This includes specifying the information and/or part of proceedings to which the order applies, where the order applies and the duration of the order (chapter 6).
- Including consistent procedures for making orders, reviewing and appealing orders, giving reasons for decisions under the Act, making orders for costs, and enforcement of orders (chapter 7).
- Clarifying who has standing in relation to these procedures and promoting the voices of the person who is, or would be, protected by an order (chapter 7).

An effective regime for access to records on the court file

1.64 People who are not parties to proceedings (including the media and researchers) have no common law right to access documents on a court file. Access to court records is traditionally not an inherent part of the principle of open justice. However, there is increasing recognition that access to court records is necessary to give effect to the principle of open justice.

1.65 Currently, access to records on the court file is largely regulated by a complex mix of statutory provisions, court rules and practice notes. Whether a person can access court records depends on factors such as the type of forum, proceeding and information being sought. The application procedures and methods by which access may be provided also vary.

1.66 As noted above, the *Court Information Act* was an attempt to consolidate access to records on court files. Concerns about its practical operation, including a requirement to remove personal identification information, means the Act never commenced.

1.67 One of our aims is to create an effective regime for access to court information, which would:

- improve and simplify access to court records by clarifying what records are available to particular classes of applicant
- promote greater consistency across different courts and types of proceedings, including by adopting uniform terminology, and
- ensure that important countervailing interests, such as privacy, are consistently and effectively protected.

1.68 Our recommended framework takes a different approach to the *Court Information Act*, which would have outlined access rules based on the type of information. The new Act should provide that some records may be accessible as of right, and others may be

accessible only with leave, depending on the category of applicant. We recognise that certain classes of applicant have a greater interest in accessing records, require access more frequently and are subject to professional and/or ethical constraints.

1.69 One of our aims is to promote the efficient and effective operation of the courts by avoidining unreasonable burdens on those who must adminster them. While we have aimed for clarity and consistency, our recommended access framework also recognises the importance of providing flexibility to courts and taking account of differences between jurisdictions. Courts would be able to make rules to expand or supplement the framework.

The special role of the media should be recognised

1.70 The media plays a significant role in facilitating open justice by publishing fair and accurate reports of what happens in court. Few members of the public have the capacity to attend courts in person.[7] One rationale for the media's special status is that they are "the eyes and ears of the public".[8]

1.71 The courts have recognised the importance of the media to open justice. For example, in 2004, Justice Barrett observed that:

> [e]nsuring (or, at least, not prejudicing) opportunities for fair reporting of legal proceedings by the press is, in a real sense, an aspect of that principle … it would be wrong for any court to proceed on the basis of some *a priori* assumption that press reporting will be otherwise than objective and responsible.[9]

1.72 As noted above, technological developments, such as the growth of social media, have challenged the business models of media organisations and changed the way that news is produced and distributed. Research by the Australian Competition and Consumer Commission (ACCC) found that, in 2018, major metropolitan and national daily newspapers produced 40% fewer articles on local court matters than at the peak of local court reporting in 2005.[10] As the ACCC says, public interest journalism of this kind performs a "critical role in the effective functioning of democracy at all levels of government and society".[11]

1.73 The development of social media has also given rise to problems in defining a "journalist" or "news media organisation" (chapter 3).

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7. *R v Davis* (1995) 57 FCR 512, 514.
8. *AB v R (No 3)* [2019] NSWCCA 46, 97 NSWLR 1046 [101].
9. *ASIC v Michalik* [2004] NSWSC 966 [7].
10. Australian Competition and Consumer Commission, *Digital Platforms Inquiry*, Final Report (2019) 314–315.
11. Australian Competition and Consumer Commission, *Digital Platforms Inquiry*, Final Report (2019) 19.

1.74 Notwithstanding these difficulties, professional journalists and news media organisations remain the main source of information for the public about what happens in courts, rather than news posted on social media.[12]

1.75 Existing legislation provides a special status for media organisations and their representatives in several settings.[13] We make a number of recommendations that continue and expand on this status, including:

- In certain situations journalists should be able to be present in proceedings from which the public is excluded, such as where an exclusion order is made under the new Act (chapter 6) and in certain proceedings involving children (chapter 9).
- In other circumstances, there should be a more limited exception for journalists to remain when the public is excluded while a complainant gives evidence in proceedings involving a sexual offence (chapter 10) and in domestic violence offence proceedings, ADVO proceedings involving adults and AVO proceedings involving young people where the public is excluded (chapter 11).
- The media should have standing to appear and be heard in applications for orders made under the new Act, as well as to apply for, appear and be heard in reviews of non-publication, non-disclosure and closed court orders, and appeals of all types of orders (chapter 7).
- Journalists should be entitled to access certain records on the court file as of right, without the need to seek leave (chapter 5).
- A journalist should be able to make audio recordings of proceedings, upon having notified the court of an intention to do so, unless the court orders otherwise (chapter 14).

Empowering people to speak about their experiences in the justice system

1.76 There have been prominent, recent calls to empower people who have experienced sexual assault to speak about their experience.

1.77 The #MeToo movement encourages victims to speak out about their experiences of sexual abuse in an effort to expose and halt violence against women.[14]

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12. Victorian Law Reform Commission, *Contempt of Court*, Report (2020) [10.25].
13. See, e.g., *Criminal Procedure Act 1986* (NSW) s 291C, s 314(2); *Children (Criminal Proceedings) Act 1987* (NSW) s 10(1)(b); *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 104C; *Court Suppression and Non-publication Orders Act 2010* (NSW) s 9(2)(d), s 13(2)(d), s 14(3)(d).
14. A Gjika and A J Marganski, "Silent Voices, Hidden Stories: A Review of Sexual Assault (Non) Disclosure Literature, Emerging Issues and Call to Action" (2020) 9 *International Journal for Crime, Justice and Social Democracy* 163, 164.

1.78 The #LetHerSpeak campaign focuses on changing the laws that prevent people who have experienced sexual assault from being publicly identified if they choose, without a court order.[15]

1.79 The Royal Commission into Institutional Responses to Child Sexual Abuse also recognised the importance of giving victims a voice.[16]

1.80 One of our aims is to empower people to tell their stories, should they wish to. However, we also note that this may need to be limited in some circumstances, where it may impact on the administration of justice.

1.81 Some of our recommendations include:

- In the majority of cases where a statutory prohibition on publication or disclosure applies, there should be a mechanism for the person to consent and/or the court to grant leave for publication or disclosure (chapters 8–12).
- A court should be required to revoke a non-publication or non-disclosure order made over the identity of certain people, if requested to do so (subject to some limitations) (chapter 7).
- The court should consider the views of the person who is, or would be, protected by an order, when making a decision in relation to orders under the new Act (chapter 7).
- The statutory prohibitions that apply in NCAT and the MHRT should be clarified so that they apply only to the publication of information that would identify a person in a way that connects them with proceedings (chapter 15).

Effective regimes for compliance and enforcement

1.82 Guiding principle six provides that any exception to open justice should (so far as practicable) be applied in a way that is transparent, accessible and subject to scrutiny.

1.83 In addition, one of our aims is to create effective regimes for compliance and enforcement. Some examples of our recommendations that give effect to this are:

- The new Act should include penalties for offences under the Act (chapters 5 and 7) and provide that breaches of non-publication or non-disclosure orders that occur overseas can be punishable as offences in NSW (chapter 7).
- Breaches of orders, statutory prohibitions on publication or disclosure and statutory exclusion or closed court provisions in subject-specific legislation should be

15. #LetHerSpeak, “What is #LetHerSpeak / #LetUsSpeak?” <www.letusspeak.com.au> (retrieved 4 April 2022).
16. *Royal Commission into Institutional Responses to Child Sexual Abuse,* Interim Report (2014) vol 1, 28.

punishable either as a statutory offence or as contempt of court (but not both) (chapter 13).

- All offences for breaches of orders, statutory prohibitions on publication or disclosure and statutory exclusion or closed court provisions should contain standard elements and time limits (chapter 13).

- There should be an online register of non-publication, non-disclosure and closed court orders (chapter 13).

Legislation should respond, and not be a barrier, to technological change

1.84 As outlined above, many of the laws that govern open justice were introduced at a time when technological landscapes looked very different. In contemporary society, information is frequently and easily shared across borders via the internet, particularly on social media. We discuss the impact of technology on open justice further in chapter 14.

1.85 One of our aims is to update legislation in response to societal and technological changes. Technology, and responses to the COVID-19 pandemic, provide opportunities in terms of accessibility. The internet enables people to search court files, read judgments and watch live court proceedings, without having to physically attend the court.

1.86 However, to ensure flexibility, we have not made recommendations prescribing how the government should address issues related to open justice and technology.

1.87 Instead, we make a number of recommendations accounting for issues created by an increasingly digital and globalised world. These include:

- expanding definitions of some terms, such as “publish” and “contact information”, to include social media (chapter 3)

- enabling a court to make a non-publication or non-disclosure order that applies worldwide (chapter 6)

- clarifying that “obtaining a copy” of a court record includes obtaining an digital copy (chapter 5), and

- facilitating remote access to proceedings (chapter 14).

Education and implementation will be key to ensuring delivery

1.88 Our recommendations aim to increase clarity and consistency, introduce effective regimes for exceptions to open justice and access to records on the court file, and promote the efficient and effective operation of courts and tribunals.

1.89 In order to deliver on these aims, appropriate resourcing will be required for effective implementation and education to improve awareness and understanding of these laws (chapter 16).

Exclusions from the review

The common law

1.90 There are a number of common law and statutory exceptions to open justice. We discuss the common law exceptions further in chapter 2. Our recommendations only apply to the statutory exceptions to open justice.

Commissions and administrative functions

1.91 In accordance with the terms of reference, this report considers legislation relating to open justice in courts and tribunals. It does not address legislation relating to:

- commissions of inquiry, such as the Independent Commission Against Corruption, or royal commissions, or
- the exercise of non-judicial, purely administrative, functions, such as those which arise under the *Victims Rights and Support Act 2013* (NSW).

1.92 This report deals separately with specialised courts, such as the Drug Court and the coronial jurisdiction, and tribunals. We have applied the framework for classifying exceptions to open justice and some of the uniform definitions recommended in chapter 3 to NCAT and the MHRT. However, the frameworks recommended in chapters 4–7 for powers to make orders and access to records on the court file are inappropriate for these jurisdictions (chapter 15).

The law of contempt

1.93 The law of contempt empowers courts to deal with interferences with the proper administration of justice. Of the many different types of contempt, several are relevant to this review. For example:

- "disobedience contempt", which involves a failure or refusal to comply with a court order, for example, a person disclosing information that a court has ordered not to be disclosed[17]
- "sub judice contempt", or contempt by publication, for example, a person publishes information about ongoing proceedings and the publication has a "real and definite" tendency to interfere with the administration of justice in the proceedings,[18] and

17. N Adams and B Baker, "Sentencing for Contempt of Court" (Paper presented at National Judicial College of Australia and the Australian National University Sentencing Conference, Canberra, 29 February 2020–1 March 2020) [30]–[31], [38].
18. *Hinch v AG (Vic)* (1987) 164 CLR 15, 46–47.

- a contempt in the face of the court, which involves misconduct in or near the courtroom that disrupts or interferes with proceedings, for example, a person who refuses to leave the courtroom after a judge has ordered them to leave.[19]

1.94 Contempt is a complex area of law. We have considered it only in the limited context in which it is relevant to open justice. It would not be appropriate in the context of this review to make broader recommendations about the law of contempt.

1.95 We do not recommend any changes to the law of contempt or the way it is applied. However, contempt is relevant to some of our recommendations for dealing with breaches (chapter 13).

Juries and avoiding juror prejudice

1.96 Like the law of contempt, the issue of juror exposure to prejudicial information has some relevance to this review. There is also a form of contempt applicable to jurors, for example, disclosing the deliberations of a jury.[20]

1.97 As mentioned above, a key reason for making non-publication orders may be the desire to protect jurors from potentially prejudicial information.[21] If jurors make decisions based on such information, rather than the information that has been presented and tested at the trial, it jeopardises the accused person's right to a fair trial.[22]

1.98 In the consultation paper, we considered a range of options for managing the risk of juror exposure to prejudicial information.[23]

1.99 However, preserving the integrity of the jury system, by ensuring that jurors make decisions based solely on the evidence before them, is an issue that goes beyond the scope of this review. Accordingly, we do not make any recommendations relating to juries, or to the statutory prohibitions on publication and disclosure contained in s 68 of the *Jury Act 1977* (NSW).

Legislation excluded from the review

1.100 Over the course of the review, we identified and considered over 100 provisions relating to open justice in subject-specific legislation.

1.101 We have excluded a number of provisions from the recommendations in this report for one or more of the following reasons:

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19. *Re Bauskis* [2006] NSWSC 908.
20. Victorian Law Reform Commission, *Contempt of Court,* Report (2020) 124.
21. J Johnston, P Keyzer, A Wallace and M Pearson, *Preliminary Submission PCI26,* 6.
22. New Zealand Law Commission, *Reforming the Law of Contempt of Court: A Modern Statute*, Report 140 (2017) [12].
23. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication,* Consultation Paper 22 (2020) [13.39]–[13.74].

- The provision is unique, forming part of a statute that is specialised and specific in nature. The application of our generic recommendations in these contexts may have unintended consequences.
- The provision is part of a model law framework, uniform law or reciprocal arrangement with other states, territories and the Commonwealth. If the provision in NSW legislation were changed, it would no longer be consistent with comparable provisions in other jurisdictions.
- The provision is contained within a statute that confers jurisdiction on NCAT. As we explain in chapter 15, we make limited recommendations relating to NCAT.

1.102 A list of the provisions we have excluded from the report is at appendix B.

2. The principle of open justice

In Brief

The important principle of open justice involves three elements: open courts, fair and accurate reporting of proceedings, and access to court records. There are common law limits to open justice, that exist in courts' inherent and implied powers, and that can be found in recognised categories of exception.

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2.1 The principle of open justice is most closely connected with the idea that court proceedings should be open to the public. The elements of open justice also include the fair and accurate reporting of court proceedings and access to court records. In this chapter we consider the elements of open justice and the development by the courts of necessary exceptions to the principle.

Elements of open justice

Open courts

2.2 It is a well-established rule of common law that court proceedings must, subject to exceptional cases, be held in public.[1] This is fundamental to the maintenance of confidence in the courts and the administration of justice. In 1913, in a case in the House of Lords which is often referred to in discussions of open justice, Lord Atkinson observed that the negative impacts of public hearings are:

1. *Scott v Scott* [1913] AC 417, 422–423.

> tolerated and endured, because it is felt that in public trial is to [be] found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means of winning for it public confidence and respect.[2]

2.3 In 1976, Justice Gibbs (in the High Court of Australia) made a similar observation, stating that the open court rule:

> has the virtue that the proceedings of every court are fully exposed to public and professional scrutiny and criticism, without which abuses may flourish undetected. Further, the public administration of justice tends to maintain confidence in the integrity and independence of the courts.[3]

2.4 In the same case, Chief Justice Barwick observed that it is "of the essence of the State system of courts" that, unless authorised by statute, court proceedings will be open to the public.[4]

2.5 A phrase that is commonly used when referring to the principle of open justice is that it "is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done".[5] This aphorism, which was originally applied to a case of apprehended bias,[6] has since also been deployed to support the open court rule.[7]

2.6 Exposing court proceedings to public scrutiny encourages judges to act fairly and impartially.[8] It can also encourage others in court to act reasonably and responsibly. It has been said that conducting business in open court exposes other participants, including witnesses and lawyers, to necessary public scrutiny. In particular, it has been suggested that open courts can help ensure fair conduct by prosecutors and can act as

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2. *Scott v Scott* [1913] AC 417, 463.
3. *Russell v Russell* (1976) 134 CLR 495, 520. See also *Commissioner of the Australian Federal Police v Zhao* [2015] HCA 5, 255 CLR 46 [44]; *Hogan v Hinch* [2011] HCA 4, 243 CLR 506 [20].
4. *Russell v Russell* (1976) 134 CLR 495, 505.
5. *R v Sussex Justices; ex parte McCarthy* [1924] 1 KB 256, 259.
6. *R v Sussex Justices; ex parte McCarthy* [1924] 1 KB 256. See, eg, *Kaldas v Barbour (No 2)* [2016] NSWSC 1886 [13]; *Crossman v Sheahan* [2016] NSWCA 200 [21]; *RPS v R* [2000] HCA 3, 199 CLR 620 [95]; *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63, 205 CLR 337 [6], [147].
7. J J Spigelman, "Seen to be Done: The Principle of Open Justice: Part 1" (2000) 74 *Australian Law Journal* 290.
8. See, eg, *Russell v Russell* (1976) 134 CLR 495, 520; *AG (UK) v Leveller Magazine Ltd* [1979] AC 440, 449–450; *Richmond Newspapers Inc v Virginia* (1980) 448 US 555, 592, 596.

a curb on state power.[9] It has also been argued, in relation to witnesses, that open proceedings may help to discourage false testimony.[10]

2.7 The *International Covenant on Civil and Political Rights* reflects the open court rule in requiring that the determination of civil and criminal proceedings should be by public hearing.[11] We outline international instruments relating to open justice in appendix I.

Fair and accurate reporting of proceedings

2.8 A consequence of the open court rule is that, unless otherwise provided, anybody may publish a fair and accurate report of court proceedings "including the names of the parties and witnesses, and the evidence, testimonial, documentary or physical, that has been given in the proceedings".[12]

2.9 It therefore follows "that nothing should be done to discourage the making of fair and accurate reports of what occurs in the courtroom".[13] Indeed, the common law protects fair reports of court proceedings, made in good faith, against liability, since such reports allow readers to see a "substantially correct record of what was said and done in court".[14] It has been observed that while publication of such a report may be difficult for one who is the subject of it:

> public policy requires that some hardship should be suffered by individuals rather than that judicial proceedings should be held in secret. The common law, on the ground of public policy, recognizes that there may be greater danger to the public in allowing judicial proceedings to be held in secret than in suffering persons for a time to rest under an unfounded charge or suggestion.[15]

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9. B McLachlin, "Courts, Transparency and Public Confidence: To the Better Administration of Justice" (2003) 8 *Deakin Law Review* 1, 8; *Collaery v R (No 2)* [2021] ACTCA 28.
10. *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47, 52; *Marsden v Amalgamated Television Services Pty Ltd* [1999] NSWSC 1099 [66]. J H Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law including the Statutes and Judicial Decisions of All Jurisdictions of the United States and Canada* (Little Brown and Company, 3rd ed, 1940) vol 6 [1834].
11. *International Covenant on Civil and Political Rights*, 999 UNTS 171 (entered into force 23 March 1976) art 14(1). See appendix I [I.123]–[I.126].
12. *Hogan v Hinch* [2011] HCA 4, 243 CLR 50 [22]; *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47, 55, 61.
13. *John Fairfax and Sons v Police Tribunal of NSW* (1986) 5 NSWLR 465, 476–477; *John Fairfax Publications Pty Ltd v District Court of NSW* [2004] NSWCA 324, 61 NSWLR 344 [20].
14. *Rogers v Nationwide News Pty Ltd* [2003] HCA 52, 216 CLR 327 [15].
15. *Kimber v Press Association Ltd* [1893] 1 QB 65, 68–69; *Rogers v Nationwide News Pty Ltd* [2003] HCA 52, 216 CLR 327 [16].

Access to court records

2.10 At common law, the principle of open justice supports access to records on the court file, but only as they become relevant when used in court.[16] It does not support access to documents that are not used in court. Accordingly, use of documents in court "will often be determinative" when deciding to grant access to such documents to the media, for example.[17]

2.11 The Court of Appeal has observed that there is no common law right to obtain access to documents filed in proceedings and held by the court.[18] It has explained the relationship to the principle of open justice as follows:

> The "principle of open justice" is a *principle*, it is not a freestanding right. It does not create some form of freedom of information Act applicable to courts. As a principle, it is of significance in guiding the court in determining a range of matters including, relevantly, when an application for access should be granted pursuant to an express or implied power to grant access. However, it remains a principle and not a right.[19]

2.12 Within this context, the Court of Appeal has observed that, in cases where, for reasons of efficiency or practice, material is not read out in open court, but is either taken as read or presented in some other way that informs the court, "[i]t is entirely appropriate for the court to ensure that the public is fully informed of the actual proceedings in court".[20] It has also been observed that the policy which requires the judicial process to be open to public scrutiny demands that the subject matter of the process be available "so far as this is necessary for the public to scrutinise the process itself".[21]

2.13 However, access to court documents and records outside these confines is increasingly recognised as necessary, in appropriate cases, to give effect to the principle of open justice. Access to records 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 at common law.

2.14 The uncommenced *Court Information Act 2010* (NSW) (*Court Information Act*), for example, was intended to recognise the idea that access to information held by courts is an essential feature of open justice:

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16. *John Fairfax Publications Pty Ltd v Ryde Local Court* [2005] NSWCA 101, 62 NSWLR 512 [65].
17. *John Fairfax Publications Pty Ltd v Ryde Local Court* [2005] NSWCA 101, 62 NSWLR 512 [32].
18. *John Fairfax Publications Pty Ltd v Ryde Local Court* [2005] NSWCA 101, 62 NSWLR 512 [31].
19. *John Fairfax Publications Pty Ltd v Ryde Local Court* [2005] NSWCA 101, 62 NSWLR 512 [29].
20. *John Fairfax Publications Pty Ltd v Ryde Local Court* [2005] NSWCA 101, 62 NSWLR 512 [66].
21. *Smith v Harris* [1996] 2 VR 335, 350; *John Fairfax Publications Pty Ltd v Ryde Local Court* [2005] NSWCA 101, 62 NSWLR 512 [69].

> It allows the public to be informed about what takes place in the courtroom and to understand the basis on which judicial officers make their decisions.[22]

2.15 The Act would have categorised certain court records as "open access information", regardless of whether they were ultimately used in court, including documents commencing proceedings, written submissions and fact sheets (unless set down for trial by jury).[23] This reflected the statutory aim of the Act "to provide for open access to the public to certain court information to promote transparency and a greater understanding of the justice system".[24] We discuss the *Court Information Act* further in chapters 4 and 5.

Common law limits on the principle of open justice

2.16 While important, "the principle of open justice is not, and cannot be, absolute".[25] Courts and legislators have recognised that, in some circumstances, open justice must give way to other interests.[26] To protect these interests, open justice must be subject to certain exceptions. Our terms of reference explicitly recognise this.

Inherent and implied powers to limit open justice

2.17 At common law, the power to limit open justice where this is necessary to secure the proper administration of justice is part of the superior courts' inherent jurisdiction to regulate their proceedings and inferior courts' implied powers.[27]

2.18 The Supreme Court is a superior court. 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".[28] Although the full scope of the inherent jurisdiction of superior courts is complex and has been described as a "difficult idea to pin down",[29] there are some "well-recognised elements" including:

- dealing with contempt

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22. NSW, *Parliamentary Debates,* Legislative Assembly, Agreement in Principle Speech, 19 March 2010, 21774.
23. *Court Information Act 2010* (NSW) s 5, s 8 (uncommenced).
24. *Court Information Act 2010* (NSW) s 3(b) (uncommenced).
25. A Marusevich, "Suppression orders: Old but not Obsolete" (2019) 251 *Ethos* 22, 22.
26. 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.
27. *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.
28. I H Jacob, "The Inherent Jurisdiction of the Court" (1970) 23 *Current Legal Problems* 23, 27.
29. M S Dockray, "The Inherent Jurisdiction to Regulate Civil Proceedings" (1997) 113 *Law Quarterly Review* 120, 120.

- preventing abuse of process, and
- acting in protection of those who cannot care for themselves (that is, exercising the court's protective jurisdiction).[30]

2.19 Inferior courts, such as the Local Court and the District Court, do not have inherent jurisdiction like superior courts. They do not have general responsibility for the administration of justice beyond their limited jurisdiction.[31] 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.[32] These powers are similar to, but more limited than, the inherent powers of a superior court,[33] and arise only in cases of necessity.[34]

The common law approach to limiting open justice

2.20 At common law, courts may limit open justice by making orders to:

- close all or part of the proceedings[35]
- use a pseudonym to conceal a person's identity,[36] or
- prohibit publication of reports of proceedings or certain information.[37]

2.21 Subject to the categories of exception outlined below, statutory authority is required for proceedings not to be held in public or to prevent the publication or disclosure of information heard in open court.[38]

Recognised categories of exceptions to open justice

2.22 In *Scott v Scott*, the House of Lords held that there were established exceptions to the open court rule where:

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30. R Ananian-Welsh, "The Inherent Jurisdiction of Courts and the Fair Trial" (2019) 41 *Sydney Law Review* 423, 426–427.
31. *Grassby v R* (1989) 168 CLR 1, 16.
32. *Grassby v R* (1989) 168 CLR 1, 16; *John Fairfax and Sons Pty Ltd v Police Tribunal of NSW* (1986) 5 NSWLR 465, 476.
33. *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.
34. *John Fairfax and Sons Pty Ltd v Police Tribunal of NSW* (1986) 5 NSWLR 465, 476–477; *Australian Broadcasting Corporation v Local Court of NSW* [2014] NSWSC 239 [83].
35. See, eg, *John Fairfax Group Pty Ltd v Local Court of NSW* (1991) 26 NSWLR 131, 166; *Hogan v Hinch* [2011] HCA 4, 243 CLR 506 [21], [46].
36. See, eg, *Witness v Marsden* [2000] NSWCA 52, 49 NSWLR 429 [125].
37. See, eg, *John Fairfax and Sons Pty Ltd v Police Tribunal of NSW* (1986) 5 NSWLR 465.
38. *Russell v Russell* (1976) 134 CLR 495, 533; *W v M* [2009] NSWSC 1084 [13]; *Hogan v Hinch* [2011] HCA 4, 243 CLR 506 [27].

- the court exercises its protective jurisdiction (in relation to wardship and mental health),[39] and
- the litigation is about a secret process where publicity would destroy the subject matter of the case and make it impossible to achieve justice at all.[40]

2.23 At common law, categories of cases also emerged where a court is closed because it was "really necessary to secure the proper administration of justice".[41] Such categories include where public proceedings would:

- discourage attainment of justice in cases generally, such as in blackmail prosecutions,[42] or
- derogate from even more imperative considerations of public interest, such as cases involving national security.[43]

2.24 Other recognised categories of cases include where it may be necessary to protect:

- an anticipated breach of confidence, or
- the name of a police informant.[44]

2.25 Courts have also modified the open court rule to control crowding in the courtroom, so that those who must be present can attend.[45]

2.26 While the categories of cases remain open, courts are reluctant to expand them.[46] However, it is possible to identify additional exceptions by analogy.[47]

The administration of justice

2.27 As we note above, there are categories of cases where an exception to open justice is necessary to secure the proper administration of justice.[48]

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39. *Scott v Scott* [1913] AC 417, 437–438; *Hogan v Hinch* [2011] HCA 4, 243 CLR 506 [21].
40. *Scott v Scott* [1913] AC 417, 437–438; *Andrew v Raeburn* (1874) LR 9 Ch 522, 523.
41. *John Fairfax and Sons Pty Ltd v Police Tribunal of NSW* (1986) 5 NSWLR 465, 476–477.
42. *R v Socialist Worker Printers and Publishers Ltd; Ex parte AG (UK)* [1975] QB 637, 644; *Hogan v Hinch* [2011] HCA 4, 243 CLR 506 [21].
43. *R v Lodhi* [2006] NSWCCA 101, 65 NSWLR 573 [25]–[28].
44. See, eg, *Hogan v Hinch* [2011] HCA 4, 243 CLR 506 [21].
45. 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.
46. *John Fairfax Publications Pty Ltd v District Court of NSW* [2004] NSWCA 324, 61 NSWLR 344 [19]; *Hogan v Hinch* [2011] HCA 4, 243 CLR 506 [21]; *R v Kwok* [2005] NSWCCA 245, 64 NSWLR 335 [19], [33].
47. *R v Kwok* [2005] NSWCCA 245, 64 NSWLR 335 [19], [43]–[45].

2.28 The "administration of justice" is a broad concept. There are two features of the administration of justice that are particularly relevant:

- that criminal trials are fair, and
- that people who can assist in the justice process are enabled and encouraged to do so.[49]

2.29 Included within the concept of a fair trial is that the jury must decide the case solely on the evidence presented and tested in court. Publicity about pending court cases may lead to potential jurors having inappropriate extraneous knowledge. This puts media coverage of court proceedings in tension with the need to ensure fair jury trials. This tension was exemplified in the proceedings against media organisations for contempt in relation to suppression orders in the *Pell* case, discussed below.

2.30 Other relevant features of the administration of justice include the need to encourage the reporting of offences, the right to a fair hearing in civil proceedings, and the need to support access to justice for vulnerable participants who might be deterred by publicity. It has been noted that, in civil proceedings, some form of limit on open justice might be required in cases where:

> litigants would be deterred from bringing their disputes to court and both litigants and third parties would be discouraged from complying with subpoenas and discovery processes which themselves are vital to the proper functioning of justice.[50]

2.31 The *International Covenant on Civil and Political Rights* partially reflects the principles of the common law approach by allowing the exclusion of the public in special cases where publicity would prejudice the interests of justice.[51]

The *Pell* case

2.32 As noted above, the *Pell* case illustrates some of the considerations and conflicts that arise in the context of exceptions to open justice in order to secure a fair trial.

2.33 In this case, the County Court of Victoria made an order to prohibit publication of information about a trial in which Cardinal Pell was the defendant (the cathedral trial), until the conclusion of a second trial involving Cardinal Pell (the swimmers trial). Cardinal Pell was ultimately convicted at the cathedral trial. The swimmers trial was

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48. *John Fairfax and Sons Pty Ltd v Police Tribunal of NSW* (1986) 5 NSWLR 465, 476–477.
49. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Consultation Paper 22 (2020) [1.32]–[1.38].
50. *NSW Commissioner of Police v Nationwide News Pty Ltd* [2007] NSWCA 366, 70 NSWLR 643 [32].
51. *International Covenant on Civil and Political Rights*, 999 UNTS 171 (entered into force 23 March 1976) art 14(1). See appendix I [I.123]–[I.126].

later discontinued. Cardinal Pell's conviction at the cathedral trial was later overturned by the High Court.[52]

2.34 The purpose of the order was to avoid prejudice in the swimmers trial by the exposure of potential jurors to the evidence in, and outcome of, the cathedral trial. The judge making the order accepted that "international exposure has the capacity to undermine, to some degree, the efficacy of any order that I make", given Cardinal Pell's high status in the Roman Catholic church and the consequential interest in the case. The judge also acknowledged that courts "can only do so much" to protect the fairness of a trial. Nevertheless, after weighing up the likely interest from international media, the judge concluded it did not mean the order was unnecessary.[53]

2.35 International media, including *The Washington Post* and *The Daily Beast,* reported Cardinal Pell's conviction following the cathedral trial, in breach of the order. These reports were shared on social media and other digital platforms, including Twitter, Facebook, Reddit, Wikipedia and Google,[54] which meant information about the case could be accessed within Australia.[55]

2.36 Because international media reported Cardinal Pell's convictions when they were suppressed, the *Pell* case raises the question of how effective non-publication and non-disclosure orders are if they can be disregarded by international media.[56]

2.37 The *Pell* case is not isolated in this respect. In another Victorian case, Wikileaks' publication of the details of a suppression order was so widely circulated by Australian and overseas media that it effectively rendered the court's orders redundant.[57]

2.38 Several Australian media organisations published reports that did not name Cardinal Pell but said a high-profile person had been convicted of serious crimes and that reporting had been suppressed. In response, the Victorian Director of Public Prosecutions initiated contempt proceedings against various media organisations, editors, journalists, and television and radio presenters.

2.39 Twelve Australian news media organisations pleaded guilty to charges of contempt of court and were convicted and sentenced.[58]

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52. *Pell v R* [2020] HCA 12, 268 CLR 123.
53. *DPP (Vic) v Pell* [2018] VCC 905 [59].
54. M Dobbie, *The War on Journalism: The MEAA Report into the State of Press Freedom in Australia in 2020* (2020) 56.
55. University of Sydney Policy Reform Project, *Preliminary Submission PCI11* [7.3].
56. 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 April 2022); F Kunc, "Victorian Suppression Orders and the International Media" (2019) 93 *Australian Law Journal* 79, 80.
57. *DPP (Cth) v Brady* [2015] VSC 246 [77]–[79].

2.40 Even though the information they published did not name Cardinal Pell or specify the charges he faced, the sentencing judge found that it had "frustrated the purpose and intended effect of the suppression order in a significant degree".[59]

2.41 The intended effect of the order was to protect the accused's right to a fair trial. The judge considered the frustration to be significant because the media organisations had usurped the court's function in protecting the proper administration of justice, by determining for themselves what they could publish:

> Excepting an appeal to a higher court, there is no place for the media to revisit, or ignore, the concerns that exercised the mind of a trial judge seeking to ensure that an accused person was tried by an impartial jury that had not been infected by material that might encourage impermissible reasoning processes.[60]

2.42 The judge further observed that:

> The Chief Judge's reasons ought to have made it apparent to any journalist, editor or media lawyer that anonymising Pell and the offences found proved, but otherwise publishing information derived from the trial, could not appropriately inform a public apparently anxious to know why the local media was not reporting on an important story that was being noted in overseas reports and on social media. That would necessarily follow because the reasonable and ordinary reader of the Suppression Order Ruling would know that the public's right to know about the first trial had been deferred to accommodate Pell's right to a fair trial.[61]

Matters that do not strictly require a public hearing

2.43 There are some matters that are considered, usually for reasons of efficiency, as not needing to be dealt with in public. Chief Justice French observed that "the character of the proceedings and the nature of the function conferred upon the court may also qualify the application of the open-court principle".[62]

2.44 One example is court rules that establish a process of seeking leave to appeal that involves private proceedings and written applications. These can be characterised as establishing a proceeding that is "not in the ordinary course of litigation" and as having

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58. *R v The Herald and Weekly Times Pty Ltd* [2021] VSC 253.
59. *R v The Herald and Weekly Times Pty Ltd* [2021] VSC 253 [277], [279].
60. *R v The Herald and Weekly Times Pty Ltd* [2021] VSC 253 [301].
61. *R v The Herald and Weekly Times Pty Ltd* [2021] VSC 253 [304].
62. *Hogan v Hinch* [2011] HCA 4, 243 CLR 506 [21].

been adopted to enable the court to control "in some measure" the volume of its appellate work.[63]

2.45 Some existing provisions in NSW that qualify the application of the open court rule involve largely procedural issues. For example, under the *Criminal Procedure Act 1986* (NSW), committal proceedings can be conducted through the electronic case management system after an accused person's first appearance, where the parties consent and the matter:

- is procedural in nature
- does not need to resolve a disputed issue, and
- does not involve the accused giving oral evidence.[64]

A number of other such provisions allow matters to continue in the absence of the public and/or the parties.[65]

2.46 Section 71 of *Civil Procedure Act 2005* (NSW) (*Civil Procedure Act*) sets out when the business of the court in relation to any civil proceedings may be held in the absence of the public.[66] Some of the categories of proceedings are procedural or do not finally determine the rights of the parties, such as:

- a hearing of an interlocutory application (except where a witness is giving evidence)
- proceedings that are not before a jury and are formal or non-contentious, and
- business that does not involve the appearance of any person before the court.[67]

2.47 These are proceedings that would, under earlier arrangements, have been conducted "in chambers" as distinct from "in court" before that distinction was abolished for the Supreme Court in 1970.[68] The open court rule did not apply to proceedings in chambers.

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63. *Coulter v R* (1988) 164 CLR 350, 356, 357.
64. *Criminal Procedure Act 1986* (NSW) s 57(3).
65. See, eg, *Civil Procedure Act 2005* (NSW) s 71; *Crimes (Administration of Sentences) Regulation 2014* (NSW) cl 329(6); *Crimes (Appeal and Review) Act 2001* (NSW) s 7(1); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 91(2), s 100(2); *Crimes (Sentencing Procedure) Regulation 2017* (NSW) cl 13(6); *Supreme Court Rules 1970* (NSW) pt 65C r 3(2), pt 65C r 4(7), pt 71A r 5, pt 71A r 7(4), pt 78 r 9(1), pt 78 r 47, pt 78 r 51(2), pt 78 r 63(2), pt 78 r 82, pt 80A r 13A(3), pt 80A r 13B(3), pt 80A r 13C(3), pt 80A r 22(4), pt 80A r 23(4), pt 80A r 33(6), pt 80A r 35(2), pt 82 r 3, pt 82 r 7(8).
66. *Civil Procedure Act 2005* (NSW) s 71.
67. *Civil Procedure Act 2005* (NSW) s 71(a), s 71(d)–(e).
68. *Supreme Court Act 1970* (NSW) s 11; NSW Law Reform Commission, *Supreme Court Procedure*, Report 7 (1969) 15.

2.48 On the other hand, some grounds in s 71 of the *Civil Procedure Act* for holding proceedings in the absence of the public are more substantive. These include:

- if the presence of the public would defeat the ends of justice, and
- if the business concerns the guardianship, custody or maintenance of a minor.[69]

2.49 Our draft proposals noted that these grounds may overlap with the grounds for making an exclusion or closed court order under the recommended new Act, in particular that the order is necessary to prevent prejudice to the proper administration of justice.[70] We discuss general powers for making orders in the new Act in chapters 4, 6 and 7.

2.50 However, we do not make any recommendations for reform of these provisions, because:

- neither their nature nor function requires an open court to achieve the purposes of open justice, or
- they apply to clearly established categories of cases where open justice can be limited (for example, the court's protective jurisdiction).

69. *Civil Procedure Act 2005* (NSW) s 71(b)–(c).

70. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) [4.101].

3. Classification framework and uniform definitions

In Brief

Exceptions to open justice in legislation are numerous and complex. We have developed a framework for classifying the exceptions to help understand and differentiate between them. Uniform definitions of key terms should also be used across statutes to promote consistency.

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Implementing the uniform definitions 55

3.1 In this chapter, we introduce our framework for classifying exceptions to open justice, which underpins many of our recommendations.

3.2 We also outline our recommendations for uniform definitions of certain terms. These definitions are intended to promote consistency between the new Act (chapters 4–7) and existing subject-specific legislation (chapters 8–12).

Classifying exceptions to open justice

3.3 In this report, we adopt a framework for classifying exceptions to open justice. We use the term "exceptions to open justice" throughout the report as a catch-all term for these classifications.

3.4 Exceptions to open justice are classified according to:

- the type of exception, and

- the action restricted, prohibited or required.

3.5 Not all classifications are used in the report (see appendix G for a list of all provisions in subject-specific legislation that we have classified). For example, no subject-specific provision referred to in this report currently fits within the classification of "requirement to make a non-publication order" or "statutory closed court provision".

3.6 However, these classifications may be used in legislation enacted in the future or any provisions in subject-specific legislation that we have not identified as part of this review. In addition, some provisions that we have excluded from the report (appendix B) may fit these classifications.

Table 3.1: Classifying exceptions to open justice

		Action restricted, prohibited or required			
		Non-publication of information	**Non-disclosure of information**	**Excluding people from proceedings**	**Closing the court**
Type of exception to open justice	**Provision that applies automatically**	Statutory prohibition on publication	Statutory prohibition on disclosure	Statutory exclusion provision	Statutory closed court provision
	Requirement to make an order	Requirement to make a non-publication order	Requirement to make a non-disclosure order	Requirement to make an exclusion order	Requirement to make a closed court order
	Discretion to make an order	Discretion to make a non-publication order	Discretion to make a non-disclosure order	Discretion to make an exclusion order	Discretion to make a closed court order

Type of exception to open justice

3.7 We have identified several types of exceptions to open justice (table 3.1).

3.8 In this report, "statutory prohibition" and "statutory provision" mean legislative provisions that operate automatically without the need for a court to make an order. Legislation will usually outline how the automatic prohibition or provision applies and the court does not need to make an order.

3.9 "Requirement to make an order" means a legislative provision that requires the court to make an order, that is, the court must make an order). Legislation will usually outline the circumstances that give rise to the requirement to make the order. The court will sometimes retain a residual discretion to not make an order (for example, if making an order is not in the interests of justice).

3.10 "Discretion to make an order" means a legislative provision that gives the court discretion to make an order, that is, the court may, but does not have to, make an order.

There may be some limitation on the court's discretion, such as a test that must be applied or considerations that must be taken into account.

3.11 We have categorised these types of exceptions according to the starting point of the provision. A statutory prohibition or a statutory provision may also give the court a discretion to order otherwise. Similarly, a requirement to make an order may give the court a discretion not to make an order in certain circumstances. While this could be perceived as giving the court discretion over whether to make an order at all, we consider that such arrangements are in the nature of a residual discretion.

Action or behaviour restricted, prohibited or required

3.12 We have identified four types of action or behaviour that are restricted, prohibited or required by exceptions to open justice (table 3.1).

3.13 "Non-publication" means a restriction or prohibition on publishing certain information (to the public or a section of the public) that does not otherwise prohibit or restrict the disclosure of information. The restriction or prohibition may derive from:

- a statutory prohibition that automatically prohibits the publication of certain information without a court needing to make an order, or
- a non-publication order made by a court.

3.14 Non-publication is a lesser exception to open justice than non-disclosure. Recommendation 3.2 includes a uniform definition of "publish".

3.15 "Non-disclosure" means a restriction or prohibition on disclosing certain information by any means, including by publication. This restriction or prohibition may derive from:

- a statutory prohibition that automatically prohibits the disclosure of certain information, without a court needing to make an order, or
- a non-disclosure order made by a court.

3.16 Non-disclosure of information is a more significant exception to open justice than non-publication, as it prohibits a person from disclosing information to another person, as well as prohibiting publication. Recommendation 3.2 includes a uniform definition of "disclose".

3.17 We generally use the term "non-disclosure" in preference to the term "suppression", which is used in the *Court Suppression and Non-publication Orders Act 2010* (NSW) (*CSNPO Act*) and which we have previously used in our consultation paper and draft proposals. The term "non-disclosure" more clearly describes the behaviour that is restricted or prohibited by the statutory prohibition or order and may help to reduce confusion.

3.18 "Exclusion" means the exclusion of a specified person or class of people, or all people other than those whose presence is necessary, from the whole or any part of

proceedings (whether the proceedings are being conducted in person, virtually or by telephone). A person may be excluded from proceedings pursuant to:

- a statutory exclusion provision, which applies automatically, without the court making an order, or
- an exclusion order made by a court.

3.19 Unlike closing the court, excluding people from proceedings does not have the additional effect of prohibiting disclosure (including by publication) of information in the proceedings.

3.20 "Closed court" means the exclusion of all people from the whole or any part of proceedings (whether the proceedings are being conducted in person, virtually or by telephone), other than those whose presence is necessary for the proceedings (such as parties, legal representatives, judicial officers, court staff, witnesses and support people). A court may be closed pursuant to:

- a statutory closed court provision, which applies automatically, without the court needing to make an order, or
- a closed court order made by a court.

3.21 Closing the court also has the effect of prohibiting disclosure (including by publication) of information from the closed part of the proceedings.

Distinction between a statutory provision and requirement to make an order

3.22 Our draft proposal was that several exceptions to open justice should be amended to reflect the classification of a requirement to make an exclusion order or a requirement to make a closed court order.[1] We considered that, wherever possible, provisions should adopt language consistent with a requirement to make an exclusion order or closed court order, instead of a statutory exclusion provision or statutory closed court provision.

3.23 This is because a requirement to make an order more accurately reflects how courts are closed or people are excluded from proceedings in practice. Usually, a court would make an order to close the court or exclude people when moving from case to case, or from one part of proceedings to another part of proceedings, if required to do so by legislation. Further, it is beneficial for the court to make an order, rather than rely on an extraneous mechanism, so that it is clear to everyone present that certain people must be excluded or that the court is closed.

3.24 However, we now consider that some provisions should be classified as statutory exclusion provisions. This is because some provisions operate automatically in high-

1. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 7.1, proposal 8.1.

volume summary jurisdictions, such as the Local Court or Children's Court.[2] The Local Court and Children's Court submitted that requiring a court to make an exclusion order in these cases would be a significant change in the law and would create additional work for judicial officers and court registries.[3]

3.25 We explain which provisions should require the court to make an order, and which should apply automatically, in chapters 8–12.

Distinction between exclusion and closing the court

Uncertainty as to whether closing the court has a suppression effect

3.26 It has become clear that there is some uncertainty about the effect of closing the court; specifically, as to whether this also has a suppression effect (prohibiting disclosure, including by publication, of information in the closed proceedings).[4]

3.27 There is some divergence in how courts have viewed the effect of closing the court. In 1959, a committee of the British Section of the International Commission of Jurists examined the extent to which it was permissible to publish details of proceedings held in private, and found there was a variety of judicial statements purporting to represent the law.[5]

3.28 Section 12(1) of the *Administration of Justice Act 1960* (UK) now provides that "[t]he publication of information relating to proceedings before any court sitting in private shall not of itself be contempt of court", except in certain cases (including cases relating to minors, national security, or a secret process, discovery or invention). This provision has since been held to mean that it is not a contempt to publish information relating to proceedings held in private where a defence applies (for example, an absence of knowledge that the information published related to private proceedings).[6]

3.29 In a High Court of Australia case, one member of the Court observed, in passing:

> What is described as an "*in camera* order", or a closed court order, which excludes the public from proceedings, is a different kind of order. By itself, it does not restrain the publication or disclosure of evidence in the proceedings by persons permitted to attend the hearing. A suppression or non-publication order may stand without an *in camera* order.[7]

3.30 However, the judge did not refer to any authorities and the observation was incidental.

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2. See, eg, *Children (Criminal Proceedings) Act 1987* (NSW) s 10(1).
3. Local Court of NSW, *Submission CI58,* 6–7; Children's Court of NSW, *Submission CI62,* 6.
4. Roundtable 1, *Consultation CIC02*; Roundtable 2, *Consultation CIC03*.
5. H Shawcross *Contempt of Court: A Report by Justice* (1959) 16–18.
6. *Re F* [1977] Fam 58, 99–100.
7. *HT v R* [2019] HCA 40, 269 CLR 403 [85].

3.31 The position is also unclear in NSW. In some cases, courts have made closed court orders in order to give effect to non-disclosure orders made with respect to the identities of parties and/or other people and evidence.[8] In other NSW cases, courts appear to have considered a closure of the court as already having a suppression effect.[9]

3.32 The uncertainty around the effect of closing the court may have arisen due to the different categories of cases in which the common law permits closure. For example, it is well-recognised at common law that a court may be closed where the case concerns:

- trade secrets, secret processes or documents, or other confidential information
- blackmail
- police informers, or
- national security.

3.33 If the information given in these cases could be published, the whole object of the action would be defeated.[10] This supports a closed court order also having a suppression effect (that is, prohibiting disclosure, including by publication, of information in the closed proceedings). It has also been held that publication of material in closed wardship proceedings may constitute contempt.[11]

3.34 However, the common law also permits proceedings to be closed in circumstances where no suppression effect appears to be supported. For example, the court can be closed to prevent disorder or apprehended disorder by members of the public.[12]

3.35 Uncertainty about the effect of closing the court may also be due to the variety of terms used in existing subject-specific legislative provisions to refer to closing the court or excluding people from proceedings. The terms used include “in camera”, “in private” and “in closed court”. These provisions do not make clear whether closing proceedings has the effect of prohibiting disclosure of information in the proceedings.

3.36 Further, certain provisions allow the media to remain in proceedings that are closed to the public.[13] This may create confusion about whether closing the court also prohibits

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8. *Medich v Local Court of NSW* [2013] NSWSC 1338 [1]; *X v University of Western Sydney* [2013] NSWSC 1280 [4].
9. *Director General of the Department of Community Services; Re Jules* [2008] NSWSC 1193 [24]; *AMI Australia Holdings Pty Ltd v Fairfax Media Publications Pty Ltd* [2009] NSWSC 1290 [6]–[7].
10. *Scott v Scott* [1913] AC 417, 443, 445, 450–451, 482–483; *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47, 54; *Hogan v Hinch* [2011] HCA 4, 243 CLR 506 [21].
11. *Re F* [1977] Fam 58, 95–96; *P v P* (1985) 2 NSWLR 401, 403.
12. *Scott v Scott* [1913] AC 417, 445–446.
13. *Children (Criminal Proceedings) Act 1987* (NSW) s 10(1)(b); *Children and Young Persons (Care and Protection) Act 1998* (NSW) s104C.

disclosure of information in the proceedings, given that the purpose of allowing the media to remain is to enable reporting of the proceedings.

3.37 In Victoria, the position is clearer. The *Open Courts Act 2013* (Vic) (*Open Courts Act*) contains powers to make both "suppression orders" and "closed court orders". A closed court order is an order that:

- the whole or any part of a proceeding be heard in "closed court" or "closed tribunal", or
- only specified persons or classes of persons may be present during the whole or any part of a proceeding.[14]

3.38 Closed court orders under the *Open Courts Act* "are not suppression orders" and "do not directly suppress material".[15]

Our view

3.39 Our view is that it is inherent in a decision formally to close the court (as distinct from excluding specified people from the court or conducting certain business in the absence of the public for administrative efficiency) that disclosure outside the closed court of what transpires within it would defeat the intent of the order and would be a contempt of court. In other words, if information in closed proceedings could be disclosed, this would undermine the purpose of closing the court in the first place.

3.40 To resolve doubt about this, it should be clarified that an order closing the court has the associated effect of prohibiting disclosure (including by publication) of information from the closed proceedings.

3.41 In conjunction with this, we contrast the effect of closing the court with excluding people from proceedings. While closing the court is an established feature in certain types of proceedings and contexts, by highlighting the distinction with exclusion, closed courts can be confined to circumstances where the additional suppressive effect is required.

3.42 Legislation should enable or require a court to make a closed court order only where there is a clear need to preserve the confidentiality of information in the proceedings. Accordingly, we recommend:

- specific grounds for making closed court orders under the new Act (chapter 6), and

14. *Open Courts Act 2013* (Vic) s 3 definition of "closed court order", s 28(2), s 30(1).
15. Judicial College of Victoria, *Open Courts Bench Book*, "Closed Court Orders" [5.4] (updated 14 February 2020) <www.judicialcollege.vic.edu.au/eManuals/OCBB/67747.htm> (retrieved 18 May 2022).

- that a limited number of existing provisions in subject-specific legislation should be classified as conferring a discretion, or a requirement to make a closed court order (chapters 8–12 and appendix G).

3.43 Where legislation allows or requires the public to be excluded for a purpose other than to preserve the confidentiality of the proceedings (for example, to assist a witness to give evidence), such a provision should be classified as "exclusion". We explore which provisions should be classified as "exclusion" or "closed court" in chapters 8–12.

Uniform definitions of key terms

3.44 In this section, we outline our recommended definitions for certain terms used in legislation containing exceptions to open justice.

3.45 Introducing uniform definitions of certain terms reflects our aim of promoting consistency across different statutes through uniformity in terminology and definitions (chapter 1). Several submissions supported introducing uniform definitions of key terms.[16]

3.46 Our draft proposals included uniform definitions of "party", "complainant", "victim" and "protected person".[17] After further consideration, we do not recommend introducing uniform definitions of these terms into subject-specific legislation. This is because many such statutes use different terms or different definitions of these terms that are specific to the context and purpose of the legislation.

3.47 However, we recommend including these terms, and defining them, in the new Act for the purposes of that Act (chapter 4).

Orders

Recommendation 3.1: Definitions of "non-publication order", "non-disclosure order", "exclusion order" and "closed court order"

(1) "Non-publication order" should be defined as an order that prohibits or restricts publication of information (but that does not otherwise restrict the disclosure of information).

(2) "Non-disclosure order" should be defined as an order that prohibits or restricts disclosure of information (by publication or otherwise).

(3) "Exclusion order" should be defined as an order:

(a) to exclude a specified person or class of people, or all people other than those whose presence is necessary, from the whole or any part of proceedings, and

16. NSW, Mental Health Review Tribunal, *Submission CI33*, 2; NSW Office of the Director of Public Prosecutions, *Submission CI48*, 1; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission CI49*, 2; NSW Bar Association, *Submission CI56* [4]; Local Court of NSW, *Submission CI58*, 2; Children's Court of NSW, *Submission CI62,* 1.

17. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 3.3–3.4.

(b) that does not, of itself, restrict or prohibit the disclosure (by publication or otherwise) of information.

(4) "Closed court order" should be defined as an order that:

(a) excludes all people, other than those whose presence is necessary, from the whole or any part of proceedings, and

(b) has the effect of prohibiting disclosure (by publication or otherwise) of information from the closed part of proceedings.

"Non-publication order" and "non-disclosure order"

3.48 The definition in recommendation 3.1(1) is the same as our draft proposal,[18] which received some support in submissions.[19] It also aligns with the definition of "non-publication order" in the *CSNPO Act.*[20] Some submissions supported the *CSNPO Act* definition.[21]

3.49 The definition of "non-disclosure order" in recommendation 3.1(2) is the same as the definition of "suppression order":

- in our draft proposal,[22] which some submissions supported,[23] and
- contained in the *CSNPO Act*,[24] which some submissions also supported.[25]

"Exclusion order" and "closed court order"

3.50 The *CSNPO Act* does not include definitions of "exclusion order" or "closed court order", as that Act does not contain powers to make such orders. The definitions in

18. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 3.1(1).
19. NSW, Mental Health Review Tribunal, *Submission CI47,* 1; Supreme Court of NSW, *Submission CI55* [1].
20. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 3 definition of "non-publication order".
21. NSW Office of the Director of Public Prosecutions, *Submission CI17,* 8; Children's Court of NSW, *Submission CI28,* 3.
22. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 3.1(2).
23. NSW, Mental Health Review Tribunal, *Submission CI47,* 1; Supreme Court of NSW, *Submission CI55* [1].
24. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 3 definition of "suppression order".
25. NSW Office of the Director of Public Prosecutions, *Submission CI17,* 8; Children's Court of NSW, *Submission CI28,* 3.

recommendation 3.1(3)–(4) are similar to our draft proposals,[26] which some submissions supported.[27]

3.51 In the recommended definitions, the reference to a person "whose presence is necessary" is intended to capture people such as the parties, legal representatives, judicial officers, court staff, witnesses, victims and support people.

"Publish" and "disclose"

Recommendation 3.2: Definitions of "publish" and "disclose"

(1) "Publish" should be defined as 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
- (b) broadcast by radio or television
- (c) public exhibition, or
- (d) broadcast or publication by means of the internet or other form of electronic communication, including through social media, and
- (e) any other means specified in regulations.

(2) "Disclose" should be defined as including:

- (a) making information available to a person by any means, or
- (b) releasing or providing access to information to a person,

by publication or otherwise.

3.52 In consultations and submissions, we received support for uniform definitions of "publish" and "disclose".[28] The recommended definitions are intended to promote consistency and clarity across statutes and make it easier to understand what actions are prohibited, which may lead to greater compliance.

3.53 The definition of "publish" in recommendation 3.2(1) is similar to our draft proposal,[29] which several submissions supported.[30]

3.54 Currently, several statutes use the terms "publish", "publish or broadcast" and "broadcast". These terms are often defined differently,[31] or not at all,[32] which may create

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26. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 3.1(3)–(4).
27. Youth Justice NSW, NSW Department of Communities and Justice, *Submission CI39*; NSW, Mental Health Review Tribunal, *Submission CI47*, 1; Supreme Court of NSW, *Submission CI55* [1].
28. Roundtable 1, *Consultation CIC02*; Roundtable 2, *Consultation CIC03*; NSW, Mental Health Review Tribunal, *Consultation CIC10*; NSW Office of the Director of Public Prosecutions, *Submission CI17*, 15; Legal Aid NSW, *Submission CI57*, 7.
29. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 3.2.
30. NSW, Mental Health Review Tribunal, *Submission CI47,* 1; Supreme Court of NSW, *Submission CI55* [1]; NSW Bar Association, *Submission CI56* [7]; Legal Aid NSW, *Submission CI57*, 7.

confusion and uncertainty. In later chapters, we recommend that certain provisions in subject-specific legislation should use the term "publish" instead of other terms (such as "publish or broadcast") and include the uniform definition of "publish".

3.55 The definition of "publish" in recommendation 3.2(1) is based on the *CSNPO Act*,[33] which includes broadcasting information via radio or television and by means of the internet. The Court of Criminal Appeal has observed, in relation to the *CSNPO Act* definition, that information is published on the internet:

> by uploading it in a particular form to a particular site or web page identified by a URL. By that means, the publisher provides access to the information to the public.[34]

3.56 A wide range of internet publications may fall within this, including websites, comments on social media and blogs.[35] The Court also observed, in relation to the *CSNPO Act,* that publication "is a continuing act in the case of a website: access is provided to the public for so long as material is available on the web".[36]

3.57 Unlike the *CSNPO Act* definition, the definition in recommendation 3.2(1) specifies that "publish" includes publishing by "other form of electronic communication, including through social media". The wording is intentionally broad to capture current and future forms of electronic communication and social media.

3.58 The recommended definition of "publish" also includes publication by "any other means specified in regulations". This is intended to ensure flexibility. Regulations could, for example, be updated to include other means of publication as technology develops.

3.59 The definition of "disclose" in recommendation 3.2(2) is similar to our draft proposal,[37] which several submissions supported.[38]

3.60 Several statutes use the term "disclose".[39] However, this term is frequently not defined, including in the *CSNPO Act*.

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31. See, eg, *Court Suppression and Non-publication Orders Act 2010* (NSW) s 3 definition of "publish"; *Crimes Act 1900* (NSW) s 578A(1) definition of "publish".
32. See, eg, *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 45(2); *Children (Criminal Proceedings) Act 1987* (NSW) s 15A(1).
33. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 3 definition of "publish".
34. *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125, 83 NSWLR 52 [43].
35. B Fitzgerald and C Foong, "Suppression Orders after *Fairfax v Ibrahim*: Implications for Internet Communications" (2013) 37 *Australian Bar Review* 175, 178.
36. *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125, 83 NSWLR 52 [43].
37. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 3.2.
38. NSW, Mental Health Review Tribunal, *Submission CI47*, 1; Supreme Court of NSW, *Submission CI55* [1]; NSW Bar Association, *Submission CI56* [7]; Legal Aid NSW, *Submission CI57,* 7.

3.61 The recommended definitions of "publish" and "disclose" are intended to distinguish the terms and avoid confusion about their meaning. Sometimes, the two terms are conflated. For example, in one case, the Court of Criminal Appeal considered that the breadth of the definition of "publish" in the *CSNPO Act,* which includes publication via the internet, "tends to diminish the significance of any attempt to distinguish between the respective concepts".[40]

3.62 The key difference is that publishing information is the act of providing or disseminating information to the public or a section of the public. The phrase "disseminates to the public or a section of the public" in the *Family Law Act 1975* (Cth) (*Family Law Act*) has been held to refer to widespread communication with the aim of reaching a wide audience.[41] Recommendation 3.1(1) uses similar language.

3.63 In contrast, disclosing information is the act of making information available to any person. A prohibition on disclosure also prohibits publication, but a prohibition on publication does not prohibit disclosure. For example, a non-publication order would prohibit a person from publishing information online, but it would not prohibit a person from talking about that information privately with another person. However, a non-disclosure order would prohibit both activities.

"Information tending to identify" a person

Recommendation 3.3: Definition of "information tending to identify" a person

"Information tending to identify" a person should be defined as information that:

(a) has a real possibility of identifying a person to a member of the public or a member of the section of the public to which the information is provided, and

(b) can include, but is not limited to:

- (i) the person's name, title or alias
- (ii) the address of premises where the person lives or works, or the premises' locality
- (iii) the address or name of the school attended by the person or the school's locality
- (iv) any employment or occupation engaged in, profession practised or calling pursued by the person, or any official or honorary position held
- (v) the person's relationship to identified relatives or the person's association with identified friends or businesses, or the person's official or professional acquaintances
- (vi) the recreational interests or the political, philosophical or religious beliefs or interests of the person
- (vii) any real or personal property in which the person has an interest or with which the person is associated, and

39. See, eg, *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30N(1); *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 29(1)(f).

40. *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125, 83 NSWLR 52 [40].

41. *Re Edelsten; Ex parte Donnelly* (1988) 18 FCR 434, 436.

(viii) the person's biometric information, such as fingerprints, facial patterns or voice of the person.

3.64 Several provisions in existing subject-specific legislation use the term "name", and then clarify that the term "name" includes reference to any information, picture or other material that identifies the person, or that is likely to lead to the identification of the person.[42] Some provisions refer to material "likely to lead to the identification" of a person (or a similar phrase).[43] Other provisions use both "name" and "information likely to lead to the identification" of a person (or similar).[44]

3.65 In later chapters, we recommend that legislation should:

- use the term "information tending to identify" a person, and
- include a uniform definition of this term, as information that has a "real possibility" of identifying someone to a member of the public or to a member of the section of the public to which the information is provided.

3.66 This is similar to the expression "tending to reveal" the identity of a person used in the *CSNPO Act,*[45] which has been interpreted as meaning a "real possibility" of revealing an identity.[46]

3.67 To satisfy the definition in recommendation 3.3(a), information that has a "real possibility" of identifying someone must be sufficient to identify the person "to a member of the public or a member of the section of the public to which the information is provided". This is intended to clarify how a person may be identified. The focus is on the effect of the relevant information, rather than the specific type.

3.68 For example, in some cases, the name of a person's school or their employment or occupation may have a real possibility of identifying that person to a member of the public or member of the section of the public to which that information is provided. Legal Aid observes that people may also be identified through publication of their cultural affiliations or location.[47] In other cases, however, this information may be insufficient to identify a person.

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42. See, eg, *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 45(2), s 45(4); *Children (Criminal Proceedings) Act 1987* (NSW) s 15A(1), s 15A(5); *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 105(1), s 105(4); *Young Offenders Act 1997* (NSW) s 65(1), s 65(4).
43. See, eg, *Crimes Act 1900* (NSW) s 578A(2); *Surrogacy Act 2010* (NSW) s 52(1).
44. See, eg, *Status of Children Act 1996* (NSW) s 25; *Crimes (Forensic Procedures) Act 2000* (NSW) s 43; *Bail Act 2013* (NSW) s 89(1).
45. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 7(a).
46. *Moseley v AB (No 2)* [2017] NSWSC 1812 [53].
47. Legal Aid NSW, *Submission CI24*, 10; Legal Aid NSW, *Submission CI57*, 8.

3.69 In some cases, information may only be sufficient to identify a person to a member of the public or member of the section of the public to which the information is provided in conjunction with other types of information. Submissions pointed out that "jigsaw identification" may occur when pieces of information published in different sources are pieced together.[48]

3.70 Recommendation 3.3(b) lists examples of information that has a real possibility of identifying a person to a member of the public or a member of the section of the public to which the information is provided. Several submissions supported including a list of identifying information as providing useful guidance about what information is protected.[49]

3.71 The list of examples in recommendation 3.3(b) is non-exhaustive, to avoid the perception that anything not listed can be published or disclosed. One submission said that a non-exhaustive list "would guide the court's discretion but allow it to determine that a particular item on the list is not identifying in the particular circumstances".[50]

3.72 The recommendation is not intended to mean that the publication of any one type of information in the list will necessarily tend to identify a person. Depending on the circumstances, the publication of one type of information may tend to identify a person, it may have this effect in conjunction with other types of information, or it may not have the effect of identifying the person at all.

3.73 The recommended list of examples is based on a similar list contained in legislation in Victoria and in the *Family Law Act*.[51] Unlike the Victorian legislation and *Family Law Act* provisions, the list also includes a person's "biometric information" (such as fingerprints, facial patterns or voice of the person) as an example of information tending to identify a person. This was suggested in consultations[52] and aligns with our general aim of updating legislation in response to societal and technological changes.

"Contact information"

Recommendation 3.4: Definition of "contact information"

(1) Section 149B, s 247S, s 280 and s 280A of the *Criminal Procedure Act 1986* (NSW) should use the term "contact information" instead of "personal details", "address or telephone number" or "personal information".

(2) "Contact information" should be defined to include:

48. Children's Court of NSW, *Submission CI28*, 11; Children's Court of NSW, *Submission CI62*, 2.
49. See, eg, Youth Justice NSW, NSW Department of Communities and Justice, *Submission CI39*, 1; NSW Office of the Director of Public Prosecutions, *Submission CI48*, 1; Legal Aid NSW, *Submission CI57*, 8; Rape and Domestic Violence Services Australia, *Submission CI61* [11]; Children's Court of NSW, *Submission CI62*, 2.
50. Youth Justice NSW, NSW Department of Communities and Justice, *Submission CI39*, 1.
51. *Family Violence Protection Act 2008* (Vic) s 168; *Family Law Act 1975* (Cth) s 121(3).
52. Roundtable 2, *Consultation CIC03*.

(a) a private, business or official telephone number

(b) a private, business or official address, and

(c) a private, business or official email address or social media profile.

3.74 Currently, various provisions in the *Criminal Procedure Act 1986* (NSW) (*Criminal Procedure Act*) limit the disclosure of certain people's addresses or telephone numbers in criminal proceedings:

- Section 149B and s 247S limit disclosure of "personal details" in prosecution notices. The prosecutor is not to disclose the "address or telephone number" of any witness proposed to be called by the prosecutor, or of any other living person, in a notice.
- Under s 280, a witness in criminal proceedings, or a person who has made a written statement that is likely to be produced in such proceedings, is not required to disclose their address or telephone number.
- Under s 280A, a person to whom a subpoena is addressed is not required to disclose any "personal information" in any document or thing produced in compliance with the subpoena. "Personal information" means the address or telephone number of the person to whom the subpoena is addressed or of any other living person.[53]

3.75 There are some exceptions, including where:

- the address or telephone number is a materially relevant part of the evidence or the court makes an order permitting or requiring disclosure of it,[54] and
- the disclosure of an address does not identify a particular person's address, or it could not reasonably be inferred from the matters disclosed that it is a particular person's address.[55]

3.76 The general purpose of these provisions is to prevent witnesses from being contacted improperly, including by the accused person in the proceedings. Recommendation 3.4 is for these provisions to use the term "contact information" instead, which captures a broader range of information. The reference to a person's email address and social media profiles is intended to reflect societal and technological changes.

3.77 Recommendation 3.4 is the same as our draft proposal,[56] which some submissions supported.[57] We do not recommend any other changes to s 149B, s 247S, s 280 and s 280A of the *Criminal Procedure Act*.

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53. *Criminal Procedure Act 1986* (NSW) s 280A(6) definition of "personal information".
54. *Criminal Procedure Act 1986* (NSW) s 149B(1), s 247S(1), s 280(1), s 280A(1).
55. *Criminal Procedure Act 1986* (NSW) s 149B(4), s 247S(4), s 280(6), s 280A(5).
56. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 3.6.

"Journalist", "news media organisation" and "news medium"

Recommendation 3.5: Definitions of "journalist", "news media organisation" and "news medium"

(1) "Journalist" should be defined as a person engaged in the profession or occupation of journalism in connection with the publication of information in a news medium.

(2) In deciding whether a person is engaged in the profession or occupation of journalism, it is relevant to consider whether:

- (a) the person is employed by a news media organisation
- (b) a significant proportion of the person's professional activity involves:
  - (i) collecting and preparing information having the character of news, or
  - (ii) commenting or providing observations on news for dissemination in a news medium
- (c) the information collected or prepared by the person is regularly published in a news medium
- (d) the person's comments or observations on news are regularly published in a news medium, and
- (e) in respect of the publication of:
  - (i) any information collected or prepared by the person, or
  - (ii) any comment or observation,

  the person or the publisher of the information or observation is required to comply (including through a complaints process) with recognised journalistic or media professional standards or codes of practice.

(3) "News media organisation" should be defined as an enterprise or service that engages in the business of broadcasting or publishing news to the public or a section of the public as its principal activity.

(4) "News medium" should be defined as a medium for the dissemination to the public or a section of the public of news and observations on news, including:

- (a) a newspaper, magazine, journal or other periodical
- (b) a radio or television broadcasting service, and
- (c) an electronic service (including a service provided by the internet) that is similar to a newspaper, magazine, radio broadcast or television broadcast.

3.78 Some statutes confer certain entitlements on the media. For example:

- a person "engaged in preparing a report on the proceedings for dissemination through a public news medium" can access certain proceedings from which the public has been excluded[58]
- a "media representative" is entitled to access certain documents in criminal proceedings,[59] and

57. NSW Bar Association, *Submission CI56* [7]; Children's Court of NSW, *Submission CI62*, 2.

58. *Criminal Procedure Act 1986* (NSW) s 291C; *Children (Criminal Proceedings) Act 1987* (NSW) s 10(1)(b); *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 104C.

- under the *CSNPO Act,* a "news media organisation" is included in the list of persons that are entitled to apply for a review, and to appear and be heard on an application, review or appeal of a suppression or non-publication order.[60]

3.79 The uniform definitions in recommendation 3.5 are intended to promote clarity and consistency across the different statutes.

"Journalist"

3.80 The definition of "journalist" in recommendation 3.5(1) is the same as our draft proposal,[61] and is similar to the definition used in the uniform evidence law.[62]

3.81 In later chapters, we recommend that certain provisions in subject-specific legislation should adopt the term "journalist" instead of other terms (such as "media representative" or "person engaged in preparing a report on proceedings through a public news medium") and include the recommended definition of journalist.

3.82 As with the definition in the *Evidence Act 1995* (NSW), recommendation 3.5(1) is intended to cover people "who are recognisably engaged in working as a journalist" and exclude "amateur bloggers or users of social networking media who happen to obtain and publish information or opinion that may be of some public interest".[63] Amateur bloggers or social media users are not professionally engaged or occupied in journalism.[64]

3.83 Recommendation 3.5(2) includes a non-exhaustive list of factors that are relevant to consider in deciding whether a person is engaged or occupied in the profession of journalism. These factors reflect the process of journalism,[65] such as collecting and preparing information having the character of news and commenting or providing observations on news for dissemination in a news medium, and its professionalism, in complying with recognised journalistic or media professional standards or codes of practice.

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59. *Criminal Procedure Act 1986* (NSW) s 314(2).
60. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 9(2)(d), s 13(2)(d), s 14(3)(d).
61. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 3.7(b).
62. See, eg, *Evidence Act 1995* (NSW) s 126J definition of "journalist"; *Evidence Act 2008* (Vic) s 126J(1) definition of "journalist"; *Evidence Act 1995* (Cth) s 126J(1) definition of "journalist".
63. NSW, *Parliamentary Debates,* Legislative Assembly, Agreement in Principle Speech, 27 May 2011, 1319.
64. Judicial College of Victoria, *Uniform Evidence Manual,* "s 126J: Definitions" [7] (1 December 2014) <www.judicialcollege.vic.edu.au/eManuals/UEM/index.htm#44197.htm> (retrieved 17 May 2022).
65. R Ananian-Welsh and P Greste, *Consultation CI06*.

3.84 The list of factors is intended to be flexible enough to capture a range of journalistic practices and to account for emerging forms of journalism.[66] It is also intended to be distinct enough to exclude practices that do not constitute journalism (for example, a member of the public expressing their views on social media about current issues).[67]

3.85 It would weigh against a person being a journalist within the definition if, for example, the person is not employed by a news media organisation, if a "significant proportion" of their professional activity does not involve commenting or providing observations on news for dissemination in a news medium, if their comments and observations are not regularly published in a news medium, or if they are not required to comply with recognised journalistic or media professional standards or codes of practice.

3.86 The list of factors in recommendation 3.5(2) are similar to our draft proposal[68] and are based on Victorian legislation.[69]

3.87 Recommendation 3.5(2)(e) refers to recognised journalistic or media professional standards or codes of practice, but does not identify particular professional standards or codes. Specifying this in legislation would be unduly inflexible. The Victorian legislation also does not identify particular professional standards or codes.[70]

3.88 The Federal Court recently explained, in the context of the uniform evidence legislation, that having regard to professional standards or codes of practices would also involve having regard to:

- whether "an account of events is sought to be presented in a fair and balanced manner", and
- "the motive or purpose of the person conveying the 'news'".[71]

3.89 The recommended definition of journalist, and the associated list of factors, is intended to assist decision-makers in determining matters such as:

- applications for access to court records
- standing to appear and be heard on an application, review or appeal of an order, and
- whether a person can remain in proceedings from which the public has been excluded.

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66. R Ananian-Welsh and P Greste, *Consultation CI06*.
67. Supreme Court of NSW, *Submission CI55* [1].
68. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 3.7(c).
69. *Evidence Act 2008* (Vic) s 126J(2).
70. *Evidence Act 2008* (Vic) s 126J(2)(d).
71. *Kumova v Davison* [2021] FCA 753 [33].

3.90 Recommendation 3.5(1)–(2) does not specify who, at a practical level, is responsible for determining whether a person is engaged in the profession or occupation of journalism.[72] This is because the relevant decision-maker will vary, depending on the circumstances and in whom the relevant function is vested. For example:

- where a journalist makes an application to access certain records on the court file, the decision-maker could be court registry staff, a registrar or a judicial officer, and
- where a journalist seeks to appear and be heard on an application, review or appeal of an order, or to remain in proceedings from which the public have been excluded, the decision-maker would be the presiding judicial officer.

3.91 Australia's Right to Know (ARTK) opposed the list of factors in recommendation 3.5(2), due to concerns that it could be used as a default checklist and be likely to "exclude genuine journalists".[73] While the list of factors is intended to provide assistance to courts or court registry staff in determining whether a person is a journalist, no one factor is essential or decisive, and the list is not exhaustive. It is not apparent how it would exclude genuine journalists.

3.92 Another submission opposed limiting the definition of journalist to a person engaged in the profession or occupation of journalism as it:

> does not align with the manner in which thousands of Australians disseminate news via social media. Persons employed as 'journalists' often turn to the work of these unpaid 'citizen journalists' to populate headlines.[74]

3.93 Expanding the definition of journalist to capture a broader range of people is undesirable. The rationale for extending certain privileges to the media (such as allowing the media to be present in proceedings from which the public have been excluded or to access certain court records as of right) is to assist the media as a profession to produce fair and accurate reports of proceedings. Such reports can help to expand the public's knowledge of key cases and their overall understanding of the courts. However, it involves reliance upon the professionalism of the media.

3.94 Individuals publishing on the internet, particularly on social media, generally do not have the same level of training, expertise and knowledge that professional journalists have, especially in relation to legal restrictions on reporting such as the law of contempt, non-publication orders and statutory prohibitions on publishing certain information.[75] They

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72. Supreme Court of NSW, *Submission CI55* [1].
73. Australia's Right to Know, *Submission CI59*, 7.
74. M Douglas, *Submission CI35*, 1.
75. S Rodrick, "Achieving the Aims of Open Justice? The Relationship between the Courts, the Media and the Public" (2014) 19 *Deakin Law Review* 123, 154; University of Sydney Policy Reform Project, *Preliminary Submission PCI11* [5.1]; NSW Department of Communities and Justice, *Preliminary Consultation PCI01*.

are also unlikely to be subject to any form of editorial control or consider themselves bound by any professional code.[76] The rationale for conferring special status on the media does not extend to such individuals.

"News media organisation"

3.95 The definition in recommendation 3.5(3) is similar to our draft proposal[77] and the definition of "news media organisation" in the *CSNPO Act*.[78]

3.96 The recommended definition of "news media organisation" is not limited to commercial organisations, as it refers to any "enterprise or service". This is intended to provide flexibility and ensure that a range of media organisations are included, such as non-commercial organisations and public broadcasters.

3.97 Unlike the *CSNPO Act* definition, the definition in recommendation 3.5(3) refers to an enterprise or service that broadcasts or publishes news as its principal activity. This is intended to confine the scope of the definition.

"News medium"

3.98 Some of the factors for determining whether a person is a journalist listed in recommendation 3.5(2) refer to publication or dissemination of material in a "news medium". The Local Court suggested defining this term would be of assistance, "given the rise of non-traditional, citizen-run sources of news and information".[79]

3.99 The definition of "news medium" in recommendation 3.5(4) is intended to cover "a medium which is routinely or regularly used by journalists as a medium primarily, or at least substantially, for the publication of 'news'".[80] It is not intended to cover "a medium which may from time to time be the source of 'news'",[81] such as a social media platform. This is consistent with our view, outlined above, that a "journalist" should not capture an individual posting on social media.

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76. J Barrett, "Open Justice or Open Season? Developments in Judicial Engagement with New Media" (2011) 11 *Queensland University of Technology Law and Justice Journal* 1, 13; S Rodrick, "Achieving the Aims of Open Justice? The Relationship between the Courts, the Media and the Public" (2014) 19 *Deakin Law Review* 123, 154.
77. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 3.7(d).
78. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 3 definition of "news media organisation".
79. Local Court of NSW, *Submission CI58*, 2.
80. *Kumova v Davison* [2021] FCA 753 [44].
81. *Kumova v Davison* [2021] FCA 753 [44].

3.100 The definition in recommendation 3.5(4) is similar to a definition used in the uniform evidence law.[82] It also includes examples of news media (such as a newspaper, magazine, radio or television broadcasting service) to provide further clarity. The examples have been drawn from existing legislation.[83]

Accreditation of journalists

3.101 Our draft proposal was that the Department of Communities and Justice should:

- maintain a list of accredited journalists that can be used by each court for the purpose of enabling journalists to exercise existing and recommended entitlements, and
- issue identification that could be carried by journalists on court premises, so they can be easily identified and use this identification to exercise these entitlements.[84]

3.102 While some submissions noted potential benefits of an accreditation system,[85] there was also significant opposition to it.

3.103 The Supreme Court raised questions about how an accreditation scheme would operate in practice, who would make the decision to accredit, and whether there would be reviews, appeals or disciplinary procedures.[86]

3.104 Other concerns with an accreditation system included:

- it could create unnecessary complexity or be overly onerous to maintain compared with current arrangements[87]
- processes to apply for and determine accreditation and to issue identification could delay access to the courts or court records for some individuals[88]
- it could have anti-competitive effects or pose barriers to smaller media organisations or freelance journalists,[89] and

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82. See, eg, *Evidence Act 1995* (NSW) s 126J definition of "news medium"; *Evidence Act 2008* (Vic) s 126J(1) definition of "news medium"; *Evidence Act 1995* (Cth) s 126J(1) definition of "news medium".
83. *Court Security Act 2005* (NSW) s 4(1) definition of "media report"; *Corporations Act 2001* (Cth) s 1317AAD(3).
84. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 3.8.
85. Courts, Tribunals and Service Delivery, NSW Department of Communities and Justice, *Submission CI53*, 8; Law Society of NSW, *Submission CI54*, 2.
86. Supreme Court of NSW, *Submission CI55* [2].
87. Courts, Tribunals and Service Delivery, NSW Department of Communities and Justice, *Submission CI53*, 8.
88. Courts, Tribunals and Service Delivery, NSW Department of Communities and Justice, *Submission CI53*, 8.

- it is "tantamount to licensing journalists".[90]

3.105 Courts, Tribunals and Service Delivery said that the existing arrangements to determine a journalist's credentials are "generally operating effectively".[91] As a result, we do not recommend an accreditation system. We consider it is best left to the courts to identify journalists according to their own practices (for example, requiring journalists to provide proof of media credentials).

"Official report of proceedings"

Recommendation 3.6: Definition of "official report of proceedings"

An "official report of proceedings" should be defined as including:

(a) a report of proceedings intended primarily for use in a law report, or

(b) a report of proceedings approved by the court or tribunal.

3.106 The definition in recommendation 3.6 is intended to clarify that information that would otherwise be prohibited from publication or disclosure by a statutory prohibition can be published in a law report, or with approval of the court or tribunal.

3.107 Currently, a number of statutory prohibitions on publication contain an exception for an "official report of proceedings" (or similar) but do not define it.[92] This may result in confusion or uncertainty as to the application of the exception.

3.108 The recommended definition of "official report of proceedings" captures reports of proceedings that are intended primarily for use in a law report or reports approved by a court or tribunal (including unreported judgments published online). The definition does not include other reports of proceedings, such as news articles.

3.109 The recommended definition has been adapted from the *Family Law Act*,[93] is the same as our draft proposal,[94] and is supported by some submissions.[95]

3.110 ARTK opposed the definition in recommendation 3.6. It argued that the phrase "accounts of proceedings … approved by the court" in the *Family Law Act* has been

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89. Law Society of NSW, *Submission CI54*, 2.
90. Australia's Right to Know, *Submission CI59*, 8.
91. Courts, Tribunals and Service Delivery, NSW Department of Communities and Justice, *Submission CI53*, 8.
92. See, eg, *Children (Criminal Proceedings) Act 1987* (NSW) s 15B; *Adoption Act 2000* (NSW) s 180(3)(b).
93. *Family Law Act 1975* (Cth) s 121(9)(e), s 121(9)(g).
94. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 3.9.
95. Youth Justice NSW, NSW Department of Communities and Justice, *Submission CI39*, 1; NSW, Mental Health Review Tribunal, *Submission CI47*, 1; NSW Bar Association, *Submission CI56* [7].

interpreted to include news reports by the media, such that courts are required to approve these reports, and that this occurs even when reporters are "well versed in statutory restrictions".[96]

3.111 However, the approval of the court is required for a report of proceedings only to the extent that it would identify a party or child. Thus, the Family Court has sometimes approved reports in cases of missing children with identifying information, to assist in their location. Otherwise, approval of reports which do not identify participants is not required.

3.112 The effect of the definition of "official report of proceedings" in recommendation 3.6 would not be to require courts to approve media reports of proceedings, except to the extent that the report would otherwise contravene a statutory prohibition on publication.

Implementing the uniform definitions

Recommendation 3.7: Implementing the uniform definitions

To implement the definitions in recommendations 3.1–3.6 in legislation containing exceptions to open justice, consideration should be given to:

(a) adopting the definitions in full in the new Act, and

(b) cross-referring to these definitions in the new Act in other legislation containing exceptions to open justice.

3.113 In chapters 9–12, we recommend that the uniform definitions recommended in this chapter should apply to certain provisions in subject-specific legislation. Recommendation 3.7 is that, rather than including the definitions within each subject-specific statute, there should be cross-references to the definitions in the new Act.

3.114 This approach is intended to avoid inconsistencies that may develop over time, particularly if individual statutes are amended without consequential amendments to all statutes using the definitions. It also ensures that if the uniform definitions need to be updated for any reason, they only need to be updated in one statute.

3.115 Finally, should Government consider that the uniform definitions may benefit any of the provisions we have excluded from our recommendations (appendix B), these provisions can be easily amended in a way that is consistent with other subject-specific legislation.

96. Australia's Right to Know, *Submission CI59*, 8.

4. The new Act: Introduction

In Brief

There should be a new Act that sets out a legislative framework for access to records on the court file and contains general powers to make non-publication, non-disclosure, exclusion and closed court orders. The new Act should contain matters including the objects of the Act, definitions of key terms, and powers to make regulations and rules of court that supplement the Act.

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Preliminary provisions in the new Act 80

Regulation and rule-making powers 85

4.1 In this chapter, we recommend that a new Act should be introduced, to replace certain existing legislation in this field.

4.2 One division of this new Act would include a framework governing access to records on the court file (chapter 5). This division would replace the *Court Information Act 2010* (NSW) (*Court Information Act*), which has never commenced, and existing access provisions.[1]

4.3 Another division of the new Act would set out general powers to make non-publication, non-disclosure, exclusion and closed court orders (chapters 6–7). We use "general" powers to distinguish the powers conferred by the Act, which are of general application, from those contained in subject-specific legislation (chapters 8–12). Provisions in this division would replace the *Court Suppression and Non-publication Orders Act 2010* (NSW) (*CSNPO Act*).

A new Act

Recommendation 4.1: NSW should enact a new Act

(1) NSW should enact a new Act that contains:

(a) a legislative framework governing access to records on the court file, and

(b) general powers to make non-publication, non-disclosure, exclusion and closed court orders.

1. *Criminal Procedure Act 1986* (NSW) s 314; *District Court Rules 1973* (NSW) pt 52 r 3; *Local Court Rules 2009* (NSW) r 8.10; *Uniform Civil Procedure Rules 2005* (NSW) r 36.12(2).

(2) The new Act should replace:

(a) the *Court Information Act 2010* (NSW)

(b) s 314 of the *Criminal Procedure Act 1986* (NSW), and

(c) the *Court Suppression and Non-publication Orders Act 2010* (NSW).

(3) Rules of court should be amended to align with the new legislative frameworks.

4.4 In the following sections, we explain why we recommend the introduction of a new Act and we provide an overview of what it would cover. In later chapters, we explain the elements of each division in more detail.

4.5 The existing legislation listed in recommendation 4.1(2) should be repealed as it would be superseded by this new Act. Any relevant court rules should also be revised by the respective rules committee.[2] The new Act would allow courts to make rules that supplement both divisions of the Act (recommendation 4.12).

New legislative framework governing access to records on the court file

Access to court records is necessary to give effect to open justice

4.6 As we discuss in chapter 2, those who are not parties to the proceedings (including the media and researchers) have no common law right to inspect documents on a court file.[3] Traditionally, courts have maintained that open access to court documents "is not, in absolute terms, a proposition flowing from the principle of open justice".[4]

4.7 Increasingly, however, access to documents and records on the court file is recognised as necessary to give effect to open justice. Access to court records can assist in scrutinising the courts and making fair and accurate reports of what occurs in proceedings.[5]

4.8 For some decades, there has been a shift away from the traditional reliance on oral evidence and argument. Documentary evidence and written submissions are relied on with increasing frequency in most jurisdictions, and not only in complex proceedings. This has been driven by increased emphasis on the advanced notice of evidence and arguments, and by technological developments, initially in the production and distribution of written material in print form, and more recently by the ready availability of digital written and audio visual material.

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2. See, eg, *District Court Rules 1973* (NSW) pt 52 r 3; *Local Court Rules 2009* (NSW) r 8.10; *Uniform Civil Procedure Rules 2005* (NSW) r 36.12(2).

3. See, eg, *Rinehart v Welker* [2011] NSWCA 403, 93 NSWLR 311 [137].

4. *ASIC v Rich* [2001] NSWSC 496, 51 NSWLR 643 [23].

5. NSW Law Reform Commission, *Contempt by Publication,* Report 100 (2003) [11.2].

4.9 Without access to the documents and records referred to in court, it can be difficult to understand proceedings and the basis for decisions.[6] This is particularly significant for journalists seeking to report on court cases, and researchers seeking to investigate and evaluate the operation of the courts.

Current access regimes are overly complex and create unnecessary barriers

4.10 Access to records on the court file is largely regulated by statutory provisions, court rules and practice notes. Whether a person can access court documents or records can depend on factors such as the type of forum, proceedings and information being sought. The application procedures and methods by which access may be provided also vary. We outlined the various access regimes in detail in our consultation paper.[7]

4.11 Several submissions referred to the current access regimes as complex, confusing, inconsistent, untidy and inapt.[8] The Children's Court said it "is cumbersome and is not only confusing for the public but can also be difficult to navigate for those working within the justice system".[9] It is clear that the complexity and inconsistency of the current access regimes create unnecessary barriers to access.

4.12 There is no statutory scheme for accessing information held in court records in NSW, unlike the system for accessing government information under the *Government Information (Public Access) Act 2009* (NSW) (*GIPA Act*).

4.13 Schedule 2 of the *GIPA Act* provides that the Act does not apply to a court in the exercise of its judicial functions. Access to court records falls within the definition of a court's "judicial functions" and therefore, court records are not considered "government information" under the *GIPA Act.* Accordingly, an application for access to court records must be made under other applicable legislation and court rules.

4.14 Over a decade ago, NSW made an attempt to consolidate the access regimes. On 26 May 2010, parliament enacted the *Court Information Act*, to create a statutory framework for accessing information held by courts in connection with criminal and civil proceedings. An objective of the *Court Information Act* was to promote consistency in access to court information across NSW courts.[10] It was meant to simplify access by

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6. NSW, *Parliamentary Debates,* Legislative Council, Second Reading Speech, 18 May 2010, 22800.
7. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Consultation Paper 22 (2020) ch 6.
8. See, eg, L McNamara and J Quilter, *Preliminary Submission PCI14,* 1–2, citing T Dick and g Jacobsen, "Open Justice and Closed Courts: Media Access in Criminal Proceedings in NSW" (Paper presented at Legal Aid NSW, Criminal Law Conference 2016, 1–3 June 2016); 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) 9–11; Banki Haddock Fiora, *Preliminary Submission PCI27*, 2; Legal Aid NSW, *Submission PCI39,* 6.
9. Children's Court of NSW, *Submission CI28,* 4.
10. *Court Information Act 2010* (NSW) s 3(a) (uncommenced).

creating a framework for access to two categories of information: “open access” and “restricted access”.[11]

4.15 The second reading speech recognised the complexity of access to court information, due to the competing considerations of open justice and individual privacy, and said that it had not been possible to accommodate the concerns and views of every stakeholder in every instance.[12]

4.16 Concerns about its practical operation meant the *Court Information Act* was never commenced. In particular, there were strong concerns about the capacity of courts to redact court documents,[13] in line with a requirement to ensure that documents classified as “open access” information did not contain personal identification information.[14]

4.17 Another key impediment to the commencement of the *Court Information Act* may have been its inclusion of an offence of unauthorised disclosure and use of court information.[15] There were strong concerns that court officers could be prosecuted if they made a mistake when providing a person with access to court records (for example, by failing to redact all personal identification information from the records beforehand).[16]

4.18 In this review, Courts, Tribunals and Service Delivery was opposed to the commencement of the *Court Information Act,*[17] while the Council for Civil Liberties supported it, subject to some changes.[18] The recommended access framework would replace the uncommenced *Court Information Act*.

4.19 The new access framework would be especially beneficial for the media, as it would provide a single scheme in place of the current multiple avenues of access. For example, under current arrangements, to access documents in a Local Court criminal case, media representatives can:

- exercise their statutory entitlement to inspect certain documents in criminal proceedings under the *Criminal Procedure Act 1986* (NSW) (*Criminal Procedure Act*),[19] or
- apply for access under the *Local Court Rules 2009* (NSW).[20]

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11. NSW, *Parliamentary Debates,* Legislative Council, Second Reading Speech, 18 May 2010, 22801.
12. NSW, *Parliamentary Debates,* Legislative Council, Second Reading Speech, 18 May 2010, 22801.
13. Courts, Tribunals and Service Delivery, NSW Department of Communities and Justice, *Submission CI53*, 6.
14. *Court Information Act 2010* (NSW) s 18 (uncommenced).
15. *Court Information Act 2010* (NSW) s 21 (uncommenced).
16. Local Court of NSW, *Preliminary Consultation PCIC12*; Supreme Court of NSW, *Consultation CIC14.*
17. Courts, Tribunals and Service Delivery, NSW Department of Communities and Justice, *Submission CI53*, 2.
18. NSW Council for Civil Liberties, *Preliminary Submission PCI29*, 4.
19. *Criminal Procedure Act 1986* (NSW) s 314.

4.20 There are significant differences between these access regimes, including in relation to the types of available information, the form of access and the time limits for access.[21] A single legislative framework, governing access to records in civil and criminal proceedings in various NSW courts, should reduce these complexities and provide predictable outcomes.

Overview of the recommended access framework

4.21 The recommended access framework largely reflects what we proposed in our draft proposals, which several submissions supported.[22] It seeks to:

- improve and simplify access to records on the court file by clarifying what records are available, as of right or by leave, to particular classes of applicant and which records are not available to any applicant
- promote greater consistency across different courts and types of proceedings
- ensure that important countervailing interests, such as privacy, are consistently and effectively protected, and
- avoid imposing an undue burden on the courts.

4.22 The framework takes a different approach from that of the uncommenced *Court Information Act*, which outlined access rules based on the type of information:

- information categorised as "open access information" (which included, for example, written submissions made by the parties and transcripts of proceedings in open court) would have been accessible to anyone as of right, unless the court ordered otherwise,[23] and
- information categorised as "restricted access information" (which included, for example, personal identification information and information contained in an affidavit, pleading or statement that had not been admitted) would have been accessible with leave of the court.[24]

4.23 In contrast, several aspects of our recommended access framework differ according to the category of applicant**.** These are:

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20. *Local Court Rules 2009* (NSW) r 8.10.
21. Local Court of NSW, *Submission CI25*, 1.
22. Courts, Tribunals and Service Delivery, NSW Department of Communities and Justice, *Submission CI53*, 3; NSW Bar Association, *Submission CI56* [7]; Local Court of NSW, *Submission CI58*, 1–2, 9; Children's Court of NSW, *Submission CI62*, 7.
23. *Court Information Act 2010* (NSW) s 5, s 8(1) (uncommenced).
24. *Court Information Act 2010* (NSW) s 6, s 9(1) (uncommenced).

- the types of records on the court file that are accessible as of right and those that are accessible with leave of the court
- the information that must be included in access requests
- the methods by which access can be provided, and
- whether any prescribed access fees can be waived or reduced.

4.24 Under the framework, parties and their legal representatives would be entitled to access any record on the court file for the proceeding. Journalists and researchers would be entitled to access certain records on the court file as of right and be required to seek leave of the court to access other records. Members of the public would only be entitled to access records prescribed in court rules as of right, and would be required to seek leave to access any other record on the court file.[25]

4.25 The Children's Court supported a system where "access to information is granted based upon the circumstances of the applicant who is requesting the information".[26] However, others opposed having different rules for different applicants.[27]

4.26 Our recommendations recognise that certain applicants have a greater need for, or interest in, accessing records on the court file, require access more frequently than others, and are subject to professional and/or ethical constraints.

4.27 Journalists should have special access entitlements because they facilitate open justice by reporting on the courts. Existing legislation also gives media representatives the right to inspect certain documents in criminal proceedings.

4.28 Further, journalists make more access requests than members of the public. For example, in 2020:

- Sydney metropolitan journalists from major newspapers and radio and television stations accounted for around 68% of requests for information to the Supreme Court Media Manager
- just over 11% of requests came from NSW regional newspapers, radio and television stations
- less than 2% of requests came from suburban Sydney newspapers, and
- 19% of enquiries were from interstate or overseas journalists, writers for specialist or trade publications, authors, lawyers, students or members of the public.[28]

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25. Recommendation 5.1–5.2.
26. Children's Court of NSW, *Submission CI28*, 6.
27. Roundtable 4, *Consultation CIC08.*

4.29 Researchers should have specific access entitlements because research is an important part of open justice, insofar as it involves investigating areas of the law and the operation of the courts, which can highlight what is working well and also where improvements can be made.

4.30 Without access to certain court records as of right, it may be difficult for journalists and researchers to understand and report on proceedings, due to practices such as the use of documents without their being read out in court. Journalists and researchers are also subject to professional conduct and ethics requirements, which should reduce the risk of their disclosing, publishing or misusing personal identification information contained in court records. Members of the public do not share the same interest in access and are not bound by similar constraints.

4.31 Further, a significant proportion of court records contains personal identification information. Allowing such information to be readily available to the public could lead to identity theft, or people being targeted for commercial, criminal or other purposes. Thus, we recommend that they should generally be required to seek leave to access court records.

4.32 Other aspects of the framework apply to all types of applicants. These include:

- considerations for deciding whether to grant an applicant leave to access a court record, where leave is required
- conditions that courts can impose on access to and use of court records, where leave is required for access, and
- the offence of unauthorised use or disclosure of personal identification information contained in court records.

4.33 We expand on the different elements of the framework in chapter 5.

New general powers to make non-publication, non-disclosure, exclusion and closed court orders

4.34 The new Act should also set out general powers to:

- prohibit or restrict the publication or disclosure of information (that is, make a non-publication or non-disclosure order)
- exclude a specified person or class of people, or all people other than those whose presence is necessary, from the whole or any part of the proceedings (that is, make an exclusion order), and

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28. Supreme Court of NSW, *2020 Annual Review* (2021) 44.

- exclude all people, other than those whose presence is necessary, from the whole or any part of proceedings, which also has the effect of prohibiting disclosure of information from the closed part of proceedings (that is, make a closed court order).

4.35 Several submissions supported introducing a new Act containing general powers to make orders.[29] This division of the new Act would replace the *CSNPO Act* (recommendation 4.1(2)(c)).

4.36 The *CSNPO Act* currently provides general powers to make orders prohibiting or restricting publication or disclosure only. It establishes a regime for making, reviewing, appealing and enforcing these orders.

4.37 Some elements of the *CSNPO Act* can be traced back to the 2003 Law Reform Commission's review of the law of contempt in 2003. While the report's focus was the law of contempt by publication, it also recommended substantial reforms to the procedures for suppressing material relating to court proceedings.[30]

4.38 The *CSNPO Act* was based on a Model Law developed in 2010 by the then Standing Committee of Attorneys-General.[31] The Model Law was created in response to a review of the use of non-publication and non-disclosure orders by a working group of the Standing Committee. 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.[32]

4.39 The *CSNPO Act* came into force on 1 July 2011 and most of the provisions were identical to the Model Law. Victoria and the Commonwealth were the only other jurisdictions that adopted similar legislation based on the Model Law.[33]

4.40 The agreement in principle speech said that the Bill reflects the Government's commitment to "the principles of open justice and to improving the ability of the public to

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29. knowmore, *Submission CI43*, 5–6; NSW Society of Labor Lawyers, *Submission CI52*, 1; NSW Bar Association, *Submission CI56* [4]; Local Court of NSW, *Submission CI58*, 1.
30. NSW Law Reform Commission, *Contempt by Publication*, Report 100 (2003) [10.15]–[10.30].
31. Australia, Standing Committee of Attorneys-General, *Court Suppression and Non-publication Orders Bill 2010*, Draft Model Bill (2010).
32. Australia, Standing Committee of Attorneys-General, Working Group, *Proposals for the Harmonisation of Suppression Orders Legislation* (C2008).
33. *Open Courts Act 2013* (Vic); *Federal Court of Australia Act 1976* (Cth) pt VAA, as inserted by *Access to Justice (Federal Jurisdiction) Amendment Act 2012* (Cth) sch 2 [4]; *Judiciary Act 1903* (Cth) pt XAA, as inserted by *Access to Justice (Federal Jurisdiction) Amendment Act 2012* (Cth) sch 2 [8]; *Federal Circuit and Family Court of Australia Act 2021* (Cth) ch 4 pt 7; *Federal Circuit Court of Australia Act 1999* (Cth) pt 6A (repealed); *Family Law Act 1975* (Cth) pt XIA, as inserted by *Access to Justice (Federal Jurisdiction) Amendment Act 2012* (Cth) sch 2 [1].

access appropriate court information in order to better understand what takes place in NSW courtrooms".[34]

4.41 Several submissions supported the general structure and operation of the *CSNPO Act*.[35] The Office of the Director of Public Prosecutions (ODPP) said that the Act was a "welcome development" as:

- "it consolidated the relevant principles into one statutory instrument and codified the test to be applied in making an order", and
- since the Act was introduced, "the procedure for applying for suppression or non-publication orders has been clarified and simplified and there is greater consistency in the orders that are being made by the courts".[36]

4.42 We also received numerous suggestions for improving the *CSNPO Act*.[37] In the next section, and in later chapters, we make recommendations to retain, amend or remove current *CSNPO Act* provisions, as well as to introduce new types of orders and provisions, in the new Act.

Powers to make exclusion and closed court orders

4.43 A court's powers to make non-publication and non-disclosure orders are derived from:

- the *CSNPO Act*
- provisions in subject-specific legislation that allow or require the court to make these orders in certain types of proceedings and/or in certain situations, and
- inherent or implied powers to limit open justice where it is necessary to secure the proper administration of justice (chapter 2).[38]

4.44 By contrast, powers to exclude people or close proceedings are derived only from subject-specific legislation or a court's inherent or implied powers.

4.45 Some stakeholders described the current statutory framework for excluding people or closing proceedings as confusing and complex. In particular, there is confusion around

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34. NSW, *Parliamentary Debates*, Legislative Assembly, Agreement in Principle Speech, 29 October 2010, 27195.
35. NSW Council for Civil Liberties, *Preliminary Submission PCI29*, 3–4; NSW Office of the Director of Public Prosecutions, *Preliminary Submission PCI12*, 6; H Brown, *Preliminary Submission PCI10*, 3; NSW, Public Defenders, *Preliminary Submission PCI33*, 3.
36. NSW Office of the Director of Public Prosecutions, *Preliminary Submission PCI12*, 6.
37. See, eg, Rape and Domestic Violence Services Australia, *Submission CI08* [23]–[24], [34]; NSW Office of the Director of Public Prosecutions, *Submission* CI17, 14; Commonwealth Director of Public Prosecutions, *Submission CI21*, 1; Banki Haddock Fiora, *Submission CI29*, 8.
38. *John Fairfax and Sons Pty Ltd v Police Tribunal of NSW* (1986) 5 NSWLR 465, 477. See also *Hogan v Hinch* [2011] HCA 4, 243 CLR 506 [21].

whether closing the court also has the effect of prohibiting disclosure of information in closed proceedings (chapter 3).[39]

4.46 The new Act would include general powers to make exclusion and closed court orders, as well as non-publication and non-disclosure orders. Some submissions supported this approach.[40] The different types of orders would be clearly defined, so that their purpose and effect is understood (recommendation 4.3(2)).

4.47 The new Act would contain provisions that apply generally to non-publication, non-disclosure, exclusion and closed court orders, including provisions that:

- state that a primary consideration when making an order is safeguarding the public interest in open justice,[41] and
- establish procedures for making and appealing orders.[42]

4.48 The new Act would also include some provisions that are specific to each type of order, given their different purposes and intended effects. This includes the grounds for making a particular type of order,[43] and the procedures for reviewing orders.[44]

4.49 Similar legislation in other jurisdictions contains powers to make both orders restricting the publication or disclosure of information and orders to close the court.[45]

Do not consolidate discretions and requirements to make orders from subject-specific legislation

4.50 In addition to the *CSNPO Act,* a wide range of statutes empower or require courts to make orders that limit the publication or disclosure of information, exclude people from proceedings, or close the proceedings entirely. Most of these statutes set out powers that are specific to certain types of information or contexts.

4.51 In our draft proposals, we sought feedback about whether any provisions in subject-specific legislation that may conflict or overlap with grounds in the new Act could be brought into the new Act.[46] The ODPP supported the approach of repealing any provisions that are of a general nature, or that conflict or overlap with the grounds in the

39. Roundtable 1, *Consultation CIC02*; Roundtable 2, *Consultation CIC03.*
40. See, eg, NSW Bar Association, *Submission CI56* [7]; Local Court of NSW, *Submission CI58*, 1; knowmore, *Submission CI43*, 5–6.
41. Recommendation 6.1.
42. Recommendation 7.1, 7.5.
43. Recommendation 6.4–6.6.
44. Recommendation 7.2–7.3.
45. *Open Courts Act 2013* (Vic) pt 2–5; *Evidence Act 1929* (SA) pt 8; *Criminal Procedure Act 2011* (NZ) pt 5 subpt 3.
46. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) [4.103].

new Act.[47] However, few identified specific provisions that may be appropriate to incorporate into the new Act.

4.52 The ODPP suggested that rules around closing courts in criminal cases where "there is evidence in the nature of public interest immunity" could be codified in the *CSNPO Act*.[48] Other stakeholders went further and suggested that all powers to make orders, and potentially even statutory prohibitions, could be consolidated in one Act.[49]

4.53 Most, if not all, existing discretions and requirements in subject-specific legislation should be retained in that separate legislation. This is because:

- these provisions usually address specific public policy concerns relevant to the subject matter of a particular statute[50]
- removing discretions and requirements to make orders from subject-specific legislation may result in their being over-looked, and it is convenient for those using those statutes to have the provisions contained in the same legislation[51]
- the statutory discretions contain a variety of standards or grounds for making an order, and the application of the necessity test in the new Act may set too high a bar, or may not be appropriate in the specific context
- requirements to make orders compel courts to make an order in particular circumstances, which is different to applying a test of necessity before making an order, and
- if disparate discretions and requirements to make orders are consolidated into the new Act, it may become overly complex and lengthy.

4.54 We agree with knowmore that, although promoting consistency with the new Act is worthwhile, "[a]iming for uniformity should not be the primary goal where improvements can be made, and other legislation can be amended accordingly".[52]

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47. NSW Office of the Director of Public Prosecutions, *Submission CI17*, 11.
48. NSW Office of the Director of Public Prosecutions, *Submission CI17*, 5.
49. Roundtable 2, *Consultation CIC03*.
50. NSW Office of the Director of Public Prosecutions, *Submission CI17*, 11.
51. NSW, Mental Health Review Tribunal, *Submission CI33*, 1; NSW, Mental Health Review Tribunal, *Consultation CIC10.*
52. knowmore, *Submission CI43*, 19.

Objects of the new Act

Recommendation 4.2: Objects of the new Act

The objects of the new Act should be to:

(a) recognise and promote open justice, subject to necessary exceptions

(b) promote public confidence in and understanding of the courts

(c) provide clarity about the effect and operation of exceptions to open justice

(d) promote transparency of decision-making under the Act, and

(e) promote the efficient and effective operation of the courts.

4.55 Recommendation 4.2 is for the new Act to specify its objects. Objects clauses are a common feature of statutes and provide guidance about what parliament wants a law to achieve.[53] While the objects of the new Act could be explained in a second reading speech or explanatory notes, recognising the objects in legislation would provide an important statement to the public generally of parliament's commitment to them.

4.56 The recommended objects clause is also intended to provide assistance to courts in the interpretation and application of the Act, if there is ambiguity or uncertainty. The *Interpretation Act 1987* (NSW) provides that the preferred construction of an Act is one that promotes the purpose or object underlying the Act.[54] Case law similarly recognises that a construction or interpretation that promotes the purpose of an Act is to be preferred "especially where that purpose is set out in the Act".[55]

4.57 The objects in the new Act would also form part of the policy objectives to be considered in the statutory review that we recommend in chapter 16. The objects would provide a benchmark against which to assess implementation of the new Act.

Recognise and promote open justice, subject to necessary exceptions

4.58 Certain aspects of the new Act reinforce the object in recommendation 4.2(a), including:

- the recognition that, in deciding whether to make a non-publication, non-disclosure, exclusion or closed court order under the Act, a primary consideration is safeguarding the public interest in open justice[56]
- the necessity test for making orders under the Act,[57] which sets a high bar for making an order, and

53. See, eg, *Waters v Public Transport Corporation* (1991) 173 CLR 349, 359; *Lynn v NSW* [2016] NSWCA 57, 91 NSWLR 636 [54].
54. *Interpretation Act 1987* (NSW) s 33.
55. *Mills v Meeking* (1990) 169 CLR 214, 223.
56. Recommendation 6.1.

- the requirement for courts, in deciding whether to grant an applicant leave to access a record on the court file, to consider the public interest in open justice.[58]

4.59 The recommended object is similar to the *Open Courts Act 2013* (Vic), which provides that one of the main purposes of the Act is to "recognise and promote the principle that open justice is a fundamental aspect of the Victorian legal system".[59]

Promote public confidence in and understanding of the courts

4.60 Multiple aspects of the new Act reflect the object in recommendation 4.2(b).

4.61 For example, the requirement for a court to give reasons for making a non-publication, non-disclosure, exclusion or closed court order, as well as making an order to confirm, vary or revoke an order on review or appeal, on request,[60] would enable the public to understand how the courts apply the Act, which may in turn preserve public confidence in the courts.

4.62 The access framework would provide an avenue for applicants to access records on the court file. It includes special access entitlements for journalists, which are meant to facilitate fair and accurate reports of proceedings. This in turn may enhance the public's understanding of cases and the operation of the courts generally. We discuss the access framework in chapter 5.

4.63 The register of orders may also promote public confidence in and understanding of the courts by improving awareness of non-publication, non-disclosure and closed court orders made under the new Act.[61]

Provide clarity about the effect and operation of exceptions to open justice

4.64 Certain aspects of the recommended new Act reflect the objective in recommendation 4.2(c).

4.65 Under recommendation 4.3, the new Act would include definitions of the following types of exceptions to open justice, which clarify their meaning and effect:

- "non-publication order" and "non-disclosure order"
- "exclusion order" and "closed court order"
- "statutory prohibition on publication" and "statutory prohibition on disclosure", and

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57. See [6.47]–[6.50].
58. Recommendation 5.5(1)(a).
59. *Open Courts Act 2013* (Vic) s 1(aa).
60. Recommendation 7.7.
61. Recommendation 13.8.

- "statutory exclusion provision" and "statutory closed court provision".

4.66 The new Act would also set out clear procedures for how non-publication, non-disclosure, exclusion and closed court orders can be made, reviewed and appealed (chapter 7).

4.67 Further, the new Act would clarify the impact of various exceptions to open justice on access to records on the court file (chapter 5).

Promote transparency of decision-making under the Act

4.68 Several aspects of the recommended new Act reflect the object in recommendation 4.2(d), such as:

- specified limited grounds for orders, including the necessity test[62]
- the requirement for courts to provide reasons, upon request, for making certain decisions such as making an order,[63] and
- clear procedures for reviewing and appealing orders.[64]

4.69 We discuss these aspects further in chapters 6 and 7.

4.70 In addition, the requirement to consider specified matters in deciding whether to grant leave to an applicant to access a record on the court file should provide greater clarity about the way the courts approach the leave process.[65]

4.71 The recommended register of orders also reflects the object in recommendation 4.2(d), in that it seeks to promote transparency around orders made under the new Act.[66]

Promote the efficient and effective operation of the courts

4.72 Certain aspects of the new Act reflect the object in recommendation 4.2(e) and seek to avoid placing an undue burden on the courts.

4.73 For example, in relation to powers to make orders, we recommend that a court should only be required to give reasons when requested (subject to certain exceptions), as giving reasons in every case would have significant resource implications.[67]

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62. Recommendation 6.4–6.6.
63. Recommendation 7.7.
64. Recommendation 7.2–7.3, 7.5.
65. Recommendation 5.5.
66. Recommendation 13.8.
67. Recommendation 7.7.

4.74 The access framework would not make it mandatory for courts to redact personal identification information from a court record before releasing it to an access applicant, as this would be resource intensive for courts. Instead, in deciding whether to grant an applicant leave to access a record on the court file containing such information, courts should be required to consider whether it would be reasonably practicable for the applicant to be given access to a redacted copy of the record.[68]

Definitions in the new Act

Definitions of key terms used across the new Act

Recommendation 4.3: Definitions of key terms used across the new Act

(1) The new Act should provide:

(a) "Court" means:

(i) the Supreme Court (including the Court of Appeal and the Court of Criminal Appeal), Land and Environment Court, District Court, Local Court and Children's Court and, for the avoidance of doubt, does not include a court exercising jurisdiction under the *Coroners Act 2009* (NSW) or the Drug Court, and

(ii) any other judicial body that is prescribed in regulations.

(b) "Complainant":

(i) in relation to proceedings for a prescribed sexual offence, has the same meaning as in s 290A(1) of the *Criminal Procedure Act 1986* (NSW), and

(ii) in relation to proceedings for a domestic violence offence, has the same meaning as the term "domestic violence complainant" in s 3(1) of the *Criminal Procedure Act 1986* (NSW).

(c) "Domestic violence offence" has the same meaning as in s 11 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW).

(d) "Prescribed sexual offence" has the same meaning as in s 3(1) of the *Criminal Procedure Act 1986* (NSW).

(e) "Proceeding" includes any civil or criminal proceeding.

(f) "Protected person" has the same meaning as in s 3(1) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW).

(g) "Victim" includes a person against whom an offence is alleged to have been committed.

(h) "Statutory prohibition on publication" means any provision in any other statute or law that prohibits or restricts the publication of information, without the need for an order.

(i) "Statutory prohibition on disclosure" means any provision in any other statute or law that prohibits or restricts the disclosure of information, without the need for an order.

68. Recommendation 5.5(1)(i).

(j) "Statutory exclusion provision" means any provision in any other statute or law that:

(i) provides that a specified person or class of people, or all people other than those whose presence is necessary, are excluded from the whole or any part of proceedings, without the need for an order, and

(ii) does not, of itself, restrict or prohibit the disclosure (by publication or otherwise) of information in that part of proceedings.

(k) "Statutory closed court provision" means any provision in any other statute or law that:

(i) provides that all people, other than those whose presence is necessary, are excluded from the whole or any part of proceedings, without the need for an order, and

(ii) has the effect of prohibiting disclosure (by publication or otherwise) of information from the closed part of proceedings.

(2) The new Act should define:

(a) "non-publication order", "non-disclosure order", "exclusion order" and "closed court order" in the same way as in recommendation 3.1

(b) "publish" and "disclose" in the same way as in recommendation 3.2, and

(c) "journalist", "news media organisation" and "news medium" in the same way as in recommendation 3.5.

4.75 The new Act should include definitions of certain terms that are relevant to both divisions of the Act. Several of the recommended definitions reflect our framework for classifying exceptions from open justice outlined in chapter 3.

"Court" and "proceeding"

4.76 The definition in recommendation 4.3(1)(a)(i) is similar to the definitions of "court" in the uncommenced *Court Information Act* and the *CSNPO Act*.[69] Unlike those definitions, we recommend that the coronial jurisdiction and the Drug Court should be expressly excluded, which we explain further in chapter 15.

4.77 Recommendation 4.3(1)(a)(ii) is that "court" should include any other judicial body prescribed in regulations. This is different to the *CSNPO Act,* which provides that "court" includes "any other court or tribunal, or a person or body having power to act judicially, prescribed by the regulations as a court for the purposes of this Act".[70] For the reasons outlined in chapter 15, the new Act would not apply to tribunals.

4.78 The definition of "proceeding" in recommendation 4.3(1)(e) is similar to the definition of "proceedings" in the *CSNPO Act*.[71]

69. *Court Information Act 2010* (NSW) s 4(1) definition of "court" (uncommenced); *Court Suppression and Non-publication Orders Act 2010* (NSW) s 3 definition of "court".

70. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 3 definition of "court".

71. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 3 definition of "proceedings".

"Complainant", "protected person" and "victim"

4.79 The new Act adopts the approach of referring to definitions in other legislation, rather than repeating the definitions. Legal Aid observed that this is likely to avoid inconsistencies, particularly where those definitions are amended in the original Act. This outweighs the disadvantage of having to refer to another Act to find the definition.[72]

4.80 Recommendations 4.3(1)(b) and 4.3(1)(f) are for the new Act to adopt the same definitions of "complainant" and "protected person" as in the *Criminal Procedure Act* and the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) (*Crimes (Domestic and Personal Violence) Act*). The term "complainant" is used in connection with, and defined by reference to, domestic violence offences and prescribed sexual offences.[73] "Protected person" is used in connection with, and defined by reference to, an apprehended violence order (AVO).[74]

4.81 The definitions are the same as our draft proposal,[75] which some submissions supported.[76]

4.82 In recommendation 4.3(1)(g), "victim" is defined to include a person against whom an offence is alleged to have been committed. This is the same as our draft proposal,[77] which received some support in submissions.[78]

4.83 The definition is intended to capture a person against whom an offence is alleged to have been committed but the offence has not been formally proved (for example, because the proceedings are ongoing).

"Prescribed sexual offence" and "domestic violence offence"

4.84 Recommendation 4.3(c)–(d) is for the new Act to adopt the same definitions of "prescribed sexual offence" and "domestic violence offence" as in the *Criminal Procedure Act* and the *Crimes (Domestic and Personal Violence) Act*.[79]

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72. Legal Aid NSW, *Submission CI57*, 7–8.
73. *Criminal Procedure Act 1986* (NSW) s 3 definition of "domestic violence complainant", s 290A(1) definition of "complainant".
74. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 3(1) definition of "protected person".
75. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 3.4(1), proposal 3.4(3).
76. Supreme Court of NSW, *Submission CI55* [1]; NSW Bar Association, *Submission CI56* [7]; Legal Aid NSW, *Submission CI57*, 7–8.
77. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 3.4(2).
78. Supreme Court of NSW, *Submission CI55* [1]; NSW Bar Association, *Submission CI56* [7]; Legal Aid NSW, *Submission CI57*, 8.
79. *Criminal Procedure Act 1986* (NSW) s 3 definition of "prescribed sexual offence"; *Crimes (Domestic and Personal Violence Act 2007* (NSW) s 11.

4.85 This recommendation is the same as our draft proposal,[80] which some submissions supported.[81] As with the definitions of "complainant" and "protected person" in recommendations 4.3(1)(b) and 4.3(1)(f), our intention is to:

- avoid confusion or inconsistency with the existing definitions of "prescribed sexual offence" and "domestic violence offence", and
- ensure that if these definitions are amended elsewhere, the amended definition will be automatically picked up in the new Act.

"Statutory prohibition on publication" and "statutory prohibition on disclosure"

4.86 The definitions of "statutory prohibition on publication" and "statutory prohibition on disclosure" in recommendation 4.3(1)(h)–(i) reflect our classification framework outlined in chapter 3.

4.87 It is necessary for the new Act to define these terms as they would be used in its various parts. For example, the new Act would clarify that it does not limit or otherwise affect the operation of statutory prohibitions on publication or disclosure (recommendation 4.9). The access framework in the new Act would also require an applicant to seek leave of the court to access a record on the court file containing information subject to a statutory prohibition on publication.[82]

"Statutory exclusion provision" and "statutory closed court provision"

4.88 The definitions of "statutory exclusion provision" and "statutory closed court provision" in recommendation 4.3(1)(j)–(k) would be used in various parts of the new Act. For example, the new Act would not limit or otherwise affect the operation of statutory exclusion or closed court provisions (recommendation 4.9). The access framework would also prevent an applicant from accessing a record relating to a part of the proceedings that have been closed pursuant to a statutory closed court provision.[83]

Other terms

4.89 The new Act would also include the definitions of the following terms that we recommend in chapter 3:

- "non-publication order", "non-disclosure order", "exclusion order" and "closed court order"
- "publish" and "disclose", and

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80. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 3.4(4)–(5).
81. Supreme Court of NSW, *Submission CI55* [1]; NSW Bar Association, *Submission CI56* [7]; Legal Aid NSW, *Submission CI57*, 7–8.
82. Recommendation 5.2(1)(b).
83. Recommendation 5.3(2)(a).

- “journalist”, “news media organisation” and “news medium”.

Definitions of key terms used in the access framework

Recommendation 4.4: Definitions of key terms in the access framework

(1) The access framework in the new Act should provide:

(a) “Court file” means any hard copy or electronic file maintained by the relevant court for the relevant proceedings and includes any of the following records relating to the proceedings that the court has in its possession or custody:

(i) a record filed or tendered by a party or a record of submissions made by a party

(ii) a record admitted into evidence in connection with the proceedings

(iii) a record of any judgment given and any directions given or orders made in proceedings before the court, and

(iv) a record of the proceedings (including any transcript or recording of the proceedings).

“Court file” does not include:

(i) any notes, working papers or deliberations produced by or for a judicial officer

(ii) a record produced on subpoena that is not admitted in evidence, or

(iii) a record that has been taken off the court file by order.

(b) “Personal identification information” includes:

(i) tax file number

(ii) Centrelink customer reference number

(iii) Medicare number

(iv) financial account numbers

(v) passport number

(vi) driver licence number

(vii) contact information

(viii) date of birth (other than year of birth), and

(ix) particulars of titles of land holdings.

(c) “Record” means any document (or copy of a document) or other source of information compiled, recorded or stored in written form or by electronic process, or in any other manner or by any other means.

(d) “Researcher” means a person who makes a request for access to a record on a court file for the purposes of academic research.

In deciding whether a request is for the purposes of academic research, the court may take into account:

(i) whether the person making the request works within a university or other institution that has research as one of its purposes

(ii) whether a significant proportion of the person’s professional activity involves research

(iii) whether the person is required to comply with recognised ethical or other professional standards in the course of their professional activity, and

(iv) such other considerations as the court considers relevant.

(2) The access framework in the new Act should define "contact information" in the same way as in recommendation 3.4(2).

"Court file"

4.90 The access framework would only apply to records "on the court file". It is therefore necessary to define what constitutes the "court file".

4.91 There is no clear or settled definition of this term. The definition of "court file" in recommendation 4.4(1)(a) is intended to capture records that are filed in proceedings or tendered in court by a party, admitted into evidence, or prepared by the court (such as a judgment or transcript).

4.92 The reference to a "hard copy or electronic file" is intended to clarify that the access framework would apply to all digital as well as hard copy records. While we understand that NSW courts still rely significantly on hard copy files,[84] the reference to electronic files is intended to capture future technological developments.

4.93 The definition in recommendation 4.4(1)(a) requires records on the court file to be in the court's possession or custody, which clarifies that the access framework only applies to records in the physical possession of the court. It would not, for example, apply to records that have been returned to parties at the conclusion of proceedings,[85] or to the police fact sheet or any criminal history handed up in bail proceedings that has been returned to the police prosecutor because no plea was entered (which is the current practice in the Local Court). However, if a police fact sheet or criminal history is on the court file, then the access framework would apply.

4.94 Certain records are excluded from the recommended definition of the court file. These include a judicial officer's notes, working papers or deliberations. Allowing access to these records may impinge on judicial independence or damage the perceived impartiality of the judicial process.[86]

4.95 Also excluded from the recommended definition of the court file are records produced on subpoena that have not been admitted in evidence.[87] It would be inappropriate to allow access to records produced on subpoena that do not form part of the evidence in a case as they:

- are often third party records (not those of parties to the proceedings), and
- may be confidential or privileged.

84. Supreme Court of NSW, *Consultation CI22.*
85. NSW Office of the Director of Public Prosecutions, *Submission CI48*, 5.
86. New Zealand, Law Commission, *Access to Court Records,* Report 93 (2006) [2.98].
87. Medical Insurance Group Australia (MIGA), *Submission CI04*, 1.

4.96 Records that have been taken off the court file by court order are also excluded from the recommended definition of the court file. In civil proceedings, for example, orders to take records off the court file can be made under the *Uniform Civil Procedure Rules 2005* (NSW) if the document contains a matter that is scandalous, frivolous, vexatious, irrelevant or oppressive.[88] The recommendation reflects the fact that such an order involves a decision that the relevant document should not be part of the official record.

"Personal identification information" and "contact information"

4.97 The definition of "personal identification information" in recommendation 4.4(1)(b) includes the types of information that could be used to impersonate someone or target them for commercial, criminal or other purposes such as tax file numbers, passport numbers and particulars of titles of land holdings. The ODPP observed that as the definition is non-exhaustive, it allows "flexibility in interpretation and durability to cover new forms of information that may identify someone".[89]

4.98 The recommended definition is largely the same as our draft proposal,[90] except for the inclusion of a driver licence number, which was suggested by Legal Aid.[91]

4.99 The definition in recommendation 4.4(1)(b) also includes "contact information". Recommendation 4.4(2) is to include the same definition of "contact information" in the new Act that we recommend in chapter 3, which includes addresses, telephone numbers, email addresses and social media profiles.

"Record"

4.100 As mentioned above, we understand that courts in NSW continue to rely significantly on hard copy documents. This is different from the Federal Court, where there is greater use of electronic documents.[92]

4.101 The definition of "record" in recommendation 4.4(1)(c) is intended to be broad enough to capture conventional documents, as well as materials in electronic, video or other formats, to allow for technological developments.

"Researcher"

4.102 The factors listed in recommendation 4.4(1)(d) are not exhaustive and are intended to guide decisions about whether a person is in fact a "researcher" for the purposes of the access framework. The recommendation is intended to be flexible enough to cover

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88. *Uniform Civil Procedure Rules 2005* (NSW) r 4.15(1)(b)–(c).
89. NSW Office of the Director of Public Prosecutions, *Submission CI48*, 4.
90. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 10.2(2).
91. Legal Aid NSW, *Submission CI57*, 25.
92. Supreme Court of NSW, *Consultation CIC22.*

people who have a genuine need to access court records for research purposes, but distinct enough to provide clear guidance to courts.

4.103 One factor in recommendation 4.4(1)(d) is that the person making the request works within a university or other institution that has research as one of its purposes. This is more flexible than the current Supreme Court policy about researcher access to court information, which requires a person's research project to be sponsored and supervised by a university.[93] The recommendation recognises that other institutions may also conduct research.

4.104 Another factor is that a significant proportion of the person's professional activity involves research. This is intended to be flexible enough to cover a person who is not employed solely or specifically as a researcher, but conducts research as part of their job, and distinct enough to exclude members of the public who are not involved in what is usually understood to be research work.

4.105 A third factor is that the person is required to comply with recognised ethical or other professional standards in the course of their professional activity. This is similar to the Supreme Court policy, which requires evidence of relevant privacy statements, information security policies and ethical research guidelines, for reassurance that the researcher will handle data in an ethical manner and not compromise privacy.[94]

4.106 Under our recommendation, ethics approval would not be determinative of whether a person's request is for research purposes, but rather a factor that may support this conclusion. Consultations suggested that it may be unworkable to require a researcher to have ethics approval, as in some cases an ethics committee may first require approval from the courts. In addition, some types of research projects do not require ethics approval.[95]

4.107 The list of factors in recommendation 4.4(1)(d) is similar to our draft proposal,[96] but includes a fourth factor: such other considerations as the court considers relevant. This is to ensure the list is not treated as exhaustive and that courts can consider matters that are specific to a particular case.

4.108 Court rules could provide greater specificity, or add to the list of factors, if it is considered necessary for the particular jurisdiction.

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93. Supreme Court of NSW, *Release of Statistics, Data and Information* (2021).
94. Supreme Court of NSW, *Release of Statistics, Data and Information* (2021) 2.
95. Roundtable 4, *Consultation CIC08.*
96. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 10.2(4).

Definitions of key terms relating to orders

Recommendation 4.5: Definitions of key terms relating to orders

(1) In relation to general powers to make non-publication, non-disclosure, exclusion and closed court orders, the new Act should provide:

(a) "Child" means a person who is under the age of 18 years.

(b) "Cognitive impairment" has the same meaning as in s 5 of the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW).

(c) "Information" includes any document.

(d) "Party" to proceedings includes:

(i) a complainant, victim or protected person

(ii) any person named in evidence given in proceedings, and

(iii) in relation to proceedings that have concluded, a party to proceedings before the proceedings concluded.

(e) "Mental health impairment" has the same meaning as in s 4 of the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW).

(2) The new Act should define "information tending to identify" a person in the same way as in recommendation 3.3.

"Child"

4.109 The *CSNPO Act* does not currently use or define the term "child". This term would be used in various places in the new Act including in the grounds for making a non-publication or non-disclosure order, or exclusion order, and the requirement to consider the views of the person who is, or would be, protected by an order.[97]

4.110 The Children's Court supports the definition of child in recommendation 4.5(1)(a) as a person under 18.[98]

"Cognitive impairment" and "mental health impairment"

4.111 The terms "cognitive impairment" and "mental health impairment" would be used in some of the provisions in the new Act.[99]

4.112 Recommendations 4.5(1)(b) and 4.5(1)(e) are to incorporate the definitions in s 4 and s 5 of the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW). This is intended to promote clarity and consistency. Further, if these definitions are amended, the amendment will be automatically picked up in the new Act.

97. Recommendation 6.4(f), 6.5(d), 7.6(1)(a)(ii).

98. Children's Court of NSW, *Submission CI62*, 2.

99. Recommendation 6.5(d), 7.6(1)(a)(i).

"Information"

4.113 The definition of "information" in recommendation 4.5(1)(c) is the same as s 3 of the *CSNPO Act*.

"Information tending to identify" a person

4.114 The definition in recommendation 4.5(2) is the same definition of "information tending to identify" a person that we recommend in chapter 3.

"Party"

4.115 The definition of "party" in recommendation 4.5(1)(d) is similar to s 3 of the *CSNPO Act.* Unlike the *CSNPO Act* we recommend including a "protected person" in the definition. This is to reflect the additional category of people involved in AVO proceedings who are covered by or referred to in our recommendations.[100] This broad definition of party is relevant for a number of recommendations including those relating to having standing to apply for, and to appear and be heard in, applications for, and reviews and appeals of, orders under the new Act.[101] Several submissions supported the scope of this definition.[102]

Preliminary provisions in the new Act

Inherent jurisdiction and powers of courts not affected

Recommendation 4.6: Inherent jurisdiction and powers of courts not affected

The new Act should not limit or otherwise affect any inherent jurisdiction or any powers that a court has apart from the Act to regulate its proceedings or deal with a contempt of the court.

4.116 Recommendation 4.6 aligns with the *CSNPO Act*.[103] It is also similar to our draft proposal.[104] Some submissions supported it.[105]

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100. Recommendation 6.4(d)–(e), 7.4.
101. Recommendation 7.1–7.3, 7.5.
102. Rape and Domestic Violence Services Australia, *Submission CI61* [10]; Legal Aid NSW, *Submission CI57*, 7; Youth Justice NSW, NSW Department of Communities and Justice, *Submission CI39*, 1; Supreme Court of NSW, *Submission CI55* [1].
103. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 4.
104. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 4.3.
105. NSW Bar Association, *Submission CI56* [7]; Legal Aid NSW, *Submission CI57*, 9; Australia's Right to Know, *Submission CI59*, 10.

4.117 A court may, for example, exercise its inherent jurisdiction (if it is a superior court) or implied powers (if it is an inferior or lower court) to allow a person access to records on the court file.[106]

4.118 As discussed above, the new Act would set out a statutory framework governing access to records on the court file. The framework seeks to simplify and enhance access to court records, including by clarifying what records are and are not available to particular applicants. However, a court may, for example, wish to rely on its inherent jurisdiction or implied powers to grant a person access to a record that is not captured by the framework.

4.119 Further, a court may exercise its inherent jurisdiction or implied powers to limit open justice where it is necessary to secure the proper administration of justice (chapter 2). The new Act sets out express statutory powers to make non-publication, non-disclosure, exclusion and closed court orders. These statutory powers are intended to provide clarity and expand the circumstances in which orders can be made.

4.120 Ordinarily, a court might prefer to rely on the new Act to make an order rather than its inherent jurisdiction or implied powers. However, there may still be circumstances where a court wishes to rely on such powers. For example, a court may exercise its inherent jurisdiction to restrict publication of sensitive material in commercial or corporations matters.[107]

4.121 The new Act is also not intended to limit or affect a court's inherent jurisdiction or powers to deal with contempt. As we discuss in chapters 1 and 13, there are several different types of contempt. All courts (including lower or inferior courts) have the power to deal with contempt in the face of the court as part of their inherent jurisdiction or implied powers.[108] This power is one of the mechanisms that judicial officers use to control proceedings before them and address disruptive behaviour.[109]

4.122 Other types of contempt such as disobedience contempt or contempt by breaching a court order, can be dealt with by the Supreme Court as part of its inherent jurisdiction. We discuss the processes for dealing with contempt in chapter 13.

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106. See, eg, *ASIC v Rich* [2002] NSWSC 198 [6]; *John Fairfax Publications Pty Ltd v Ryde Local Court* [2005] NSWCA 101, 62 NSWLR 512 [27]–[78].

107. Supreme Court of NSW, *Submission CI55* [4].

108. *R v Metal Trades Employers' Association* (1951) 82 CLR 208, 241–243, 254.

109. Victorian Law Reform Commission, *Contempt of Court,* Consultation Paper (2019) [4.2].

Preliminary provisions applicable to the access framework

The new Act does not interfere with other access provisions

Recommendation 4.7: The new Act should not interfere with other access provisions

The access framework in the new Act should provide that it does not prevent or otherwise interfere with the giving of access to a record on the court file as permitted or required by or under any other Act or law.

4.123 Recommendation 4.1(2) is for the new Act to replace certain legislation affecting access to court records, including s 314 of the *Criminal Procedure Act.* With the exception of the legislation referred to in that recommendation, recommendation 4.7 is that the access framework should not prevent or otherwise interfere with the giving of access to records on the court file as permitted or required by or under any other Act or law.

4.124 Recommendation 4.7 is intended to avoid conflict between the recommended access framework and other provisions relating to access to court records. For example:

- under the *Child Protection (Working with Children) Act 2012* (NSW), the Office of the Children's Guardian may, by notice in writing, compel any person to provide information relevant to assessing whether a person poses a risk to the safety of children,[110] and
- under the *National Disability Insurance Scheme (Worker Checks) Act 2018* (NSW), the Screening Agency may, by notice in writing, compel a person to provide specified information relevant to assessing whether a person poses a risk of harm to people with disability, for certain purposes.[111]

4.125 Access under these provisions may include access to relevant records on the court file for a proceeding.

4.126 Recommendation 4.7 is similar to s 12 of the uncommenced *Court Information Act.*

Preliminary provisions applicable to orders

Only judicial officers may make orders

Recommendation 4.8: Powers to make orders under the new Act can only be exercised by a judicial officer

In relation to general powers to make non-publication, non-disclosure, exclusion and closed court orders, the new Act should provide that only a judicial officer can make such orders, unless otherwise provided by rules of court.

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110. *Child Protection (Working with Children) Act 2012* (NSW) s 31(1).

111. *National Disability Insurance Scheme (Worker Checks) Act 2018* (NSW) s 30(1).

4.127 Recommendation 4.8 would mean that non-judicial officers, such as registrars or commissioners, would not be able to make orders of that kind under the new Act, unless the court makes rules allowing them to do so (recommendation 4.12). This is appropriate because orders made under the new Act have consequences for open justice and require the application of complex legal decision-making. It is desirable that the question of whether an order should be made under the new Act is subject to judicial consideration.

Other laws containing exceptions to open justice not affected

Recommendation 4.9: Other laws containing exceptions to open justice are not affected

In relation to general powers to make non-publication, non-disclosure, exclusion and closed court orders, the new Act should provide that it does not limit or otherwise affect the operation of any:

(a) statutory prohibition on publication or disclosure

(b) statutory exclusion or closed court provision

(c) requirement to make a non-publication, non-disclosure, exclusion or closed court order, or

(d) discretion to make a non-publication, non-disclosure, exclusion or closed court order,

in or under any other Act or law.

4.128 In chapters 8–12, we recommend that exceptions to open justice in subject-specific legislation should be retained. In chapter 6, we recommend specific grounds for the general powers to make orders in the new Act. These orders can apply to a wide range of information and circumstances.

4.129 As a result, there may be situations where the powers in the new Act overlap with exceptions to open justice contained in subject-specific legislation such as a statutory prohibition on publication or disclosure of certain information.

4.130 Under recommendation 4.9, the new Act would not limit or otherwise affect other legislative provisions governing exceptions to open justice. For example, we do not intend to override the Supreme Court's power to conduct business in the absence of the public under s 71 of the *Civil Procedure Act 2005* (NSW) (chapter 2).

4.131 The recommended clause is similar to s 5 of the *CSNPO Act*. It is also similar to our draft proposal,[112] which some submissions supported.[113]

112. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 4.4.

113. Legal Aid NSW, *Submission CI57*, 9; Children's Court of NSW, *Submission CI62*, 2; NSW Bar Association, *Submission CI56* [7].

Consideration of other laws containing exceptions to open justice before making an order

Recommendation 4.10: Interaction between the new Act and other laws

In relation to general powers to make non-publication, non-disclosure, exclusion and closed court orders, the new Act should:

(a) provide that, in deciding whether to make an order, a court should consider whether the following applies to the relevant information or circumstance:

- (i) a statutory prohibition on publication or disclosure in another Act or law
- (ii) a statutory exclusion or closed court provision in another Act or law
- (iii) a requirement to make a non-publication, non-disclosure, exclusion or closed court order under another Act or law, or
- (iv) a discretion to make a non-publication, non-disclosure, exclusion or closed court order under another Act or law, and

(b) contain a note providing examples of:

- (i) statutory prohibitions on publication and disclosure
- (ii) statutory exclusion and closed court provisions
- (iii) requirements to make non-publication, non-disclosure, exclusion and closed court orders, and
- (iv) discretions to make a non-publication, non-disclosure, exclusion and closed court orders.

4.132 ARTK suggested that orders have sometimes been made under the *CSNPO Act* when a statutory prohibition on publication or disclosure already applies.[114] This can be problematic as:

- an order will not be necessary if the information is already subject to a restriction on publication or disclosure[115]
- it may prevent a person from being able to consent to lifting a statutory prohibition that protects their identity (these mechanisms are discussed further in chapter 8), and
- it may result in inconsistency between a statutory prohibition and the terms of an order.

4.133 Recommendation 4.10(a)(i)–(ii) is intended to encourage courts to identify existing statutory prohibitions on publication or disclosure, and statutory exclusion and closed court provisions, before making an order. This may avoid unnecessary orders being made under the new Act. There is no similar provision to recommendation 4.10(a)(i)–(ii) in the *CSNPO Act*.

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114. Australia's Right to Know, *Submission CI27*, 57.

115. Australia's Right to Know, *Submission CI27*, 49, 57. See also *R v AB (No 1)* [2018] NSWCCA 113, 97 NSWLR 1015 [39]–[40].

4.134 Further, recommendation 4.10(a)(iii)–(iv) reflects the fact that a discretion or requirement to make a non-publication, non-disclosure, exclusion or closed court order under subject-specific legislation has been formulated to address particular public policy concerns relevant to the subject matter of the statute. These provisions should generally be used in preference to the new Act.

4.135 Recommendation 4.10(a) is similar to our draft proposal,[116] which the Children's Court considered to be a "necessary component of the introduction of a new Act".[117] The Local Court and Legal Aid also supported it.[118]

4.136 Non-compliance with recommendation 4.10(a) should not result in an order made under the new Act being invalid. If an order is made and a provision in subject-specific legislation already applies, a court would be able to revoke or amend the order on review.[119] In some cases, it may be appropriate for an order to be made to supplement or extend a statutory provision.

4.137 In relation to the interaction between subject-specific statutes and orders made under the new Act, the Local Court suggested the following approach:

- where a statutory prohibition on publication or disclosure, statutory exclusion or closed court provision or requirement to make an order applies, these provisions should prevail to the extent of any inconsistency with an order made under the new Act, and
- where a discretion to make an order exists, an order made under the new Act should not be invalidated.[120]

4.138 This would already be the effect of recommendations 4.9 and 4.10(a).

4.139 Recommendation 4.10(b) is for the new Act to contain a note that includes a non-exhaustive list of provisions in subject-specific legislation that a court should consider before making an order under the new Act. This is intended to focus a court's attention on potentially relevant subject-specific legislation.

Regulation and rule-making powers

4.140 In this section, we recommend powers to make regulations and rules that supplement, but are not inconsistent with, the new Act.

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116. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 4.5(a).
117. Children's Court of NSW, *Submission CI62*, 2.
118. Local Court of NSW, *Submission CI58*, 2; Legal Aid NSW, *Submission CI57*, 9.
119. Recommendation 7.2–7.3.
120. Local Court of NSW, *Submission CI58*, 2.

Power to make regulations that supplement the new Act

Recommendation 4.11: Power to make regulations that supplement the new Act

The new Act should provide that regulations may be made, not inconsistent with this Act, for or with respect to:

(a) any matter that is required or permitted to be prescribed under the Act, or

(b) that is otherwise necessary or convenient to be prescribed for carrying out or giving effect to the Act.

4.141 Recommendation 4.11 is similar to the general regulation-making powers in the uncommenced *Court Information Act* and the *CSNPO Act*.[121]

4.142 Regulations may be appropriate where further detail is required to guide the exercise of functions under the Act, to add to or amend lists, or to clarify the processes and procedures established under the Act.

4.143 We also recommend a rule-making power that would provide flexibility for courts to develop their own practice and procedure to supplement the new Act (recommendation 4.12). Regulations may be the more appropriate course where the prescription of further detail should be consistent across all courts.

4.144 In other chapters, we make recommendations about specific issues that the regulations should include.

Power to make court rules that supplement the new Act

Recommendation 4.12: Power to make court rules that supplement the new Act

The new Act should provide:

(1) The rules committee of a court may make rules, not inconsistent with this Act, for or with respect to:

  (a) any matter that is required or permitted to be prescribed under the Act, or

  (b) that is otherwise necessary or convenient to be prescribed for carrying out or giving effect to the Act.

(2) In particular, the rules may make provisions for or with respect to the following matters:

  (a) what powers of the court may be exercised by registrars or other officers of the court

  (b) the records on the court file that an applicant is entitled to access, and

  (c) the procedure and practice to be followed in connection with the application and hearing of applications for:

    (i) non-publication, non-disclosure, exclusion and closed court orders

    (ii) reviews of non-publication, non-disclosure, exclusion and closed court orders, and

121. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 18; *Court Information Act 2010* (NSW) s 26 (uncommenced).

(iii) leave and appeals of non-publication, non-disclosure, exclusion and closed court orders,

including the filing and service of documents and the time limits for doing so.

4.145 As we explain above, the new Act would apply generally to courts in NSW, subject to certain exceptions. The intention is to promote greater consistency across the different courts and types of proceedings. However, it must allow for differences between jurisdictions.[122]

4.146 To address this, the new Act would allow courts to make rules that supplement both divisions of the Act. The Children's Court and Courts, Tribunals and Service Delivery supported this approach, specifically in relation to the access framework.[123]

4.147 Such rules would be made by the relevant rules committee for each court (which includes the head of the relevant jurisdiction).[124] Recommendation 4.12 is intended to ensure that courts have the flexibility to make rules that expand on the new Act, where this is necessary to take account of contextual and procedural factors.

4.148 We recognise that given the differing operating environments, and the discretion vested in heads of jurisdiction, this recommendation may mean there is not complete uniformity between the courts.[125] It seeks to strike a balance between promoting consistency across the various courts and allowing for relevant differences between them.

4.149 The new Act refers to decisions made by the court, such as making non-publication, non-disclosure, exclusion or closed court orders, or granting leave to an applicant to access a court record. In relation to powers to make orders under the new Act, only a judicial officer would be able to exercise these powers, unless otherwise provided by rules of court (recommendation 4.8).

4.150 Under recommendation 4.12(2)(a), the rules committee of a court would be able to prescribe what powers of the court under the new Act may be exercised by registrars or other officers of the court. In relation to the access framework, the Children's Court supported enabling court rules to sub-delegate responsibility to other officers of the Court as is appropriate to the particular jurisdiction.[126]

4.151 This would provide flexibility for courts to determine whether applications for access can, and the circumstances in which they can, be determined by a judicial officer or a

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122. Children's Court of NSW, *Submission CI28*, 5.

123. Children's Court of NSW, *Submission CI28*, 5; Courts, Tribunals and Service Delivery, NSW Department of Communities and Justice, *Submission CI53*, 3.

124. See, eg, *Supreme Court Act 1970* (NSW) s 123–124; *District Court Act 1973* (NSW) s 18A–18E, s 161, s 171; *Local Court Act 2007* (NSW) s 25, s 26, s 42, s 71.

125. Local Court of NSW, *Submission CI58*, 10.

126. Children's Court of NSW, *Consultation CIC25*.

registrar.[127] In practice, most applications are determined by a registrar.[128] However, it may be necessary for a judicial officer to determine an application in some circumstances; for example, where:

- the application relates to records in the Children's Court, given the sensitive nature of records held by the Court and the complexity of some of the cases it hears,[129] or
- the application relates to proceedings currently being heard by a judicial officer.

4.152 Under recommendation 4.12(2)(b), there would also be specific authority for rules to prescribe records on the court file that are accessible to applicants as of right. It is intended that the access framework would operate as a minimum standard, and that court rules would add to the types of records that are accessible as of right. This could, for example, accommodate the more extensive access practices adopted by the Land and Environment Court (chapter 5).

4.153 This recommendation is similar to the uncommenced *Court Information Act*, which would have enabled regulations to prescribe certain records as "open access information" (which would have been accessible to anyone as of right).[130] However, including this authority in court rules, rather than in regulations, enables individual courts to prescribe certain records as accessible as of right. This would allow courts the flexibility to expand on the access framework where it is appropriate in a particular jurisdiction.

4.154 Under recommendation 4.12(2)(c), there would be express authority for rules prescribing the procedure and practice to be followed for applications for, and reviews and appeals of, orders under the Act. This could include rules about:

- the service and filing of documents
- notice requirements, and
- timeframes.

4.155 Rules could address concerns about the lack of procedural requirements under the *CSNPO Act*, for example, in relation to setting timelines.

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127. Children's Court of NSW, *Submission CI62,* 8.
128. NSW, Attorney General's Department, *Review of the Policy on Access to Court Information* (2006) 12; Courts, Tribunals and Service Delivery, NSW Department of Communities and Justice, *Submission CI53*, 4.
129. Children's Court of NSW, *Submission CI62*, 8; Children's Court of NSW, *Consultation CIC25*.
130. *Court Information Act 2010* (NSW) s 5(1)(h), s 5(2)(h) (uncommenced).

5. The new Act: Framework for access to records on the court file

In Brief

The new Act should include a legislative framework for access to records on the court file. This is intended to simplify and enhance access to court records. The recommended framework makes different provision for different classes of access applicants, such as journalists and researchers, to assist these applicants to understand and report on court proceedings.

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5.1 In this chapter, we outline the features of the new legislative framework governing access to records on the court file, which we recommend be included in the new Act (chapter 4).

5.2 The framework specifies the types of records that would be available (as of right or by leave) to different classes of access applicants, the considerations for granting leave to access a record where leave is required, the methods and procedures for access, the conditions that can be imposed on access, and when access fees can be imposed, waived or reduced. It also includes liability protections for courts and court officers and an offence of unauthorised disclosure of personal identification information contained in court records.

Records available as of right

Recommendation 5.1: Records available to certain access applicants as of right

The access framework in the new Act should provide:

(1) A party to a proceeding and the party's legal representative is entitled to access any record on the court file for that proceeding.

(2) A journalist or researcher is entitled to access the following records on the court file:

- (a) an originating process, defence or other pleading filed in civil proceedings, but only after the time for filing a defence to the originating process or reply to the defence has expired
- (b) a notice of motion, but not before proceedings on a notice of motion have come before the court
- (c) an indictment, court attendance notice, summons or other document commencing criminal proceedings
- (d) a police fact sheet, statement of facts or any similar document summarising the prosecution case, but only if:
  - (i) the accused person has pleaded guilty to the offence
  - (ii) the prosecution has been withdrawn or dismissed
  - (iii) the trial is to proceed without a jury, or
  - (iv) the accused person has been found guilty or not guilty of the offence following a trial by jury.
- (e) subject to s 89 of the *Bail Act 2013* (NSW), any bail conditions imposed on an accused person
- (f) an affidavit admitted into evidence, but not a document used in conjunction with the affidavit as an annexure or exhibit
- (g) a witness statement admitted into evidence
- (h) a transcript of proceedings in open court
- (i) a record of the judge's summing up, oral directions to a jury, and any orders and judgments, including remarks on sentence, and
- (j) such other records as may be prescribed by rules of court.

(3) A member of the public is entitled to access such records on the court file as may be prescribed by rules of court.

(4) Access to a record on the court file under recommendation 5.1(1)–(3) is subject to recommendations 5.2–5.4.

5.3 Recommendation 5.1 sets out the types of records that are accessible as of right to different classes of access applicants. Recommendation 5.1(4) clarifies that an applicant's entitlement to access a particular record is subject to certain matters, which we discuss later in the chapter.

Records available to parties as of right

5.4 Recommendation 5.1(1) reflects the fact that parties are generally considered to have a right to access their court records.

5.5 Our recommendation does not include a specific definition of a "party to a proceeding". This is because the framework would apply to a broad range of court proceedings and the type and description of parties involved in such proceedings may vary.

5.6 Recommendation 5.1(1) largely reflects our draft proposal,[1] which the Bar Association supported.[2]

5.7 However, a "party's legal representative" would also be entitled to access records on the court file for the proceedings. This is similar to the uncommenced *Court Information Act 2010* (NSW) (*Court Information Act*).[3] Access to court files is critical for legal representatives to make decisions about the merits of an appeal or review of a decision.[4]

Records available to journalists and researchers as of right

5.8 Under recommendation 5.1(2) journalists and researchers would be able to access certain types of records on the court file as of right. This reflects submissions that supported specific access rights or privileges for the media[5] and researchers.[6]

5.9 There is a competing view that the media should be treated no differently from the public.[7] However, we have concluded that journalists should be entitled to access certain court records as of right. This is not because of any special right to know what takes place in court proceedings, but rather because of the media's role in informing the public about the courts.[8]

5.10 Researchers should also be entitled to access certain records as they have an important role in giving effect to open justice. Research can investigate and evaluate the operation of areas of the law and the operation of the courts, highlight what is working well and also identify where improvements could be made.

5.11 Rape and Domestic Violence Services Australia (RDVSA) observed that academic research plays a vital role in law reform by analysing how the justice system operates, which is especially important in cases of sexual, domestic and family violence.[9] The Children's Court said its "strategic directions are informed by research" and that

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1. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 10.3.
2. NSW Bar Association, *Submission CI56* [7].
3. *Court Information Act 2010* (NSW) s 11 (uncommenced).
4. Legal Aid NSW, *Submission CI57*, 27.
5. Children's Court of NSW, *Submission CI28*, 7, 17; Banki Haddock Fiora, *Submission CI29*, 2.
6. Rape and Domestic Violence Services Australia, *Submission CI08* [32]; NSW Bar Association, *Submission CI56* [7].
7. M Douglas, *Submission CI35*, 1.
8. NSW, Attorney General's Department, *Report on Access to Court Information* (2008) 27.
9. Rape and Domestic Violence Services Australia, *Submission CI08* [30] (references omitted).

researchers make "invaluable contributions" to "understandings around children, young people and the law".[10]

5.12 Journalists and researchers are generally subject to professional training and conduct requirements, which should reduce the risk of their publishing or disclosing protected information or personal identification information. Australia's Right to Know (ARTK) said its:

> members invest significant resources every year on training and legal advice to ensure our journalists are given appropriate support to report what occurs in court fairly, accurately and within the scope of the law, in each and every Australian jurisdiction.[11]

5.13 Recommendation 5.1(2) is intended to reduce the time it takes for journalists and researchers to obtain access and reduce the administrative burden on courts in managing these access requests. For those records that a journalist or researcher is entitled to access, it would be unnecessary for the court to determine the merits of the application.[12]

5.14 Recommendation 5.1(2) is similar to s 314 of the *Criminal Procedure Act 1986* (NSW) (*Criminal Procedure Act*), which provides that media representatives are entitled to inspect specific documents in criminal proceedings, for the purpose of compiling a fair report of the proceedings for publication. It is also similar to the *Court Information Act,* which would have given news media organisations additional access rights to certain types of "restricted access information", unless a court ordered otherwise.[13]

5.15 Our draft proposal was that researchers should be entitled to access a more limited range of records than journalists. However, recommendation 5.1(2) is for these access applicants to be entitled to access the same types of records. This is because:

- access to a range of records may be necessary for researchers to acquire a complete understanding of a case
- the documents (in particular, affidavits) that were not to be available to researchers as of right may be as important for research as transcripts of oral evidence, and
- the distinction between "journalist" and "researcher" may be marginal in the case of investigative journalism or high-profile academic publications.

5.16 The types of records on the court file that journalists and researchers should be entitled to access are those that contain key information about a case and have been used or

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10. Children's Court of NSW, *Submission CI28*, 18.
11. Australia's Right to Know, *Submission CI27*, 2.
12. NSW, Attorney General's Department, *Review of the Policy on Access to Court Information* (2006) 49.
13. *Court Information Act 2010* (NSW) s 10(1) (uncommenced).

deployed in the proceedings. This is because the principle of open justice is engaged when material is used in court.[14] In practice, whether material has been used is "often determinative" of whether it should be made available.[15]

Originating process, defence or other pleading filed in civil proceedings, after time for defence or reply has expired

5.17 An originating process is a document by which a party commences civil proceedings, such as a summons or statement of claim. A pleading is a written statement submitted by a party in a civil proceeding that outlines the claim or defence they are making and the facts supporting that claim or defence. A pleading includes a statement of claim, defence, reply and any subsequent pleading.

5.18 Our draft proposal was that a journalist should be entitled to access "an originating process, defence or other pleading filed in civil proceedings".[16] The rationale was that journalists may require access to these records to understand proceedings, and report on them accurately, especially given that pleadings are not usually read out in court.[17] In the interests of efficiency, pleadings are usually taken as read, and are only referred to in the course of argument when appropriate.[18] Access to the foundation documents in a proceeding would also assist journalists in following the resolution of the dispute by the court.[19]

5.19 Of the 112 survey respondents who answered the question of what information about a case the media should be able to access, 66 (59.93%) chose "the claims made by those involved in civil (non-criminal) cases, such as defences".[20]

5.20 Legal Aid opposed the proposal, due to concerns that journalists may report on pleadings that are ultimately contested or amended. It submitted that "such early reporting may ultimately mislead the public, for example, where aspects of a claim are dropped or struck out, or worse, prejudice the proceedings".[21]

5.21 Having regard to this, recommendation 5.1(2)(a) is that journalists and researchers should be entitled to access originating processes, defences and other pleadings only after the time for filing a defence to the originating process or reply to the defence has

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14. *John Fairfax Publications Pty Ltd v Ryde Local Court* [2005] NSWCA 101, 62 NSWLR 512 [65].
15. *NSW v Reed* [2011] NSWSC 981 [6]. See also *Dallas Buyers Club, LLC v iiNet Ltd (No 1)* [2014] FCA 1232 [14] citing *Seven Network Ltd v News Ltd (No 9)* [2005] FCA 1394, 148 FCR 1 [27].
16. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 10.4(1)(a)(iv).
17. NSW Law Reform Commission, *Contempt by Publication,* Report 100 (2003) [11.68].
18. *Idoport Pty Ltd v National Australia Bank Ltd* [2000] NSWSC 776 [5]–[6].
19. *Ferguson v Tasmanian Cricket Association* [2021] FCA 1507 [5].
20. *Open Justice: Survey Results*, Research Report 16 (NSW Law Reform Commission, 2022) table 2.5.
21. Legal Aid NSW, *Submission CI57*, 26.

expired. Under the *Uniform Civil Procedure Rules 2005* (NSW) (*Uniform Civil Procedure Rules*), the time limit for:

- a defendant to file a defence is 28 days after service on the defendant of the statement of claim or such other time as the court directs for the filing of a defence,[22] and
- a plaintiff to file a reply to a defence is 14 days after service of the defence on the plaintiff.[23]

5.22 Recommendation 5.1(2)(a) balances the need for journalists and researchers to have access to foundation documents in civil proceedings with the need to ensure that parties are not prejudiced by having documents about them made public before they have had the opportunity to respond. Even if a party does not file a response, the time allowed under recommendation 5.1(2)(a) would allow parties the opportunity to object to content in pleadings that may be scandalous, frivolous, vexatious, irrelevant or oppressive.

5.23 Recommendation 5.1(2)(a) would not entirely prevent a journalist or researcher from accessing originating processes, defences or other pleadings before the time for filing a defence to the originating process or reply to the defence has expired. Instead, a journalist or researcher would have to seek leave for access in those circumstances (recommendation 5.2).

Notice of motion, but not before motion has come before the court

5.24 A notice of motion sets out the orders that a party is applying for and the day the application will be made to the court.

5.25 An entitlement to access the notice of motion under recommendation 5.1(2)(b) is consistent with our general view that information that would have been heard or seen by anyone present in open court should be accessible to journalists and researchers as of right. The information in a notice of motion may assist them to understand and report on ancillary issues in a case.

5.26 As a qualification of our draft proposal,[24] recommendation 5.1(2)(b) is for journalists and researchers to be entitled to access a notice of motion only once proceedings on a notice of motion come before the court. This recognises that in some cases, early access to and publication of information in a notice of motion could be prejudicial to future proceedings.

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22. *Uniform Civil Procedure Rules 2005* (NSW) r 14.3(1).
23. *Uniform Civil Procedure Rules 2005* (NSW) r 14.4(3).
24. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 10.4(1)(v).

Indictment, court attendance notice, summons or other document commencing criminal proceedings

5.27 An indictment is a document charging an accused person with one or more indictable offences. It initiates a criminal trial in the District or Supreme Court.

5.28 Of the 112 survey respondents who answered the question of what information about a case the media should be able to access, 110 (98.21%) chose "the charges against the defendant".[25]

5.29 An entitlement to access the indictment under recommendation 5.1(2)(c) would assist journalists and researchers to report accurately on the offences with which the accused was charged. Similar considerations apply to other documents commencing criminal proceedings, including:

- A court attendance notice, which is a document requiring a person to appear at the Local Court or Children's Court, in relation to an offence.[26] It contains information prepared by police, including a description of the alleged offence.[27]
- A summons, which is used in certain types of criminal cases to require a person to appear and answer a charge.

5.30 Recommendation 5.1(2)(c) is similar to our draft proposal.[28] It is also similar to:

- s 314(2) of the *Criminal Procedure Act,* which provides that media representatives are entitled to inspect "copies of the indictment, court attendance notice or other document commencing the proceedings"
- the *Court Information Act,* where "open access information" (which would have been accessible to anyone as of right) included "an indictment, court attendance notice or other document commencing proceedings",[29] and
- access regimes in Queensland and the Northern Territory that allow non-parties to access an indictment, without the need for leave.[30]

5.31 In opposition to the draft proposal, one confidential submission said that if journalists are entitled to access indictments, and publish or otherwise disclose them to the public, it may prejudice an accused person's trial. The prosecution may file an indictment at the

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25. *Open Justice: Survey Results*, Research Report 16 (NSW Law Reform Commission, 2022) table 2.5.
26. See *Criminal Procedure Act 1986* (NSW) s 45, s 47, s 171, s 172.
27. See *Criminal Procedure Act 1986* (NSW) s 50(3)(a)–(b), s 175(3)(a)–(b).
28. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 10.4(1)(a)(ii).
29. *Court Information Act 2010* (NSW) s 5(1)(a) (uncommenced).
30. See, eg, *Criminal Practice Rules 1999* (Qld) r 57(1)(a), r 57(3); *Supreme Court Rules 1987* (NT) r 81A.09(1), r 81A.39.

time of the arraignment but ultimately present a different case to the jury. Certain counts on an indictment may be discontinued or a co-accused person named on an original indictment may plead guilty prior to trial.[31] We do not consider that these are sufficient reasons to deny journalists an entitlement to access indictments, even in the case of jury trials. The indictment is presented and read in open court. The accused person is arraigned on the indictment in open court at (or before) the beginning of the trial.

5.32 Recommendation 5.1(2)(c) is consistent with our general view that information that would have been heard or seen by anyone present in open court should be accessible to the media and researchers as of right.

Police fact sheet, statement of facts or similar document summarising the prosecution case, in certain circumstances

5.33 Our draft proposal was that journalists should be entitled to access a statement of facts or any similar document summarising the prosecution case.[32] A statement of facts is an agreed statement of the factual circumstances of an offence prepared by the prosecution and tendered to the court, usually in connection with sentencing proceedings. The rationale for the proposal was that access to these records would assist journalists to report fairly and accurately on the proceedings.[33]

5.34 Recommendation 5.1(2)(d) is for journalists and researchers to be entitled to access police fact sheets as well. These records similarly contain key information about the case against the accused person and are deployed in proceedings.

5.35 A police fact sheet is an unsworn statement prepared by the police officer in charge of the case, which provides a short narrative of the circumstances surrounding the alleged offence. It may, for example, be provided to the court in sentencing hearings where an accused person has pleaded guilty.[34]

5.36 In our survey, we asked respondents what information about a case the media should be able to access. Of the 112 people who answered this question, 84 (75%) chose “the details of what the police allege the defendant did” (in other words, the police fact sheet).[35] Access to these details may enable a fuller understanding of the case being reported on by a journalist or under analysis by a researcher.

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31. Confidential, *Submission CI51*.
32. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 10.4(1)(a)(i).
33. NSW, Attorney General’s Department, *Review of the Policy on Access to Court Information* (2006) 26.
34. NSW, Attorney General’s Department, *Review of the Policy on Access to Court Information* (2006) 26.
35. *Open Justice: Survey Results*, Research Report 16 (NSW Law Reform Commission, 2022) table 2.5.

5.37 As a qualification of our draft proposal,[36] recommendation 5.1(2)(d) is for journalists and researchers to be entitled to access a police fact sheet, statement of facts or other similar document summarising the prosecution case only in certain circumstances; that is, where:

- the accused person has pleaded guilty, which is similar to s 314(2) of the *Criminal Procedure Act*
- the prosecution has been withdrawn, as there is no longer any risk of prejudice to a jury trial
- the trial is to proceed without a jury (for example, the proceedings are to be dealt with summarily by a magistrate or on indictment by judge alone), as there is a minimal risk of prejudice in such circumstances,[37] or
- the accused person has been found guilty or not guilty following a trial by jury, as there is no longer any risk of prejudice at this stage.

5.38 This approach is intended to avoid the risk of jurors being adversely influenced by the publication of unsworn and untested allegations. Statements of facts are prepared at an early stage of proceedings and may include or describe evidence that is ultimately not admitted at trial.[38] Allowing journalists and researchers to access the statement of facts in all cases, and publish or otherwise disclose it to the public, could prejudice the jury in an accused person's trial.

5.39 A journalist or researcher would have to seek leave to access the police fact sheet, statement of facts or similar document summarising the prosecution case:

- during earlier stages of proceedings (such as bail applications), or
- where there is a jury trial and there has not yet been a verdict (recommendation 5.2).

5.40 The leave process would enable the court to consider factors including the impact on the administration of justice (recommendation 5.5). The extent of the potential prejudice to a jury trial may vary according to the circumstances of the case or the information contained in the police fact sheet or statement of facts.[39]

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36. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 10.4(1)(a)(i).
37. NSW, Attorney General's Department, *Review of the Policy on Access to Court Information* (2006) 27; NSW, Attorney General's Department, *Report on Access to Court Information* (2008) 17.
38. NSW Bar Association, *Submission CI56* [59].
39. NSW, Attorney General's Department, *Review of the Policy on Access to Court Information* (2006) 27.

Bail conditions imposed on an accused person

5.41 The rationale for recommendation 5.1(2)(e) is that decisions relating to bail, including the conditions imposed on an accused person, are matters of public interest and often subject to public scrutiny.[40] Bail conditions may be imposed to address issues such as the protection of victims of crime and the general community.

5.42 Of the 112 survey respondents who answered the question of what information about a case the media should be able to access, 71 (63.39%) chose "information about a person's bail, such as bail conditions".[41]

5.43 Legal Aid opposed conferring an entitlement on journalists to access bail conditions, due to concerns that media reporting on:

- bail conditions could potentially identify third parties who would not be protected by the statutory prohibition on publication in s 89 of the *Bail Act 2013* (NSW) (*Bail Act*),[42] and
- enforcement conditions that require the accused person to refrain from consuming drugs or alcohol, or to undergo testing for drugs or alcohol, could impact on their reputation, the presumption of innocence and their right to a fair trial.[43]

5.44 We do not consider that these are sufficient reasons to deny journalists or researchers an entitlement to access an accused person's bail conditions. Bail conditions are generally stated in open court. In effect they form part of an order of the court. Accordingly, this information could have been heard or seen by anyone present in the court.

5.45 The entitlement of a journalist or researcher to access bail conditions imposed on an accused person, without the need for leave, would be subject to s 89 of the *Bail Act,* which prohibits publishing identifying information of a "prohibited associate" of an accused person. Publishing such information could result in people drawing negative conclusions about the person identified as the person with whom the accused is prohibited from associating, who may not themselves be accused of a criminal offence.

Affidavits and witness statements admitted into evidence, but not annexures or exhibits

5.46 Recommendation 5.1(2)(f)–(g) differs from our draft proposals, which were for journalists and researchers to be entitled to access "any record admitted into

40. NSW, Attorney General's Department, *Review of the Policy on Access to Court Information* (2006) 26.
41. *Open Justice: Survey Results*, Research Report 16 (NSW Law Reform Commission, 2022) table 2.5.
42. Legal Aid NSW, *Submission CI57*, 26.
43. Legal Aid NSW, *Submission CI57*, 26.

evidence".[44] The rationale was that material admitted into evidence is part of the court record[45] and the principle of open justice requires that this evidence be accessible.[46]

5.47 "Any record admitted into evidence" would cover a broad range of records, including physical exhibits (such as photographs, video footage, weapons and prohibited drugs) and documentary exhibits (such as commercial, banking or medical records).[47]

5.48 We acknowledge several concerns about the draft proposal, which include:

- an entitlement to access and obtain copies of exhibits, such as records of interview, crime scene photographs and closed-circuit television footage, would pose risks to the fairness of criminal trials and may cause distress to victims and their families[48]
- the interests or views of victims or their families would not be able to be considered in relation to the release of material that may be distressing,[49] and
- records such as closed-circuit television footage or photographs may identify third parties who are not involved in the proceedings.[50]

5.49 In response to these concerns, recommendation 5.1(2)(f)–(g) is for journalists and researchers to be entitled to access a more limited class of record admitted into evidence: an affidavit or witness statement. This is similar to:

- s 314(2) of the *Criminal Procedure Act,* which allows media access to "witnesses' statements tendered as evidence", and
- the *Court Information Act,* which defined "open access information" (which would have been accessible to anyone as of right) to include "statements and affidavits admitted into evidence in proceedings, including expert reports".[51]

5.50 An affidavit is a written statement of a witness's evidence that is sworn or affirmed to be true. Journalists and researchers may require access to affidavits and witness statements, to gain a full understanding of a case. This is because witnesses often give their evidence in chief by way of an affidavit or statement, rather than orally in open court. They adopt their affidavit or statement once they are in the witness box and are

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44. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 10.4(1)(a)(viii), proposal 10.5(1)(a)(ii).
45. *P v Australian Crime Commission* [2008] FCA 1336 [18]–[19].
46. See, eg, *Scott v Scott* [1913] AC 417, 441, 445; *Russell v Russell* (1976) 134 CLR 495, 520.
47. NSW, Attorney General's Department, *Review of the Policy on Access to Court Information* (2006) 41.
48. Confidential, *Submission CI51*; Supreme Court of NSW, *Submission CI55* [23]. See also NSW Office of the Director of Public Prosecutions, *Submission CI48*, 4.
49. Confidential, *Submission CI51*; Supreme Court of NSW, *Submission CI55* [23].
50. Legal Aid NSW, *Submission CI57*, 27.
51. *Court Information Act 2010* (NSW) s 5(1)(e), s 8(1) (uncommenced).

cross-examined on it.[52] It may be difficult to understand cross-examination of witnesses without having access to their written evidence.[53]

5.51 Recommendation 5.1(2)(f)–(g) is consistent with our general view that records of what takes place in open court, which would be heard or observed by someone present, should be accessible to journalists and researchers as of right. The affidavit or witness statement is notionally read in open court, in place of oral evidence in chief, although nowadays it is usually not read aloud.

5.52 Under recommendation 5.1(2)(f), the entitlement of a journalist or researcher to access an affidavit would not extend to an annexure or exhibit to the affidavit. This is because of the broad range of records that may be used in conjunction with affidavits under the *Uniform Civil Procedure Rules*.[54] Instead, a journalist or researcher would have to seek leave to access annexures or exhibits to affidavits (recommendation 5.2).

Transcript of proceedings in open court

5.53 A journalist or researcher is able to attend open court proceedings and report on what they see and hear. Access to the transcript under recommendation 5.1(2)(h) may enhance the accuracy of a journalist's report.

5.54 Court transcripts are also a key source of data for research.[55] As McNamara and Quilter observed:

> 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.[56]

5.55 Recommendation 5.1(2)(h) is consistent with our general view that records of what takes place in open court, which would be heard or observed by someone present, should be accessible by journalists and researchers as of right. It is the same as our draft proposals.[57]

5.56 Recommendation 5.1(2)(h) is also similar to:

- s 314(2) of the *Criminal Procedure Act,* which provides that media representatives are entitled to inspect "transcripts of evidence"

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52. S Rodrick and others, *Australian Media Law* (Lawbook Co, 6th ed, 2021) [5.690].
53. NSW Law Reform Commission, *Contempt by Publication,* Report 100 (2003) [11.57].
54. *Uniform Civil Procedure Rules 2005* (NSW) r 35.6.
55. J Chin, *Submission CI01*, 1.
56. L McNamara and J Quilter, *Preliminary Submission PCI14*, 4.
57. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 10.4(1)(a)(vii), proposal 10.5(1)(a)(i).

- the *Court Information Act*, which would have classified a transcript of proceedings in open court as "open access information", to which any person would have had a right of access[58]

- the *Federal Court Rules 2011* (Cth), which allow non-parties to inspect "a transcript of a hearing heard in open Court", without the need for leave,[59] and

- legislation in South Australia (SA), which allows non-parties to access "a transcript of evidence taken by the court in any proceedings", without the need for leave.[60]

5.57 Unlike our draft proposal,[61] recommendation 5.1(2)(h) does not include a separate reference to transcripts of oral submissions, as they are covered by the reference to a "transcript of proceedings in open court".

5.58 Recommendation 5.1(2)(h) applies only to a transcript in the possession or custody of the court, as the access framework is limited to records "on the court file".[62] Consultations indicated that transcripts are not always kept on the court file.[63] In such a case, an access applicant could order a transcript using the relevant process for each court.[64]

Record of the judge's summing up, oral directions to a jury, and any orders and judgments (including sentencing remarks)

5.59 The summing up is the summary provided by the judge to the jury of the evidence as it relates to the cases presented by the prosecution and the defence. Remarks on sentence is a statement made by a judge or magistrate when imposing a sentence on an offender, which includes the reasons for the sentence.

5.60 Recommendation 5.1(2)(i) reflects the fact that judgments, directions and summings up are often not included in the transcript, or are separately transcribed. They too can be an important part of the case being reported on by a journalist or under analysis by a researcher.

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58. *Court Information Act 2010* (NSW) s 5(1)(d), s 5(2)(d), s 8(1) (uncommenced).
59. *Federal Court Rules 2011* (Cth) r 2.32(2)(m).
60. *Supreme Court Act 1935* (SA) s 131(1)(a); *District Court Act 1991* (SA) s 54(1)(a); *Magistrates Court Act 1991* (SA) s 51(1)(a).
61. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 10.4(1)(a)(vi).
62. Recommendation 4.1(1)(a).
63. Roundtable 4, *Consultation CIC08*; Supreme Court of NSW, *Consultation CIC22.*
64. See, eg, NSW, Department of Communities and Justice, "Transcripts Forms and Fees" (26 April 2022) <www.courts.nsw.gov.au/courts-and-tribunals/legal-resources/transcripts/transcripts-forms-and-fees.html> (retrieved 19 May 2022).

5.61 Recommendation 5.1(2)(i) is the same as our draft proposals,[65] which did not receive any opposition in submissions. It is also similar to:

- the *Uniform Civil Procedure Rules,* which allow access to orders and judgments, without the need for leave[66]
- s 314(2) of the *Criminal Procedure Act,* which provides that media representatives are entitled to inspect "any record of a conviction or an order", and
- some access regimes elsewhere in Australia, which allow non-parties to access reasons for judgments, the judge's summing up or directions to the jury, and/or judgments and orders, without the need for leave.[67]

Such other records as prescribed in rules of court

5.62 As discussed in chapter 4, we recommend that the new Act should enable the rules committee of a court to make rules that supplement the Act. This includes rules that expand the categories of records to which access is granted as of right.[68]

5.63 Recommendation 5.1(2)(j) is intended to enable the legislative access framework to operate as a minimum standard, and that courts can add to the types of records that are accessible to journalists and researchers as of right, as considered appropriate in the particular jurisdiction.

Records available to members of the public as of right

5.64 Unlike our recommendations for journalists and researchers, we do not recommend that the access framework should prescribe a list of records on the court file that members of the public are entitled to access. Generally, members of the public should have to seek leave to access a record. The exception should be where rules of court prescribe certain records that are accessible to members of the public as of right.

5.65 A key issue with allowing court records to be freely accessible to the public is the risk to individual privacy. Court records are likely to contain significant amounts of personal identification information that could be misused. Members of the public are not subject to the ethical or professional obligations that affect journalists and researchers.

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65. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 10.4(1)(a)(ix), proposal 10.5(1)(a)(iii).
66. *Uniform Civil Procedure Rules 2005* (NSW) r 36.12(1).
67. *Federal Court Rules 2011* (Cth) r 2.32(2)(l); *Magistrates Court (Civil Division) Rules 1998* (Tas) r 155(1)(d); *Supreme Court Act 1935* (SA) s 131(d)–(f); *District Court Act 1991* (SA) s 54(d)–(f); *Magistrates Court Act 1991* (SA) s 51(e)–(f); *Local Court Act 2015* (NT) s 30.
68. Recommendation 4.12.

5.66 We considered whether, to address this issue, the access framework should require personal identification information to be redacted from court records before they are released to the public.

5.67 The *Court Information Act* would have taken that approach. Under that Act, courts would have been required to ensure, "to the maximum extent reasonably practicable", that personal identification information was removed from court records classified as "open access" (which would have been accessible to anyone as of right).[69] The Act specified two ways in which court rules could seek to achieve this:

- 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.[70]

5.68 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".[71]

5.69 Strong opposition was expressed to a requirement for courts to redact personal identification information from court records before releasing them. Reasons included:

- redaction is an onerous and resource-intensive task, which courts are not currently resourced to perform[72]
- redaction would be time-consuming, as it cannot presently be automated, and there is a high risk of missing or overlooking personal information in a court record,[73] and
- redacting information "may render evidence unintelligible", which does not serve the aims of open justice.[74]

5.70 There were also concerns about a requirement for parties to redact personal information from court records, which included:

- it would increase the cost of litigation and reduce access to justice for individuals[75]

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69. *Court Information Act 2010* (NSW) s 18(1) (uncommenced).
70. *Court Information Act 2010* (NSW) s 18(2) (uncommenced).
71. NSW Office of the Director of Public Prosecutions, *Preliminary Submission PCI12*, 11.
72. NSW Office of the Director of Public Prosecutions, *Submission CI17*, 18–19; Local Court of NSW, *Submission CI25*, 3; Supreme Court of NSW, *Submission CI26*, 2–3.
73. Supreme Court of NSW, *Submission CI26*, 3.
74. NSW Office of the Director of Public Prosecutions, *Submission CI17*, 22–23.
75. Supreme Court of NSW, *Submission CI26*, 3.

- filing redacted copies of documents would frustrate a court's business (for example, a person's address is essential for serving court documents and for assessing bail considerations)[76]

- 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,[77] and

- once a legal practitioner no longer represents a party, they would be unable to seek instructions in relation to the redaction.[78]

5.71 We are persuaded that imposing a requirement for personal identification information to be redacted from court records before they are released to a member of the public in every case would be onerous, impractical and unworkable. Our preferred approach is generally to require members of the public to seek the court's leave to access court records. This is consistent with the approach under various current access regimes in NSW.[79] The Bar Association, Legal Aid and the Children's Court supported requiring members of the public to seek leave to access court records.[80]

5.72 The leave process would give courts the opportunity to consider a range of matters, including:

- the impact on individual privacy or safety

- the appropriate method of access (for example, whether the member of the public should only be able to inspect, rather than copy, the record)

- whether it would be reasonably practicable for personal identification information to be deleted from a record before a member of the public is given access to it, or

- any conditions on access or use of the record that could be imposed (for example, a condition requiring the member of the public to access the record on court premises and under supervision) (recommendation 5.5).

5.73 Although we do not consider that legislation should prescribe a list of records that members of the public are entitled to access, it should be possible for individual courts

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76. Children's Court of NSW, *Submission CI28*, 8.
77. Law Society of NSW, *Preliminary Submission PCI31*, 2.
78. Law Society of NSW, *Preliminary Submission PCI31*, 2.
79. 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).
80. NSW Bar Association, *Submission CI56,* 2; Legal Aid NSW, *Submission CI57*, 27; Children's Court of NSW, *Submission CI62* [7].

to do so in their court rules, where this is considered appropriate for a particular jurisdiction.

5.74 The Supreme Court practice note provides that access to court materials "is restricted to parties, except with the leave of the Court". However, non-parties will normally be granted access to certain types of records, including:

- documents that record what was said or done in open court, and
- material that was admitted into evidence.[81]

5.75 In the Land and Environment Court there is currently no specific practice note or policy setting out the arrangements for accessing records, and the Supreme Court Practice Note is applied.[82] However, in practice, non-parties are treated as having a right to access documents tendered or read in proceedings (including originating processes and affidavits), because of the public interest nature of the proceedings.[83] The rules of the Land and Environment Court could formalise this approach by prescribing certain records as accessible to members of the public as of right.

Victims

5.76 Some stakeholders supported more extensive entitlements for victims to access court records than members of the public generally.[84] Victims may need access to records on the court file to assist with their support or compensation applications, applications for social assistance or family law proceedings.[85]

5.77 However, there are other considerations, particularly while proceedings are current. For example, as the ODPP submitted, allowing victims to access records in a case where there are also other victims could mean they are exposed to another witness's evidence. Their evidence could also be impacted by access to other information, such as the existence of other charges against the accused person.[86]

5.78 Our preferred approach is for victims, like other members of the public, to be able to access court records with leave. The leave process would allow the court to weigh up all considerations, including any potential prejudice to the administration of justice (recommendation 5.5).

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81. Supreme Court of NSW, *Practice Note SC Gen 2: Access to Court Files* (2019) [6]–[7].
82. Land and Environment Court of NSW, "Media" (29 May 2020) <www.lec.nsw.gov.au/lec/Facilities-and-support/media.html> (retrieved 19 May 2022).
83. Land and Environment Court of NSW, *Consultation CIC29.*
84. Legal Aid NSW, *Submission CI24*, 4, 12, 23; Rape and Domestic Violence Services Australia, *Submission CI61* [40]–[42], [44]; Roundtable 3, *Consultation CIC05*; Women's Legal Service NSW, *Consultation CIC07.*
85. Women's Legal Service NSW, *Consultation CICC07*; Legal Aid NSW, *Submission CI24*, 23*;* Rape and Domestic Violence Services Australia, *Submission CI61* [40].
86. NSW Office of the Director of Public Prosecutions, *Submission CI17*, 24–25.

5.79 However, recommendation 5.10(1) is for victims to be exempt from any prescribed fees, so that they do not face financial barriers in accessing court records.

Records available only with leave

Recommendation 5.2: Records available to certain access applicants with leave

The access framework in the new Act should provide:

(1) Despite recommendation 5.1(2)–(3), a journalist, researcher or member of the public may access the following records only with leave of the court:

(a) a record on the court file for:

(i) criminal proceedings against a child

(ii) proceedings before the Children's Court or on appeal from the Children's Court

(iii) proceedings for a domestic violence offence or apprehended violence order

(iv) proceedings for a prescribed sexual offence, and

(b) a record on the court file that contains information subject to a non-publication order or statutory prohibition on publication.

(2) A journalist, researcher or member of the public may access a record on the court file not specified in recommendation 5.1(2)–(3) or recommendation 5.2(1) only with leave of the court.

(3) Access to a record on the court file under recommendation 5.2(1)–(2) is subject to recommendations 5.3–5.4.

5.80 Recommendation 5.2 is to require a journalist, researcher or member of the public to seek leave of the court to access records on the court file:

- for certain types of proceedings
- containing information subject to a publication restriction, and
- that are not otherwise accessible as of right.

5.81 A requirement for leave to access these particular records is intended to provide an additional layer of protection. The court can exercise a higher degree of control and scrutiny and assess whether release of these records is appropriate in the particular circumstances.

Records on the court file for certain types of proceedings

5.82 Recommendation 5.2(1)(a)(i)-(ii) is for records on the court file for criminal proceedings against a child and proceedings before the Children's Court to only be accessible by journalists, researchers and members of the public with leave. This would also be the

case for records on the court file for proceedings on appeal from the Children's Court, so there is consistency of approach across different jurisdictions.[87]

5.83 Particular sensitivities arise in these proceedings. These include the vulnerability of children generally and the statutory prohibitions on publishing the identity of children involved in children's criminal and care proceedings.[88] The leave process would give the court the opportunity to consider the needs and interests of the child,[89] and the circumstances of the individual case,[90] in deciding whether to allow or refuse access. Courts, Tribunals and Service Delivery (CTSD) observed that:

> the circumstances of an alleged offence may be so distinctive that any report is likely to identify the child involved, or there may be material about an alleged offence that is already in the public domain such that the publication of information contained in the court record may enable the identification of the child ("jigsaw" identification).[91]

5.84 Recommendation 5.2(1)(a)(iii)–(iv) is for records on the court file for domestic violence offence proceedings, apprehended violence order (AVO) proceedings and sexual offence proceedings to be accessible with leave only, due to the sensitive nature of such proceedings and the potential for media access to court records to cause additional distress to victims. The Attorney General's Department made a similar recommendation in its 2008 *Report on Access to Court Information*.[92]

5.85 RDVSA also supported this position.[93] The leave process would give the court the opportunity to consider matters such as the impact on the victim's privacy and safety (recommendation 5.5).

5.86 Another reason for requiring leave to access records in AVO proceedings is that the AVO application or another document on the court record may contain untested allegations that are ultimately not relied upon or admitted in evidence in court.[94] The leave process would give the court the opportunity to consider the nature of the record, including whether it has been admitted in proceedings (recommendation 5.5).

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87. Children's Court of NSW, *Consultation CIC25.*
88. *Children (Criminal Proceedings) Act 1987* (NSW) s 15A(1); *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 105(1).
89. Children's Court of NSW, *Submission CI28*, 6, 7, 13.
90. Courts, Tribunals and Service Delivery, NSW Department of Communities and Justice, *Submission CI53*, 3.
91. Courts, Tribunals and Service Delivery, NSW Department of Communities and Justice, *Submission CI53*, 3–4.
92. NSW, Attorney General's Department, *Report on Access to Court Information* (2008) rec 3(a), 23.
93. Rape and Domestic Violence Services Australia, *Preliminary Submission PCI36*, 7.
94. Courts, Tribunals and Service Delivery, NSW Department of Communities and Justice, *Submission CI53*, 4.

Records containing information subject to a publication restriction

5.87 Recommendation 5.2(1)(b) is for records containing information subject to a non-publication order or statutory prohibition on publication to be accessible by journalists, researchers and members of the public, but only with leave of the court.

5.88 Recommendation 5.2(1)(b) differs from:

- s 314(4) of the *Criminal Procedure Act,* which provides that a registrar must not make documents in criminal proceedings available for inspection to a media representative if the documents are subject to a non-publication order or statutory prohibition on publication, and
- the *Court Information Act,* which would not have allowed access to court information where this would contravene a non-publication order or statutory prohibition on publishing information.[95]

5.89 Many stakeholders raised concerns about how the access restrictions in s 314 of the *Criminal Procedure Act* are interpreted and applied.[96] Submissions indicated that there are differing views about whether any court documents in sexual offence proceedings can be released, because of the statutory prohibition on publishing the identity of the complainant in such proceedings.[97] Some said that District and Local Court registries impose a "blanket ban" on media access to documents in sexual offence cases, which undermines the media's ability to report on them.[98]

5.90 Journalists, researchers and members of the public should not be prohibited from accessing a record subject to a publication restriction (either in the form of a statutory prohibition or a non-publication order).[99] The purpose of these restrictions is to prevent the publication of information to the wider community, rather than to prevent the release or disclosure of information to a particular individual.[100] Providing access to a particular applicant would not generally constitute "publication" and the applicant would still be prohibited from publishing the information subject to the publication restriction.

5.91 Access to records subject to a publication restriction could help ensure journalists and researchers receive a complete account of proceedings and produce an accurate

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95. *Court Information Act 2010* (NSW) s 13 (uncommenced).
96. Banki Haddock Fiora, *Preliminary Submission PCI27*, 2, 3; Sydney Morning Herald, *Preliminary Consultation PCIC07*; 9News, *Preliminary Consultation PCIC09*; Australia's Right to Know, *Submission CI27*, 64, 82–89; Roundtable 2, *Consultation CIC03*; Roundtable 4, *Consultation CIC08.*
97. Local Court of NSW, *Submission CI25*, 2, 5; Children's Court of NSW, *Submission CI28*, 17–18; Australia's Right to Know, *Submission CI27*, 83–87.
98. Banki Haddock Fiora, *Preliminary Submission PCI27*, 3. See also Australia's Right to Know, *Submission CI27*, 82.
99. Australia's Right to Know, *Submission CI27,* 64.
100. NSW, Attorney General's Department, *Report on Access to Court Information* (2008) 37.

report. It may also help journalists understand what information in a court record may or may not be published.[101]

5.92 However, records subject to a statutory prohibition on publication or non-publication order should be accessible to journalists, researchers and members of the public only with leave, and not as of right, because these restrictions are generally imposed to protect sensitive or potentially prejudicial information. The leave process would enable the court to assess whether release of a record subject to a publication restriction is appropriate in the particular circumstances, and to impose appropriate conditions if access is granted (recommendation 5.5).

Any other record on the court file

5.93 Recommendation 5.2(2) is for journalists, researchers and members of the public to be able to access any other record on the court file only with leave. This would include all records on the court file that are not listed in recommendation 5.1(2)–(3), such as:

- police fact sheets and statements of facts used during earlier stages of proceedings (such as bail applications), or where there is a jury trial on foot and there has not yet been a verdict
- annexures and exhibits to affidavits
- documentary and physical exhibits
- victim impact statements, and
- the brief of evidence.

5.94 Under s 314(2) of the *Criminal Procedure Act,* the media are entitled to inspect the brief of evidence in criminal proceedings. Under the recommended access framework, briefs of evidence would only be accessible with leave of the court. This is because they may contain a wide range of evidentiary documents, including records of interview, medical and financial records, search warrant records and photographs. Some of these records may also contain sensitive and personal information.[102]

5.95 Unlike our draft proposal,[103] written submissions made by a party to proceedings would only be accessible under the access framework with leave of the court.

5.96 Submissions are the arguments that parties put before the court. There is increasing reliance on written, rather than oral, submissions. Written submissions are often

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101. NSW, Attorney General's Department, *Report on Access to Court Information* (2008) 37.
102. NSW, Attorney General's Department, *Report on Access to Court Information* (2008) 18.
103. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 10.4(1)(a)(vi).

provided in advance or handed up during argument.[104] Many higher courts rely significantly on written submissions.[105]

5.97 The rationale for our draft proposal was that an entitlement to access written submissions could assist journalists to report accurately on the key or contentious issues in a trial. Access to submissions could also allow for a greater understanding of the reasons for the court's decision.[106]

5.98 Some other access regimes elsewhere in Australia allow non-parties to access submissions, without the need for leave.[107]

5.99 However, the Bar Association opposed conferring an entitlement on journalists to access written submissions, as submissions often "refer to sensitive evidence or evidence that is likely to be prejudicial to a party, for example, tendency evidence". It said it would be "inappropriate to publish the details of documents in advance of a trial".[108]

5.100 The Supreme Court also expressed concern about an entitlement to access submissions in Court of Criminal Appeal matters. Submissions may, for example, concern "confidential assistance provided by the offender" to authorities or "national security considerations in terrorism cases".[109]

5.101 We are persuaded that written submissions should only be accessible by a journalist, researcher or member of the public with leave of the court. The leave process would give the court the opportunity to consider the nature of the submissions, including whether its contents have been admitted in proceedings, and whether it is appropriate in the circumstances of the particular case to allow access (recommendation 5.5).

Records that should not be accessible

Recommendation 5.3: Records that should not be accessible

The access framework in the new Act should provide:

(1) Despite recommendation 5.1(1), a party to a proceeding or the party's legal representative is not permitted in any case to access a record on the court file for that proceeding that:

(a) is subject to a claim of privilege that has not yet been decided

104. *NSW v Reed* [2011] NSWSC 981 [6].
105. S Rodrick and others, *Australian Media Law* (Lawbook Co, 6th ed, 2021) [5.690].
106. *NSW v Bowdidge (No 2)* [2020] NSWSC 159 [30].
107. *Criminal Practice Rules 1999* (Qld) r 57(1)(g), r 57(3); *Magistrates Court (Civil Division) Rules 1998* (Tas) r 155(1)(c), r 155(2).
108. NSW Bar Association, *Submission CI56* [60].
109. Supreme Court of NSW, *Submission CI55* [23].

(b) a court has decided contains material that is privileged, or

(c) is required for the court's use and it is not reasonably practicable for the party or the party's legal representative to be given access to a copy of the record.

(2) Despite recommendations 5.1(2)–(3) and 5.2(1)–(2), a journalist, researcher or member of the public is not permitted in any case to access a record on the court file:

(a) relating to a part of the proceedings that was closed pursuant to a closed court order or statutory closed court provision

(b) that contains information subject to a non-disclosure order or statutory prohibition on disclosure, and it is not reasonably practicable for the journalist, researcher or member of the public to be given access to a copy of the record that does not contain information subject to the order or statutory prohibition

(c) that is subject to a claim of privilege that has not yet been decided

(d) that a court has decided contains material that is privileged, or

(e) that is required for the court's use and it is not reasonably practicable for the journalist, researcher or member of the public to be given access to a copy of the record.

5.102 Recommendation 5.3 is intended to set clear parameters for decision-makers in determining access requests. It is also intended to reduce the time and resources involved in processing certain access requests.

Records that are claimed or decided to be privileged

5.103 The *Evidence Act 1995* (NSW) includes a number of privileges (such as client legal privilege), which prevent evidence protected by the privilege from being adduced in a proceeding.[110] Recommendations 5.3(1)(a)–(b) and 5.3(2)(c)–(d) are necessary because allowing access applicants (parties, journalists, researchers or members of the public) to access a court record claimed or decided to be privileged would defeat the privilege.

Records required for the court's use where copying is not reasonably practicable

5.104 Recommendations 5.3(1)(c) and 5.3(2)(e) are intended to address the situation where, for example, a record is needed in court or by a judge to prepare their judgment.[111] It is similar to the approach in Queensland.[112]

Records relating to closed court proceedings

5.105 Recommendation 5.3(2)(a) is necessary because it would defeat the closed court order or statutory closed court provision to release records relating to a part of the proceedings that were closed. This would include, for example, a transcript of closed proceedings.

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110. *Evidence Act 1995* (NSW) pt 3.10.

111. Supreme Court of NSW, *Submission CI55* [23].

112. *Criminal Practice Rules 1999* (Qld) r 57(6)(a)(ii); *Uniform Civil Procedure Rules 1999* (Qld) r 981(3).

5.106 This recommendation reflects our view of a "closed court" as both requiring exclusion of all people other than those whose presence is necessary from proceedings, and prohibiting disclosure (including by publication) of information from closed proceedings (chapter 3).

Records containing information subject to a disclosure restriction

5.107 While a statutory prohibition on publication or non-publication order seeks to prevent publicity of information, a statutory prohibition on disclosure or a non-disclosure order prevents disclosure of information to any individual (chapter 3).[113] Recommendation 5.3(2)(b) is necessary because it would defeat the prohibition or order to release a record containing the protected information to the access applicant. It is similar to the approach under the *Civil and Administrative Tribunal Rules 2014* (NSW).[114]

5.108 It would not, however, defeat the statutory prohibition on disclosure or non-disclosure order for the court to provide the part of the record that does not contain the protected information. This could be achieved by the court providing a copy of the record with that information deleted or removed, in a case where it was reasonably practicable to do so. For example, in one case, the court allowed the media to inspect a copy of the statement of facts from which material subject to suppression orders had been redacted.[115]

5.109 In determining whether it is reasonably practicable to redact information subject to a statutory prohibition on disclosure or non-disclosure order, relevant considerations may include:

- the scope of the prohibition or order, including the information to which it applies
- the resources required to undertake redaction, including the availability of suitably experienced and trained staff, and
- the level of risk of error in redaction or inadvertent disclosure of the protected information.

Access to records should be subject to certain matters

Recommendation 5.4: Access to records should be subject to certain matters

The access framework in the new Act should provide:

113. NSW, Attorney General's Department, *Report on Access to Court Information* (2008) 38.
114. *Civil and Administrative Tribunal Rules 2014* (NSW) r 42(5).
115. *DPP (Cth) v Alameddine* [2017] NSWLC 7 [35]–[36].

(1) Despite recommendation 5.1(1), access to a record on the court file by a party or the party's legal representative is subject to:

(a) the prescribed fee (if any) for the provision of access to the record

(b) any order that restricts or otherwise affects access to the record that a court has made, on application, in the particular case, and

(c) any provision in any other Act or law that restricts or otherwise affects access to the record.

(2) Despite recommendations 5.1(2)–(3) and 5.2(1)–(2), access to a record on the court file by a journalist, researcher or member of the public is subject to:

(a) the prescribed fee (if any) for the provision of access to the record

(b) the prescribed fee (if any) for the deletion or removal of personal identification information from the record, where the journalist, researcher or member of the public has been granted leave to access the record and is to be given access to a copy of the record from which such information has been deleted or removed

(c) any order that restricts or otherwise affects access to the record that a court has made, on application, in the particular case

(d) any provision in any other Act or law that restricts or otherwise affects access to the record, and

(e) any condition imposed by the court under recommendation 5.8.

5.110 Recommendation 5.4 is for access under the framework, by any applicant and whether by right or by leave, to be subject to certain matters.

Any prescribed fees for access

5.111 Recommendation 5.4(1)(a) is similar to the *Local Court Rules 2009* (NSW) (*Local Court Rules*), which provide that a party is entitled to obtain a copy of documents on the court record or a transcript of evidence taken at committal, summary or application proceedings, on payment of any prescribed fee.[116] Fees for a copy of a transcript are specified in regulations.[117]

5.112 In the case of criminal proceedings, however, accused persons and offenders would be exempt from paying fees (recommendation 5.10(1)(a)).

5.113 Recommendation 5.4(2)(a) is also similar to the *Local Court Rules,* which require a non-party to pay the prescribed fee to obtain a copy of documents on the court record or a transcript of evidence taken at the proceedings. Access regimes, elsewhere in Australia, similarly require non-parties to pay any prescribed fee for access.[118]

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116. *Local Court Rules 2009* (NSW) r 8.10(2)(b).

117. *Civil Procedure Regulation 2017* (NSW) sch 1 pt 5 item 10.

118. 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 2005* (WA) r 51(6B).

Any prescribed fees for deleting or removing personal identification information

5.114 Recommendation 5.4(2)(b) is for access by a journalist, researcher or member of the public to be subject to any prescribed fee for the deletion or removal of personal identification information from the record, where the applicant is to be provided access to a copy of the record from which such information has been deleted or removed. It is necessary to enable courts to recover the costs of redaction.

Any order a court has made that restricts or otherwise affects access

5.115 Recommendations 5.4(1)(b) and 5.4(2)(c) would enable a court, on application, to make an order in a particular case that restricts or otherwise affects access to a record on the court file. Such an order would prevail over any provision in the access framework.

5.116 Recommendations 5.4(1)(b) and 5.4(2)(c) are intended to provide courts with a residual discretion to control access to a record by making an order. However, it is envisaged that such orders would be made in limited circumstances, as parties would have to apply for them.

5.117 Our recommendation is similar to our draft proposal, which was that there should be no access to a record on the court file that is the subject of a court order to be kept confidential or otherwise restricted from access.[119] We have concluded that access should instead be "subject" to an order that restricts or otherwise affects access to a record, as the scope and effect of such an order may vary from case to case.

5.118 For example, an order may not prohibit access to a record entirely, but instead provide that access can only occur with leave of the court and that parties to the proceedings must be heard on any leave application. Such orders are commonly made in practice.[120]

5.119 Recommendations 5.4(1)(b) and 5.4(2)(c) are similar to the *Court Information Act,* which would have provided that certain access applicants were entitled to access certain information "unless the court otherwise orders in a particular case".[121] However, recommendations 5.4(1)(b) and 5.4(2)(c) provide that access to a record is subject to any order that the court "has made". This should operate to prevent an applicant being denied access to a record because of an order made by a court after an access application has been received.

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119. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 10.3(3)(c), proposal 10.4(4)(e), proposal 10.5(3)(e), proposal 10.6(3)(e).

120. See, eg, *NSW v Holschier (No 2)* [2018] NSWSC 1921 [41]; *NSW v Bowdidge* [2019] NSWSC 1843 [34]; *AG (NSW) v Mailes (Preliminary)* [2021] NSWSC 298 [26].

121. *Court Information Act 2010* (NSW) s 8(1), s 10(1), s 11(1) (uncommenced).

Recent approaches to making orders affecting access

5.120 In two recent Federal Court cases, the court made orders to restrict access to a particular record:

- in *Porter,* the court made an order to remove an unredacted defence and unredacted reply from the court file[122] under the *Federal Court Rules 2011* (Cth) (*Federal Court Rules)*,[123] and
- in *Ferguson,* the court made an order under the *Federal Court Rules*[124] that an originating application be "confidential" until after it has been served on the respondent.[125]

5.121 In both cases, the Federal Court considered that:

- the grounds for making an order to keep a document confidential or remove it from the court file are the same as those for making a suppression or non-publication order under the *Federal Court of Australia Act 1976* (Cth) (*Federal Court of Australia Act*),[126] and
- the relevant order was necessary to prevent prejudice to the proper administration of justice.[127]

5.122 In *Porter*, the court also considered that, as is the case in applications for suppression and non-publication orders under the *Federal Court of Australia Act*,[128] news publishers should have the right to be heard in any application for removal of a document from a court file.[129]

5.123 Recommendations 5.4(1)(b) and 5.4(2)(c) do not prescribe the procedures, considerations or grounds for making an order under the access framework to restrict or otherwise affect access to a record. It is unclear whether NSW courts would follow the same approach as the Federal Court in making such orders.

5.124 We envisage that the relevant considerations for making an order to restrict or otherwise affect access to a record would depend on the circumstances of the particular

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122. *Porter v Australian Broadcasting Corporation* [2021] FCA 863 [118].
123. *Federal Court Rules 2011* (Cth) r 2.28, r 16.21(2).
124. *Federal Court Rules 2011* (Cth) r 2.32(3)(a).
125. *Ferguson v Tasmanian Cricket Association* [2021] FCA 1507 [16].
126. *Federal Court of Australia Act 1976* (Cth) s 37AG(1).
127. *Porter v Australian Broadcasting Corporation* [2021] FCA 863 [10], [44], [90], [106], [118]; *Ferguson v Tasmanian Cricket Association* [2021] FCA 1507 [8]–[9], [16].
128. *Federal Court of Australia Act 1976* (Cth) s 37AH(2)(d).
129. *Porter v Australian Broadcasting Corporation* [2021] FCA 863 [45]–[46].

case in which the order is made. A relevant consideration may, for example, include the public interest in open justice.

Provisions in any other Acts that restrict or otherwise affect access

5.125 Recommendations 5.4(1)(c) and 5.4(2)(d) are intended to ensure that the access framework does not interfere with or displace provisions in any other Act or law that restrict or otherwise affect access to the record. For example, s 53 of the *Surrogacy Act 2010* (NSW) provides that:

- a person (including a party and a news media organisation) is not entitled to access court records that relate to proceedings in respect of a parentage order, but may do so with leave of the court
- an application for leave by a child of a surrogacy arrangement (who is under 18 years of age) can be made only with the consent of those who have parental responsibility for the child, and
- the court can impose conditions on access granted by leave.[130]

5.126 The framework should not displace this provision, which is intended "to protect the privacy of parties to surrogacy arrangements and to protect the child from possible stigmatisation".[131]

5.127 Similarly, s 143 of the *Adoption Act 2000* (NSW) provides that a person is not entitled to receive prescribed information relating to adoption from records of adoption proceedings, but may apply to the court for the information.[132]

5.128 Certain provisions in the *Crimes (Sentencing Procedure) Act 1999* (NSW) (*Crimes (Sentencing Procedure) Act*) restrict access to victim impact statements by an offender or accused person.[133] Section 30G:

- permits the prosecution to provide a copy of a victim impact statement to the offender's legal practitioner
- allows offenders without legal representation to have only supervised access to victim impact statements, and
- prohibits the copying and dissemination of victim impact statements unless done for a legitimate purpose related to the proceedings by the offender's legal representative, and requires them to be destroyed at the end of sentencing proceedings.

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130. *Surrogacy Act 2010* (NSW) s 53(1)–(3).
131. NSW, *Parliamentary Debates*, Legislative Council, Second Reading Speech, 21 October 2010, 26546.
132. *Adoption Act 2000* (NSW) s 143(1)–(2).
133. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3 definition of "offender".

5.129 Section 30N of the *Crimes (Sentencing Procedure) Act* allows a court, on the request of a victim, not to disclose the whole or part of a victim impact statement to the accused person in forensic proceedings.

5.130 The framework should not interfere with or displace these provisions restricting access to victim impact statements as these records may contain highly personal information (chapter 12). The access restrictions are also necessary to prevent offenders from retaining victim impact statements as "trophies" or disseminating them with the intention of further harming the victim.[134]

Conditions imposed on access to or use of a record

5.131 Recommendation 5.4(2)(e) is for access by a journalist, researcher or member of the public to be subject to any condition imposed by the court under recommendation 5.8. Recommendation 5.8 would allow conditions to be imposed only where access to a record is by leave.

Considerations in granting leave for access

Recommendation 5.5: Considerations in deciding whether to grant leave for access

The access framework in the new Act should provide:

(1) In deciding whether to grant leave to access a record on the court file, the court must take the following matters into account to the extent to which it considers them relevant:

- (a) the public interest in open justice
- (b) the impact on the administration of justice, including the right to a fair trial
- (c) the impact on an individual's privacy or safety
- (d) the impact on the safety, welfare, wellbeing, privacy, rehabilitation prospects and other future prospects of a child
- (e) the reasons for which access is sought
- (f) the nature of the record sought, including whether it has been admitted in evidence or contains scandalous, frivolous, vexatious, irrelevant or otherwise oppressive material
- (g) the appropriate method of access
- (h) any conditions that can be imposed under recommendation 5.8
- (i) where the record contains personal identification information, whether it would be reasonably practicable for the applicant to be given access to a copy of the record from which such information has been deleted or removed
- (j) whether the record contains information subject to a statutory prohibition on publication or non-publication order, and
- (k) any other matter the judicial officer or registrar considers relevant in the circumstances.

134. NSW Sentencing Council, *Victims' Involvement in Sentencing,* Report (2018) [3.20].

(2) In respect of recommendation 5.5(1)(j), the existence of a statutory prohibition on publication or non-publication order that applies to information contained in a record on the court file does not, of itself, operate to prevent an applicant from accessing the record or the court giving an applicant access to the record.

5.132 Few access regimes in NSW contain detailed guidance about how decision-makers should exercise the discretion to allow access to court records. While this may afford significant flexibility in dealing with applications, it can also give rise to uncertainty and unpredictability in outcomes.

5.133 The access framework would require leave to be sought in many cases, which means the court will need to consider the applicant's request. Recommendation 5.5 lists the considerations that the court would have to take into account in deciding whether to grant leave to an applicant to access certain records, to the extent to which it considers them relevant. This is intended to promote consistency, assist applicants in framing access requests, and assist decision-makers in determining requests.[135]

5.134 The considerations listed in recommendation 5.5 are similar to our draft proposal, which the Bar Association and the Children's Court supported.[136] They are also similar to those included in existing access regimes in NSW,[137] the *Court Information Act,*[138] and access regimes in some other jurisdictions.[139]

Public interest in open justice

5.135 While the open justice principle does not create "a freestanding right" to access records on the court file, courts have recognised that the principle should guide decisions about granting access.[140] This is also reflected in recommendation 5.5(1)(a).

5.136 Some access regimes in NSW do not make explicit reference to the open justice principle.[141] However, the access regimes for certain criminal proceedings in the Local Court, and for the coronial jurisdiction, expressly refer to the principle that proceedings

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135. Roundtable 4, *Consultation CIC08*; Local Court of NSW, *Consultation CIC12.*
136. NSW Bar Association, *Submission CI56* [7]; Children's Court of NSW, *Submission CI62*, 8.
137. 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]; *Local Court Rules 2009* (NSW) r 8.10(5); *Coroners Act 2009* (NSW) s 65(3).
138. *Court Information Act 2010* (NSW) s 9(2) (uncommenced).
139. Federal Court of Australia, *Access to Documents and Transcripts Practice Note (GPN-ACCS)* (2016) [4.10]; *Senior Courts (Access to Court Documents) Rules 2017* (NZ) r 12.
140. *ASIC v Rich* [2002] NSWSC 198 [9]; *John Fairfax Publications Pty Ltd v Ryde Local Court* [2005] NSWCA 101, 62 NSWLR 512 [29]; *P v D1* [2009] NSWSC 1492 [10]. See also *Eisa Ltd v Brady* [2000] NSWSC 929 [16].
141. See, eg, *Uniform Civil Procedure Rules 2005* (NSW) r 36.12(2); 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).

are generally to be heard in open court, alongside other considerations for deciding whether to grant access.[142]

5.137 Recommendation 5.5(1)(a) is similar to the *Court Information Act,* which would have allowed the court to consider the public interest in open justice in deciding whether to grant leave to a person to access "restricted access information".[143] The regime for accessing records in certain New Zealand courts also includes "the principle of open justice (including the encouragement of fair and accurate reporting of, and comment on, court hearings and decisions)" as a consideration for determining access requests.[144]

Impact on the administration of justice, including the right to a fair trial

5.138 Recommendation 5.5(1)(b) reflects the fact that, in practice, courts already consider the need to protect the administration of justice.[145] A court may, for example, decide not to release a court record where this may be prejudicial to an accused person's trial.[146] However, potential prejudice to an imminent or ongoing trial may be less relevant in proceedings heard by a magistrate or before a judge alone, or may no longer be relevant after a verdict or sentence.

5.139 Recommendation 5.5(1)(b) is similar to the approach under the *Court Information Act*, where the court, in determining whether to grant access to "restricted access information", would have been able to consider "the extent to which providing access will adversely affect the administration of justice".[147] The regime for accessing records in certain New Zealand courts also includes "the orderly and fair administration of justice" and "the right of a defendant in a criminal proceeding to a fair trial" as considerations for determining access requests.[148]

Impact on individual privacy or safety

5.140 In practice, courts have generally taken the approach that they are not bound by NSW privacy legislation.[149] The *Privacy and Personal Information Protection Act 1998* (NSW) (*PPIPA*) and *Health Records and Information Privacy Act 2002* (NSW) contain an

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142. *Local Court Rules 2009* (NSW) r 8.10(5)(a); *Coroners Act 2009* (NSW) s 65(3)(a).
143. *Court Information Act 2010* (NSW) s 9(2)(a)–(b) (uncommenced).
144. *Senior Courts (Access to Court Documents) Rules 2017* (NZ) r 12(e).
145. See, eg, *ASIC v Rich* [2002] NSWSC 198 [9]; *R v Abdallah (No 3)* [2015] NSWSC 121 [17], [22].
146. *NSW v Reed* [2011] NSWSC 981 [16]; *DPP (Cth) v Alameddine* [2017] NSWLC 7 [32].
147. *Court Information Act 2010* (NSW) s 9(2)(d) (uncommenced).
148. *Senior Courts (Access to Court Documents) Rules 2017* (NZ) r 12(a)–(b).
149. NSW, Attorney General's Department, *Review of the Policy on Access to Court Information* (2006) 16.

exemption in relation to courts' "judicial functions",[150] which may extend to providing access to court records.[151]

5.141 Nonetheless, privacy is normally a relevant factor for courts when determining access requests.[152] A court may, for example, refuse access to documents containing confidential medical information or sensitive personal information.[153] Courts may also consider the privacy of people who are not involved in the proceedings.[154]

5.142 Recommendation 5.5(1)(c) reflects the fact that privacy is an important consideration when dealing with the release of court records.[155] Court records can contain a large amount of personal identification information, and release of such records may pose risks to a person's privacy.

5.143 Recommendation 5.5(1)(c) is also similar to the approach contained in the uncommenced *Court Information Act.*[156]

Impact on the safety, welfare, wellbeing, privacy and future prospects of a child

5.144 Recommendation 5.5(1)(d) recognises that special considerations apply when children are involved in proceedings, given their age and vulnerability. This is reflected in other aspects of NSW law, including the statutory prohibition on publishing the identities of children involved in certain proceedings (chapter 9). The Children's Court and Legal Aid supported consideration of the rights and interests of children involved in the proceedings.[157]

5.145 Unlike our draft proposal,[158] recommendation 5.5(1)(d) includes a reference to "rehabilitation prospects", in response to a suggestion by Legal Aid.[159]

5.146 Recommendation 5.5(1)(d) is similar to the regime for accessing records in certain New Zealand courts, which includes the protection of "confidentiality and privacy interests

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150. *Privacy and Personal Information Protection Act 1998* (NSW) s 6(1); *Health Records and Information Privacy Act 2002* (NSW) s 13(1).
151. *NZ v Attorney General's Department* [2005] NSWADT 103 [18]–[19]; *NZ v Director General, Attorney General's Department* [2005] NSWADTAP 62 [3], [8]; *Budd v Director, Attorney General's Department* [2006] NSWSC 1267 [20].
152. NSW, Attorney General's Department, *Review of the Policy on Access to Court Information* (2006) 16.
153. *NSW v Reed* [2011] NSWSC 981 [16].
154. See, eg, *R v Jovanovic* [2014] ATCSC 98 [42]–[43]; *R v Abdallah (No 3)* [2015] NSWSC 121 [23].
155. Children's Court of NSW, *Submission CI28*, 7.
156. *Court Information Act 2010* (NSW) s 9(2)(c) (uncommenced).
157. Legal Aid NSW, *Submission CI24*, 13; Children's Court of NSW, *Submission CI28*, 5.
158. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 10.7(d).
159. Legal Aid NSW, *Submission CI57,* 27.

(including those of children and other vulnerable members of the community)" as a consideration in determining access requests.[160]

Reasons for which access is sought

5.147 The reason for which access is sought should be a relevant consideration for granting leave. Recommendation 5.5(1)(e) is similar to the access regimes for certain criminal proceedings in the Local Court and for the coronial jurisdiction.[161]

Nature of the record sought

5.148 Recommendation 5.5(1)(f) is similar to the Supreme Court and District Court practice notes, in which a key consideration for permitting access is whether the material has been used in proceedings. The practice notes provide that 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.[162]

5.149 Our recommendation is also similar to the approach under the Federal Court practice note.[163]

Method of access

5.150 Recommendation 5.6(1)(d) is to require access applications to specify the method of access sought. Recommendation 5.5(1)(g) could assist the court in assessing the appropriate access method, as well as the access application more generally.

5.151 Where, for example, the record contains sensitive information, a court may decide to allow the applicant to inspect the record only, and not obtain a copy of it.

Conditions on access to or use of records

5.152 Under recommendation 5.8, courts would be able to impose conditions on access, where access is by leave. Recommendation 5.5(1)(h) is for courts to consider what conditions could be imposed on access to or use of records in deciding whether to grant leave, as conditions could address concerns or issues that may otherwise weigh against granting leave.

5.153 For example, where a physical exhibit might be dangerous or compromised if handled, the court could grant an applicant leave to access it on the condition that the applicant inspect it on court premises and under supervision.

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160. *Senior Courts (Access to Court Documents) Rules 2017* (NZ) r 12(d).

161. *Local Court Rules 2009* (NSW) r 8.10(5)(d); *Coroners Act 2009* (NSW) s 65(3)(d).

162. 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].

163. Federal Court of Australia, *Access to Documents and Transcripts Practice Note (GPN-ACCS)* (2016) [4.10].

Whether it is reasonably practicable for personal identification information to be deleted or removed from court records

5.154 Recommendation 5.5(1)(i) differs from our draft proposal, which was that a court should be able to impose a condition requiring the applicant to access a copy of the record from which personal identification information has been deleted or removed.[164] We envisaged that a redaction condition could be imposed in relation to a record on the court file that an applicant is entitled to access, as well as one for which the applicant has been granted leave to access.

5.155 The ODPP considered that this was a "very important complement to the proposals concerning access by members of the public".[165] CTSD submitted that it was preferable to any "mandatory redaction of court records".[166]

5.156 We also proposed that the access framework should allow regulations to prescribe fees for the redaction of information from records, where this is a condition imposed by the court.[167] Several submissions raised concerns about the capacity of courts to redact personal identification information from court records before providing an applicant with access,[168] and that the ability to impose fees would not resolve underlying resource issues with redaction, which relate to the time, skill and technology required.[169]

5.157 Recommendation 5.5(1)(i) seeks to address these concerns and minimise the resource impact on the courts. First, a court would consider whether it is reasonably practicable for personal identification information to be redacted from a copy of the record, before access is provided, only where there is a leave requirement. The option for personal identification information to be redacted would not be available in relation to those records that are accessible to an applicant as of right. Under recommendation 5.1(2), journalists and researchers would be entitled to access a range of records as of right, without the need for leave.

5.158 Consultations indicated that most non-party applications are by media applicants and are time critical, seeking same-day access to records. It would rarely, if ever, be

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164. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 10.10(1)(d).
165. NSW Office of the Director of Public Prosecutions, *Submission CI48*, 5.
166. Courts, Tribunals and Service Delivery, NSW Department of Communities and Justice, *Submission CI53*, 6.
167. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 10.11(1)(b).
168. Confidential, *Submission CI51*; Courts, Tribunals and Service Delivery, NSW Department of Communities and Justice, *Submission CI53*, 6; Supreme Court of NSW, *Submission CI55* [25]; Local Court of NSW, *Submission CI58*, 11.
169. Courts, Tribunals and Service Delivery, NSW Department of Communities and Justice, *Submission CI53*, 6.

possible to provide access to a redacted document within this timeframe, as redaction is labour intensive and would depend on the availability of suitably experienced staff.[170]

5.159 While there would not be an option of redacting personal identification information from records accessible to journalists and researchers as of right, these access applicants are subject to professional conduct and ethics requirements. This mitigates the risk of their publishing, disclosing or misusing such information.

5.160 Secondly, the leave process would give courts the opportunity to consider the practicality of redacting personal identification information from a court record on a case by case basis. Relevant considerations may include the nature and extent of the information to be removed, the time required and the availability of resources and suitable staff.[171] This approach is intended to position redaction of court records entirely within the court's control, having regard to whether redaction is reasonably practicable.[172]

5.161 In some criminal proceedings, the amount of personal identification information contained in records on the court file may be limited, such that it may be reasonably practicable for such information to be deleted or removed from a copy of the record before an applicant is provided with access to it. As we discuss in chapter 3, legislation already limits disclosure of addresses or telephone numbers of witnesses or people who make written statements, and personal information in subpoenaed documents.[173]

5.162 Recommendation 5.5(1)(i) does not prescribe or specify how personal identification information is to be removed or deleted from a court record before an applicant is given access to it. It should be left to the courts to determine what is reasonably practicable in the circumstances of the case. In one case, for example, the court redacted personal and sensitive information from certain documents before making them available to the applicant.[174] In another case, the court ordered the plaintiff and the defendant to the primary proceedings to have first access to certain documents, before they were to be released to the applicant, to determine whether any redactions were appropriate.[175]

5.163 Where it would not be reasonably practicable for personal identification information to be redacted from a copy of the court record, a court could refuse to grant leave for access. Alternatively, a court may pursue other options for protecting the information.

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170. Courts, Tribunals and Service Delivery, NSW Department of Communities and Justice, *Consultation CIC24.*
171. Courts, Tribunals and Service Delivery, NSW Department of Communities and Justice, *Submission CI53*, 6.
172. Courts, Tribunals and Service Delivery, NSW Department of Communities and Justice, *Consultation CIC24*.
173. *Criminal Procedure Act 1986* (NSW) s 280–280A.
174. *R v Grace* [2012] NSWDC 5 [51], [55], [69]–[70].
175. *NSW v Bowdidge (No 2)* [2020] NSWSC 159 [33]–[34].

5.164 A court could, for example, decide to impose conditions on access instead, such as a condition requiring the applicant to inspect the record under supervision or preventing the applicant from copying a record that has been made available for inspection only (recommendation 5.8). Or it could grant access without redaction, and rely on the recommended offence of unauthorised use or disclosure of personal identification information contained in court records to protect the integrity of the information (recommendation 5.14).

Whether the record contains information subject to a publication restriction

5.165 We do not consider that access to records subject to a statutory prohibition on publication or non-publication order should be precluded, but rather that an applicant should have to seek leave for access (recommendation 5.2(1)(b)). However, recommendation 5.5(1)(j) is to require the court to consider the existence of a publication restriction, as such restrictions are generally imposed to protect sensitive or potentially prejudicial information.

5.166 Depending on the circumstances of the case, it may not be appropriate to grant an applicant leave to access a record containing information subject to a publication restriction, or it may be appropriate to impose conditions.

A publication restriction does not, of itself, prevent access

5.167 Recommendation 5.5(2) is intended to clarify the impact of a statutory prohibition on publication or non-publication order on access to court records. This is because there are different views about whether and how a publication restriction should be taken into account in deciding whether to grant leave for access:

> One view is that leave should be refused in order to prevent access to information that cannot lawfully be published; the other is that leave should be granted because a non-publication order or provision is in place to prevent unlawful publication and there are no limits on other disclosure.[176]

5.168 Recommendation 5.5(2) is based on a suggestion made by CTSD.[177] It is intended to alleviate any confusion or uncertainty about whether access can be provided to a record subject to a publication restriction.[178]

5.169 Unlike records containing information subject to a statutory prohibition on disclosure or a non-disclosure order, records containing information subject to a statutory prohibition on publication or a non-publication order generally need not be redacted. It would not

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176. Courts, Tribunals and Service Delivery, NSW Department of Communities and Justice, *Submission CI53*, 4.
177. Courts, Tribunals and Service Delivery, NSW Department of Communities and Justice, *Submission CI53*, 5.
178. Children's Court of NSW, *Consultation CIC25.*

defeat the publication restriction to provide access to a record subject to such a restriction.

5.170 CTSD also suggested that the framework should provide that:

- responsibility for complying with any applicable statutory prohibition on publication or non-publication order lies with the access applicant, and
- the court may require an undertaking (an enforceable promise) from an applicant that they will comply with a statutory prohibition on publication or non-publication order that applies to information contained in the record before providing access to it.[179]

5.171 We have not adopted these suggestions as our other recommendations make it sufficiently clear that access applicants would be responsible for complying with any applicable publication restriction. For example, in chapter 13, we recommend that a breach of any publication restriction should constitute a criminal offence.[180] This means that any person would have to comply, regardless of whether they have given an undertaking to do so.

5.172 Recommendation 5.5(2) would not prevent courts from notifying applicants that they are responsible for complying with any applicable publication restrictions. The standard application form for accessing materials in the Local Court, Children's Court and District Court requires applicants to acknowledge that they are aware of their responsibility to comply with any applicable limits upon publication, and that penalties may apply in the event of non-compliance.[181]

Any other relevant matters

5.173 Recommendation 5.5(1)(k) is intended to ensure the recommended list of considerations is not exhaustive, and that courts could consider other matters that are specific to the particular case. For example, in criminal proceedings involving a victim, a court may consider any distress that may be caused to the victim or their family.[182]

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179. Courts, Tribunals and Service Delivery, NSW Department of Communities and Justice, *Submission CI53*, 5.
180. Recommendation 13.1.
181. Local Court of NSW, "Record of Application by a Non-Party for Access to Material held by the Court" (supplied by Local Court of NSW, 24 November 2020).
182. See, eg, *R v Abdallah (No 3)* [2015] NSWSC 121 [24]; *R v Brewer (No 1)* [2015] NSWSC 1471 [16]; *R v Gatt (No 5)* [2018] NSWSC 447 [11]; *R v Dirani (No 33)* [2019] NSWSC 288 [83]–[85].

Requesting access

Recommendation 5.6: Procedures for access

The access framework in the new Act should provide:

(1) All requests for access to a record on the court file must provide details of:

(a) the relevant proceeding or proceedings

(b) the record or records sought

(c) the reasons for making the request, and

(d) the method of access sought.

(2) If the request is by a researcher, it must also include such information as will assist the court in determining whether the request is for the purposes of research.

(3) Where leave of the court is required to access the record on the court file, the court may notify parties to the proceedings and allow them to be heard in relation to the request.

Access requests should include certain details

5.174 Recommendation 5.6(1) is intended to ensure applications include the information necessary for decision-makers to determine them. It is similar to the existing requirements:

- for accessing documents in Supreme Court proceedings, and in civil proceedings in the District Court, which are set out in practice notes[183]
- for accessing materials in criminal proceedings in the Local Court, District Court and Children's Court, which are specified in the application form,[184] and
- under certain access regimes in Tasmania and New Zealand.[185]

5.175 The requirement to specify the method of access sought in recommendation 5.6(1)(d) was not included in our draft proposal[186] and was suggested by CTSD.[187] It is intended to reduce the time it takes to process applications, as the court would be made aware of the method of access sought at an early stage.

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183. 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].

184. Local Court of NSW, "Record of Application by a Non-Party for Access to Material held by the Court" (supplied by Local Court of NSW, 24 November 2020).

185. *Supreme Court Rules 2000* (Tas) r 33(2)(b); *Senior Courts (Access to Court Documents) Rules 2017* (NZ) r 14(a).

186. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 10.8(1)(b).

187. Courts, Tribunals and Service Delivery, NSW Department of Communities and Justice, *Submission CI53*, 5.

5.176 Unlike our draft proposal,[188] we do not recommend that the access framework should specify the format for access requests (for example, a written application). It should be left to the courts to determine the appropriate format (for example, in their individual court rules).

Access requests by researchers should include additional information

5.177 Recommendation 5.6(2) is intended to ensure access requests by researchers include the information necessary for courts to determine whether the request is for the purposes of research, without the need for additional investigation, which should promote efficiency.

5.178 The access framework would define a "researcher" as a person who makes a request for access to a record on a court file for the purposes of academic research, and list certain factors that indicate a request is for this purpose.[189] In line with these factors, an access request from a researcher could include information:

- establishing that they are employed by a university or other institution that has academic research as one of its purposes
- indicating that a significant proportion of their professional activity involves academic research, and
- outlining any recognised ethical or other professional standards with which they must comply in the course of their professional activity.

Access requests should be made to the relevant court

5.179 In the consultation paper, we asked whether there should be a centralised scheme for giving researchers access to court records, including a research committee.[190] In 2006, the New Zealand Law Commission recommended "a single entry point for all requests for access to court records by researchers". It also recommended that a committee be established by the Ministry of Justice to consider research proposals, and to have the final say on granting access and imposing any conditions.[191]

5.180 However, we have concluded that all access requests, including those made by researchers, are best made to the relevant court. The court is in the best position to make decisions as to whether access should be granted to specific records and then to make records available. Courts have practical knowledge about what records they hold,

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188. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 10.8(1)(a).
189. Recommendation 4.4(1)(d).
190. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Consultation Paper 22 (2020) question 11.1(2)(a).
191. New Zealand Law Commission, *Access to Court Records,* Report 93 (2006) [8.40]–[8.41] rec 27–28.

how they can be identified, how registry staff can support access to them, and what orders have been made in relation to them.[192]

5.181 As the framework would require access applicants to seek leave in certain circumstances, courts would play an essential role in handling access requests. A centralised scheme for giving researchers access to court information may be difficult to administer efficiently, as requests from a centralised body would need to be conveyed to each individual court.

No time limit on making access requests

5.182 We do not support imposing any time limit on journalists, or any other access applicants, making a request to access records on the court file.

5.183 Under s 314(1) of the *Criminal Procedure Act,* media access to certain documents in criminal proceedings is only available from the start of the proceedings until two working days after they have ended. The end of proceedings is when the defendant is sentenced or the charges dismissed.[193]

5.184 The time limit may be said to reflect the contemporaneous nature of much media reporting of court proceedings. However, this does not take into account the role of investigative journalism into law and justice issues, and the fact there may be ongoing public interest in certain cases.[194]

5.185 ARTK opposed the two-day time limit.[195] One journalist said that it can make it difficult to access information about a co-defendant being sentenced at a later date.[196]

5.186 Some journalists also said they may be unable to make an access request within two days when they have other priorities, and may instead have to piece together missing information from less reliable sources.[197] We note that, if more than two working days have elapsed since the final disposal of the proceedings, a journalist would still be able to apply for leave to access court documents under relevant court rules.[198]

5.187 Nevertheless, access to records on the court file by any applicant should be available without any restriction on timing. Any such restriction would pose an unnecessary practical barrier to access.

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192. NSW Law Reform Commission, *Contempt by Publication,* Report 100 (2003) [11.86]; Children's Court of NSW, *Submission CI28*, 18.
193. *Maxwell v R* (1996) 184 CLR 501, 509, 510–511.
194. NSW, Attorney General's Department, *Review of the Policy on Access to Court Information* (2006) 39.
195. Australia's Right to Know, *Submission CI27*, 91–92.
196. Sydney Morning Herald, *Preliminary Consultation PCIC06*.
197. Sydney Morning Herald, *Preliminary Consultation PCIC06*; Sydney Morning Herald, *Preliminary Consultation PCIC07*.
198. *Criminal Procedure Act 1986* (NSW) s 314(4A); see, eg, Local Court Rules 2009 (NSW) r 8.10.

5.188 We acknowledge that responding to requests for access to records in finalised matters may take more time and be more resource intensive, particularly where the file has been archived. Under recommendations 5.4(1)(a) and 5.4(2)(a), access by any applicant would be subject to any prescribed fee. To recover the costs involved, courts could collect a prescribed fee for retrieving files from an offsite facility.[199]

Parties may be notified of and heard on applications for leave to access a record

5.189 Our draft proposal was that, in an appropriate case, the court should be able to notify the parties to the proceedings and allow them to be heard in relation to an access request.[200] We did not propose making this mandatory, as this could increase the formality of applications and the time involved in considering them.[201]

5.190 Some submissions considered that parties should always be notified of, and heard on, access applications.[202] For example, the Bar Association submitted that this would give parties the opportunity to seek a non-publication order in relation to a record.[203]

5.191 We do not support a requirement to notify the parties where the applicant is entitled to access the record as of right. The purpose of conferring an entitlement on certain applicants to access certain records is to allow applications to be handled efficiently, in respect of classes of records for which there is no reasonable basis for refusing access. A requirement to notify the parties and hear their views would defeat this.

5.192 Instead, recommendation 5.6(3) would permit the court to notify the parties only where leave to access the record is required. We do not envisage that this would add to the length or formality of leave applications, as the court would do so only in an appropriate case, where it seemed that a party might have reason to oppose access.

Accessing and copying records

Recommendation 5.7: Accessing and copying records

The access framework in the new Act should provide:

(1) If the applicant for access to a record on the court file for a proceeding is a party to the proceeding or the party's legal representative, the applicant may inspect, view, listen to or obtain a copy of the record.

199. *Criminal Procedure Regulation 2017* (NSW) sch 2 pt 1 item 9; *Civil Procedure Regulation 2017* (NSW) sch 1 pt 5 item 8.

200. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 10.8(3).

201. New Zealand Law Commission, *Access to Court Records,* Report 93 (2006) [5.61]–[5.63].

202. Law Society of NSW, *Preliminary Submission PCI31*, 2; Law Society of NSW, *Submission CI54*, 1–2; NSW Bar Association, *Submission CI56* [61], [63].

203. NSW Bar Association, *Submission CI56* [61], [63].

(2) If the applicant for access to a record on the court file for a proceeding is a journalist, researcher or member of the public, the applicant may:

(a) inspect, view or listen to the record, and

(b) with leave of the court, obtain a copy of the record.

(3) "Obtain a copy" of a record includes making a digital copy of, or photocopying, scanning or photographing a record.

(4) A person who makes a copy of a record without the leave of the court under recommendation 5.7(2)(b), commits an offence, the maximum penalty for which is:

(a) for an individual: a fine of 100 penalty units, or

(b) for a corporation: a fine of 500 penalty units.

(5) Making a copy of a record without the leave of the court may be punished as a contempt of court even though it could be punished as an offence.

(6) Making a copy of a record without the leave of the court may be punished as an offence even though it could be punished as a contempt of court.

(7) If making a copy of a record without the leave of the court constitutes both an offence and a contempt of court, the offender is not liable to be punished twice.

(8) Proceedings for the offence are to be dealt with:

(a) summarily before the Local Court, or

(b) summarily before the Supreme Court in its summary jurisdiction.

5.193 Currently, the access methods vary across the different access regimes in NSW,[204] which may create confusion. Under recommendation 5.7, the available method of access would, like some other aspects of the framework, depend on the category of applicant.

Access methods for parties

5.194 A broad range of access methods should be available to parties and their legal representatives as they are directly involved in the proceedings and therefore there are fewer privacy concerns. The different access methods referred to in recommendation 5.7(1) reflect the fact that a "record" may include digital and audio visual material as well as a written document.

5.195 Recommendation 5.7(1) is the same as our draft proposal,[205] except for the addition of a party's legal representative.

Access methods for journalists, researchers and members of the public

5.196 Our draft proposal was that:

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204. See, eg, *Criminal Procedure Act 1986* (NSW) s 314(1); Supreme Court of NSW, *Practice Note No. SC Gen 2: Access to Court Files* (2019) [17]; *District Court Rules 1973* (NSW) pt 52 r 3(2); *Local Court Rules 2009* (NSW) r 8.10(2)(b), r 8.10(3)(b).

205. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 10.9(2).

- journalists and researchers should be entitled to inspect, view, listen to or obtain a copy of a record on the court file, and
- members of the public should be able to inspect, view or listen to the record and, with additional permission of the court, obtain a copy of it.[206]

5.197 Submissions and consultations highlighted the need for journalists and researchers to be able to obtain copies. Journalists may need to make copies of records to ensure information is correctly transcribed or recorded, where the court file is large, or where the journalist is unfamiliar with the legal concepts raised in the documents and needs to seek legal advice.[207] Researchers may also need to take copies of court records, so they can refer back to them over long-term projects.

5.198 We have concluded that journalists, researchers and members of the public should be able to exercise access by:

- inspecting, viewing or listening to a court record, and
- obtaining a copy of it with leave of the court.

5.199 Recommendation 5.7(2) is intended to "limit the exercise of discretion" to "enable access applications and the provision of inspection access to be handled promptly".[208] Where a journalist, researcher or member of the public is entitled to access a particular record, and they seek only to inspect, view or listen to it, access can be provided by the court registry without the need to seek leave. Limiting the access method to inspection only also reduces the risk of personal or sensitive information in the court record being improperly disclosed or published.

5.200 Recommendation 5.7(2) also allows for flexibility, in that a journalist, researcher or member of the public could obtain a copy of a record if they obtain leave of the court. This option would be available in respect of records that the journalist or researcher is entitled to access and records that are only accessible with leave. The Children's Court supports retaining a discretion to determine whether a copy of a record is provided to journalists or researchers, given the sensitive nature of the records held by that court.[209]

5.201 Recommendation 5.7(4)–(8) is to create criminal sanctions where a person, who is required to seek leave to obtain a copy of a record, obtains a copy without leave. Our recommendation is intended to ensure that the access framework is not undermined. It

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206. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 10.9(1)–(2).
207. Australia's Right to Know, *Submission CI27*, 82, 91; Roundtable 4, *Consultation CIC08*; Banki Haddock Fiora, *Submission CI29*, 11.
208. Courts, Tribunals and Service Delivery, NSW Department of Communities and Justice, *Submission CI53*, 5.
209. Children's Court of NSW, *Submission CI62*, 8.

aligns with the approach we recommend for other offences in the new Act (chapter 7) and our approach in relation to breach of conditions for access to court records outlined below.

Electronic access methods

5.202 The terms of reference for this review required us to consider whether, and to what extent, technology can be used to facilitate access to court records.

5.203 Electronic access to some court records is already commonplace for parties to proceedings. NSW Online Registry allows parties to file court documents, access court-sealed documents, and view court orders and case information.[210]

5.204 Electronic access to court records is less available for other access applicants. For example, media access to documents in criminal proceedings under s 314 of the *Criminal Procedure Act* requires in person attendance to "inspect" hard copies of documents.

5.205 Where copying is appropriate, access applicants should be able to receive electronic copies of documents, including by making their own copies. Recommendation 5.7(3) makes it clear that obtaining a copy of a record includes making a digital copy of, or photocopying, scanning or photographing a record. There was support for electronic access methods in submissions and consultations.[211]

5.206 We do not recommend particular approaches to facilitating inspection access to records in electronic format. Where an access applicant is permitted to inspect an electronic court record, there will likely be technological solutions to ensure access is limited to inspection only. This is best left to the courts to manage, having regard to their own technological arrangements (chapter 14).

Conditions on access to and use of court records

Recommendation 5.8: Conditions on access to and use of court records

The access framework in the new Act should provide:

(1) In relation to a record on the court file which the applicant has been granted leave to access, a court may impose conditions, including:

(a) a condition requiring the applicant to access the record under supervision

(b) a condition prescribing the time and place for accessing the record, and

(c) a condition on use (not including publication or disclosure) of the record.

210. NSW Online Registry: Courts and Tribunals, "Legal Professionals: What You Can Do in the Online Registry" <onlineregistry.lawlink.nsw.gov.au/content/legal-professionals> (retrieved 19 May 2022).

211. J Johnston, P Keyzer, A Wallace, and M Pearson, *Preliminary Submission PCI26*, 9; Australia's Right to Know, *Submission CI27*, 91.

(2) Any applicant who is given access to a record on a court file must not breach any condition imposed by the court.

(3) The maximum penalty for breaching a condition on access is:

(a) for an individual: a fine of 100 penalty units, or

(b) for a corporation: a fine of 500 penalty units.

(4) A breach of a condition may be punished as a contempt of court even though it could be punished as an offence.

(5) A breach of a condition may be punished as an offence even though it could be punished as a contempt of court.

(6) If a breach of a condition constitutes both an offence and a contempt of court, the offender is not liable to be punished twice.

(7) Proceedings for the offence are to be dealt with:

(a) summarily before the Local Court, or

(b) summarily before the Supreme Court in its summary jurisdiction.

5.207 As discussed above:

- under recommendation 5.5(1)(h), the court, in determining whether to grant leave, would be required to consider any conditions that could be imposed on access to or use of the record, and
- under recommendation 5.4(2)(e), access would be subject to any conditions so imposed.

5.208 Recommendation 5.8 sets out when conditions can be imposed, the types of conditions that may be imposed, the consequences for breaching a condition and how proceedings for a breach are to be dealt with.

The court should be able to impose conditions only where access is by leave

5.209 Recommendation 5.8(1) differs from our draft proposal, which was that the court should be able to impose conditions in all cases (that is, where the applicant is entitled to access certain records as of right or where leave is required).[212] The proposal was based on the approach under the *Court Information Act*[213] and some other Australian access regimes.[214]

5.210 Enabling the court to impose conditions where an applicant is entitled to access a record would add a discretionary component to the decision-making process, which could increase the complexity of access applications and the time it takes to process

212. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 10.10(1).

213. *Court Information Act 2010* (NSW) s 8(1), s 9(3), s 14(3) (uncommenced).

214. See, eg, *Local Court Act 2015* (NT) s 29(3), s 30(4), s 31(3); *Supreme Court Act 1935* (SA) s 131(3); *District Court Act 1991* (SA) s 54(3); *Magistrates Court Act 1991* (SA) s 51(3).

them.[215] This would defeat the purpose of conferring an entitlement on certain applicants to access certain records, which is to enable court registries to process applications to access those records quickly. It could also increase the administrative workload of registries.[216]

5.211 We do not envisage that enabling the court to impose conditions on access to or use of a record where leave is required would significantly increase the time or complexity of the application. As part of the leave process, the court would already be required to consider a range of matters, including the appropriate method of access and any conditions that could be imposed (recommendation 5.5).

5.212 The leave process would also give the court the opportunity to assess what conditions should be imposed to address specific risks or issues that have arisen in the circumstances of the case.

Conditions requiring supervision or a particular time or place for access

5.213 Under recommendation 5.8(1)(a)–(b), a court could impose conditions requiring the applicant to access the record under supervision and/or prescribing the time and place for accessing the record where, for example, an applicant seeks access to physical exhibits. Handling of physical material may, in some instances, compromise the integrity of the exhibit or raise health and safety issues.[217] This is similar to the approach taken in SA.[218]

Conditions on use (not including publication or disclosure) of court records

5.214 Under recommendation 5.8(1)(c), a condition on use of a record could be imposed to ensure it is used for a specified purpose (for example, by a journalist to report on court proceedings) and not otherwise (for example, to contact a person involved in court proceedings for improper purposes by using their personal identification information contained in the court record).

5.215 Recommendation 5.8(1)(c) differs from our draft proposal, which was that the court should also be able to impose conditions on use of court records, including publication or disclosure. The proposal was similar to the *Court Information Act*[219] and the access regimes in some other Australian states.[220] However, we agree that any limitations on

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215. Courts, Tribunals and Service Delivery, NSW Department of Communities and Justice, *Submission CI53*, 5.
216. Local Court of NSW, *Submission CI58*, 11.
217. NSW, Attorney General's Department, *Report on Access to Court Information* (2008) 23.
218. *Supreme Court Act 1935* (SA) s 131(3)(a); *District Court Act 1991* (SA) s 54(3)(a); *Magistrates Court Act 1991* (SA) s 51(3)(a).
219. *Court Information Act 2010* (NSW) s 8(2), s 9(3), s 21(2) (uncommenced).
220. See, eg, *Supreme Court Act 1935* (SA) s 131(3)(b); *District Court Act 1991* (SA) s 54(3)(b); *Magistrates Court Act 1991* (SA) s 51(3)(b); *Children's Court of Western Australia Act 1988* (WA) s 51A(8).

publication or disclosure can be dealt with more appropriately by a non-publication or non-disclosure order.[221]

5.216 The Local Court and CTSD opposed enabling courts to impose conditions on the use of a record, on the basis that this may be burdensome for decision-makers, who would have to assess the likely use of the record and whether any limitations on use are appropriate.[222] However, courts would only have to consider imposing conditions in respect of records that are subject to a leave requirement. This would not significantly increase the burden on decision-makers, as they would already be required to consider a range of matters as part of the leave process.

Breach of a condition should be an offence

5.217 In some instances, the court may grant access to an applicant based on representations that they will comply with certain conditions (for example, to only inspect the record and not make a copy of it). There is no remedy if such conditions are breached.[223]

5.218 Recommendation 5.8(2) is to create criminal sanctions where an applicant who is given access to a record on the court file breaches any condition imposed by the court. The maximum penalty would be 100 penalty units ($11,000) for an individual or 500 penalty units ($55,000) for a corporation.

5.219 Our recommendation is intended to deter people from breaching access conditions imposed by the court. It is the same as our draft proposal[224] and similar to the approach under the *Court Information Act.*[225]

5.220 Under recommendation 5.8(4)–(6), breaches of conditions would be punishable as an offence or as contempt of court, but not both. This is the same as our draft proposal.[226]

5.221 ARTK submitted that a breach of a condition should only be punishable as an offence.[227] Recommendation 5.8(4)–(6) is intended to allow for discretion and flexibility in dealing with breaches. For example, it may be appropriate for breaches closely connected with the relevant proceedings to be dealt with directly by the presiding

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221. Courts, Tribunals and Service Delivery, NSW Department of Communities and Justice, *Submission CI53*, 5.
222. Courts, Tribunals and Service Delivery, NSW Department of Communities and Justice, *Submission CI53*, 5; Local Court of NSW, *Submission CI58*, 11.
223. NSW, Attorney General's Department, *Report on Access to Court Information* (2008) 35–36.
224. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 10.10(2)–(3).
225. *Court Information Act 2010* (NSW) s 21 (uncommenced).
226. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 10.10(4)–(6).
227. Australia's Right to Know, *Submission CI59*, 32.

judicial officer as a contempt of court, and for a more remote breach to be prosecuted as an offence.

5.222 Like the *Court Information Act,*[228] the access framework would enable proceedings for the offence of breaching a condition to be heard summarily before the Local Court. Unlike the *Court Information Act,* the framework would also enable proceedings to be dealt with in the summary jurisdiction of the Supreme Court (recommendation 5.8(7)).

5.223 This provides the flexibility to hear serious matters, which are analogous to contempt of the Supreme Court, in its summary jurisdiction. It also aligns with the approach we recommend for other offences in the new Act (chapter 7).

Access fees

Recommendation 5.9: Access fees

The access framework in the new Act should provide:

(1) Regulations may prescribe fees for:

(a) the provision of access to a record on the court file, and

(b) the deletion or removal of personal identification information from a record on the court file, where a journalist, researcher or member of the public has been granted leave to access the record and is to be given access to a copy of the record from which such information has been deleted or removed.

(2) Any prescribed fees should not exceed what is reasonably necessary to cover the cost of providing access to a record on the court file or deleting or removing personal identification information from a record on the court file.

5.224 Currently, fees for accessing and copying certain records relating to criminal and civil proceedings are prescribed by regulations.[229] However, access fees are not always collected in practice.[230]

5.225 Recommendation 5.9(1)(a) is not intended to mandate the charging of access fees in every case or for every type of record on the court file. Rather, it is intended to allow regulations to prescribe fees, where it is considered appropriate.

5.226 Recommendation 5.9(1)(a) is the same as our draft proposal,[231] which the Bar Association supported.[232] It is also similar to the *Court Information Act* and the regime for accessing records in the Children's Court of Western Australia.[233]

228. *Court Information Act 2010* (NSW) s 27 (uncommenced).

229. *Criminal Procedure Regulation 2017* (NSW) sch 2 pt 1 item 8–11; *Civil Procedure Regulation 2017* (NSW) sch 1 pt 5 item 6–10.

230. Local Court of NSW, *Preliminary Consultation PCIC12*; Reporting Services Branch, Courts, Tribunals and Service Delivery, NSW Department of Communities and Justice, *Consultation CIC16.*

5.227 ARTK submitted that journalists should not be required to pay access fees because "the media participates in and promotes open justice".[234] However, given courts may incur costs in providing access to records, it is reasonable to prescribe fees for access by regulation.

5.228 Recommendation 5.9(1)(b) is also similar to our draft proposal.[235] It is intended to enable courts to recover at least some of the costs involved in redaction.

5.229 We acknowledge concerns that the ability to impose fees will not entirely address the resource issues associated with redaction.[236] We discuss the need for appropriate resourcing for the courts in chapter 16.

5.230 Recommendation 5.9(2) contains a guiding principle for setting fees: that they must not exceed what is reasonably necessary to cover the cost of providing access. It is intended to support open justice by ensuring that unreasonable fees do not impinge access, by keeping fees for accessing court records to a minimum, so as to not deter applicants who have a genuine interest in or need for access.

Exemptions and reductions for access fees

Recommendation 5.10: Exemptions and reductions for access fees

The access framework in the new Act should provide:

(1) The following applicants are exempt from paying any prescribed fee for the provision of access to a record on the court file, or the deletion or removal of personal identification from a record on the court file:

(a) an accused person or an offender in a criminal proceeding or their legal representative, and

(b) a complainant or victim in a criminal proceeding or protected person.

(2) If the applicant is a member of the public, the court may waive or reduce any prescribed fee to access a record on the court file for a proceeding if the applicant would experience financial hardship as a result of paying the fee.

(3) If the applicant is a researcher, the court:

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231. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 10.11(1)(a).

232. NSW Bar Association, *Submission CI56* [7].

233. *Court Information Act 2010* (NSW) s 15 (uncommenced); *Children's Court of Western Australia Act 1988* (NSW) s 51A(10).

234. Australia's Right to Know, *Submission CI59*, 30.

235. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 10.11(1)(b).

236. Courts, Tribunals and Service Delivery, NSW Department of Communities and Justice, *Submission CI53*, 6; Supreme Court of NSW, *Submission CI55* [25].

(a) may waive or reduce any prescribed fee to access a record on the court file for any reason it considers appropriate, and

(b) in determining whether to do so, may have regard to:

(i) the administrative burden of providing access to the record

(ii) the level of funding available to the researcher as part of the research project

(iii) the number or volume of records requested by the researcher, and

(iv) any other matter that the court considers relevant.

5.231 Recommendation 5.10, which specifies when prescribed access fees can be waived or reduced, is intended to provide greater certainty and reduce the time it takes to process access requests. Some submissions supported this approach.[237]

Accused persons and offenders or their legal representative

5.232 Recommendation 5.10(1)(a) is similar to the approach in Western Australia, where an accused person is entitled to a free copy of the record or transcript of their case.[238]

5.233 Recommendation 5.10(1)(a) is the same as our draft proposal,[239] except that it applies to both an "accused person" and an "offender". This responds to a concern raised by knowmore[240] and is intended to ensure that persons convicted or sentenced for a criminal offence, as well as those accused before conviction, are exempt from paying fees to access records on the court file.

5.234 Recommendation 5.10(1)(a) also applies to the "legal representative" of an accused person or an offender. This is consistent with recommendation 5.1(1) that both parties and their legal representatives should be entitled to access records on the court file for their proceeding.

Victims, complainants and protected persons

5.235 While the access framework would apply the same rules to members of the public as to victims, complainants and protected persons, we recognise that their interest in and need to access court records is greater than that of the public.[241] We also agree that a requirement to pay fees could:

- deter a victim from seeking access, where a victim is experiencing financial distress
- further disempower victims, and

237. NSW Bar Association, *Submission CI56* [7]; Legal Aid NSW, *Submission CI57*, 28.

238. *Criminal Procedure Rules 2005* (WA) r 43(1).

239. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 10.12(1)(a).

240. knowmore, *Submission CI43*, 25.

241. Legal Aid NSW, *Submission CI57*, 25.

- operate as an additional barrier to victims' full engagement in the criminal justice system.[242]

5.236 It is therefore appropriate for victims, complainants and protected persons to be exempt from paying fees to access court records. We received support for this approach in submissions and consultations.[243]

A member of the public experiencing financial hardship

5.237 Recommendation 5.10(2) is intended to reduce the likelihood of members of the public from being barred from accessing court records solely because of their financial circumstances. It aligns with some access regimes elsewhere in Australia, which allow fees to be waived on grounds of financial hardship.[244]

Researchers

5.238 Under recommendation 5.10(3)(a), where an access applicant is a researcher, the court would be able to waive or reduce any prescribed fee to access a record on the court file for any reason it considers appropriate.

5.239 Some stakeholders supported waiving or reducing fees for researchers seeking access to court records.[245]

5.240 The list of matters in recommendation 5.10(3)(b) that courts can consider in deciding whether to waive or reduce fees is intended to assist decision-makers. The administrative burden of providing access to the court record, specified in recommendation 5.10(3)(b)(i), is relevant to whether a fee should be waived.

5.241 Another relevant factor, specified in recommendation 5.10(3)(b)(ii), is the level of funding available to the researcher as part of the research project; details of which could be included in the access application. Where funding for a project is limited, a court might be inclined to waive or reduce any prescribed access fee.

5.242 A third relevant factor, specified in recommendation 5.10(3)(b)(iii), is the number or volume of records requested by the researcher. Where, for example, a researcher seeks access to a large number of documents, a court could impose a one-off or flat

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242. Legal Aid NSW, *Submission CI24*, 12–13.

243. Legal Aid NSW, *Submission CI24*, 4, 12–13, 23; Legal Aid NSW, *Submission CI57*, 25, 28; Rape and Domestic Violence Services Australia, *Submission CI61* [45]; Women's Legal Service NSW, *Consultation CIC07*.

244. *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 and Family Court Regulations 2012* (Cth) reg 2.04(2), reg 2.06.

245. L McNamara and J Quilter, *Preliminary Submission PCI14*, 3; Rape and Domestic Violence Services Australia, *Submission CI08* [32], [34]; Fighters Against Child Abuse Australia, *Submission CI32*, 34; T Sourdin, *Submission CI40*, 2.

fee. This could reduce the cost for the researcher and the administrative burden on courts processing applications for individual court records.

5.243 The reference to any other matter that the court considers relevant in recommendation 5.10(3)(b)(iv) emphasises that the list is not exhaustive, and the court can take into account factors that are specific to the particular case.

Liability protections

Protections in respect of actions for defamation or breach of confidence

Recommendation 5.11: Protection in respect of actions for defamation or breach of confidence for courts and court officers

The access framework in the new Act should provide:

(1) If a record on the court file is provided to an applicant under the access framework:

(a) no action for defamation or breach of confidence lies against the Crown, a court or a court officer by reason of providing the record, and

(b) no action for defamation or breach of confidence in respect of any publication involved in, or resulting from, the provision of the record lies against the author of the record or any other person by reason of the author or other person having supplied the record to a court.

(2) For the purposes of the law relating to defamation or breach of confidence, the provision of access to a record on the court file under the access framework does not constitute an authorisation or approval for the person to whom access is provided to publish a record, or its contents.

5.244 Recommendation 5.11 would:

- preclude actions for defamation or breach of confidence when a court record is given to an applicant under the access framework, and the decision-maker believes in good faith that the framework permits or requires this, and
- clarify that, for the purposes of the law relating to defamation or breach of confidence, the act of giving access does not constitute an authorisation or approval for the person to whom access is given to publish the record, or its contents.

5.245 Defamation is a tort that protects a person's interests in their reputation. It is committed upon "the publication of defamatory matter of any kind".[246] Defamatory matter is

246. *Defamation Act 2005* (NSW) s 7(2).

"published" if it is communicated to a third person.[247] Matter is "defamatory" if it is likely, in the minds of ordinary, reasonable people, to injure another's reputation.[248]

5.246 Breach of confidence is the misuse of confidential information that requires protection by legal action. It arises where information, which can be "identified with specificity" and has "the necessary quality of confidence", is received "in circumstances importing an obligation of confidence" and there is an "actual or threated misuse of the information" without consent.[249]

5.247 Recommendation 5.11 is intended to expedite access to information by relieving courts from the necessity of considering whether they might otherwise incur liability for defamation or breach of confidence. It is similar to the *Court Information Act* and the *Government Information (Public Access) Act 2009* (NSW) (*GIPA Act*).[250]

Protection in respect of criminal liability

Recommendation 5.12: Protection in respect of criminal liability for court officers

The access framework in the new Act should provide that if a record on the court file is provided pursuant to a decision under the framework, and the decision-maker believes in good faith when making the decision that the framework permits or requires the decision to be made, neither the person who makes the decision nor any other person concerned in providing the record is guilty of an offence merely because of the making of the decision or the provision of the record.

5.248 Recommendation 5.12 is intended to ensure that a person who makes a decision to disclose a court record is not guilty of an offence merely because of the provision of the record, if the person believed in good faith that the access framework permitted or required this.

5.249 Recommendation 5.12 is similar to the *Court Information Act* and the *GIPA Act.*[251]

Protection from personal liability

Recommendation 5.13: Personal liability of court officers

The access framework in the new Act should provide that no matter or thing done or not done by a court officer, or by any person acting under the direction of a court officer, if the matter or thing was done or not done in good faith for the purposes of executing the access

247. *Lee v Wilson* (1934) 51 CLR 276, 288; *Dow Jones and Co Inc v Gutnick* [2002] HCA 56, 210 CLR 575 [26].
248. *Consolidated Trust Co Ltd v Browne* (1948) 49 SR (NSW) 86, 88.
249. *Optus Networks Pty Ltd v Telstra Corp Ltd* [2010] FCAFC 21 [39].
250. *Court Information Act 2010* (NSW) s 23(1)(a)–(b), s 23(2) (uncommenced); *Government Information (Public Access) Act 2009* (NSW) s 113.
251. *Court Information Act 2010* (NSW) s 23(1)(c) (uncommenced); *Government Information (Public Access) Act 2009* (NSW) s 114.

framework, subjects the court officer, or person so acting, personally to any action, liability, claim or demand.

5.250 Recommendation 5.13 is to protect people involved in the administration of the access framework (such as court officers) from personal liability, where they act in good faith. This protection may help to:

- prevent court officers from being deterred from releasing a court record to an applicant under the access framework due to concerns about personal liability, and
- expedite access to court records by relieving court officers from the necessity of considering whether they would otherwise potentially incur such liability.

5.251 Recommendation 5.13 is similar to the *Court Information Act* and the *GIPA Act.*[252]

Offence of unauthorised use or disclosure of personal identification information

Recommendation 5.14: Offence of unauthorised use or disclosure of personal information

The access framework in the new Act should provide:

(1) Any applicant who is given access to a record on a court file must not use or disclose (including by publication) any personal identification information contained in it except with the permission of:

(a) the court, or

(b) the person to whom the personal identification information relates, unless:

(i) such information also includes personal identification information of another person, and

(ii) that other person does not consent to use or disclosure of their personal identification information.

(2) The maximum penalty for using or disclosing personal identification information contained in a court record without permission is:

(a) for an individual: a fine of 100 penalty units, or

(b) for a corporation: a fine of 500 penalty units.

(3) Proceedings for the offence are to be dealt with:

(a) summarily before the Local Court, or

(b) summarily before the Supreme Court in its summary jurisdiction.

5.252 Recommendation 5.14(1) is to make it an offence for an applicant, who is given access to a record on the court file, to use or disclose (including by publication) any personal

252. *Court Information Act 2010* (NSW) s 24 (uncommenced); *Government Information (Public Access) Act 2009* (NSW) s 115.

identification information in the record, unless the court or the person to whom the information relates permits this.

5.253 Recommendation 5.14(1) is intended to provide a layer of protection for personal identification information contained in all court records, including those that are accessible to an applicant as of right. It should also provide some protection where an applicant is inadvertently given access to a court record containing personal identification information that was intended to be redacted, pursuant to an order made by the court in the process of granting leave to an applicant to access the record.

5.254 The recommended offence is similar to that contained in the *Court Information Act,* which would have prohibited the media from publishing personal identification information.[253] The offence should apply to all applicants, as we agree the privacy of personal information contained in court records "should be protected stringently".[254] Imposing criminal sanctions is intended to deter improper disclosure of personal identification information.

5.255 Unlike the offence in the *Court Information Act*, the recommended offence applies to misuse as well as disclosure of personal identification information (that is, using the information in a way that has not been permitted by the court or the person to whom the information relates). This is intended to deter personal identification information from being used for identity theft or to target people for commercial, criminal or other purposes.

5.256 Under recommendation 5.14(1) either the court, or the person to whom the personal identification information relates, would be able to permit use or disclosure of the information. This allows the person to exercise control over their personal identification information. It is envisaged that the circumstances in which a court would permit such use or disclosure would be highly unusual.

5.257 However, such permission as a person can give about their personal identification information should not extend to information that includes another person's personal identification information, where that other person does not also give permission. Recommendation 5.14(1)(b) is intended to ensure that any such other person's personal identification information is not used or disclosed contrary to their wishes.

5.258 The maximum penalty for the offence would be 100 penalty units ($11,000) for an individual or 500 penalty units ($55,000) for a corporation. Proceedings for the offence would be dealt with summarily in the Local Court or in the summary jurisdiction of the Supreme Court. This is the same as our recommendation in relation to the offence of breaching a condition on access to or use of a court record (recommendation 5.8).

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253. *Court Information Act 2010* (NSW) s 10(3) (uncommenced).

254. Fighters Against Child Abuse Australia, *Submission CI32*, 20.

5.259 Legal Aid queried how the recommended offence would be brought to an access applicant's attention.[255] This should be left to the courts to address.

5.260 One option is for a court's application form to notify access applicants that it is an offence to misuse or disclose personal identification information contained in court records. For example, the form for accessing materials in criminal proceedings in the Local Court, District Court and Children's Court currently requires applicants to acknowledge that:

- it is an offence to use any device to photograph court documents, and
- approval to inspect or copy a court document does not override legislated prohibitions on the publication or broadcasting of certain court information.[256]

No offence of unauthorised disclosure of court records by court officers

5.261 In our draft proposals, we sought views about whether an offence of unauthorised disclosure of court records by court officers, with knowledge that the disclosure is unauthorised, is necessary.[257]

5.262 The *Court Information Act* would have made it an offence for a court officer to disclose or use court information without the consent of the person from whom the information was obtained, or in breach of the access provisions in the Act, unless otherwise authorised or required by regulations or law.[258]

5.263 The offence would not have included a mental element. It would not have been necessary for the court officer to have intended to disclose the information in breach of the Act. However, there would have been a defence if the court officer disclosed information in error but believed in "good faith" that they were permitted or required by the legislation to disclose it.

5.264 The maximum penalty for the offence would have been 100 penalty units ($11,000) or two years' imprisonment.[259]

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255. Legal Aid NSW, *Submission CI57*, 28.
256. Local Court of NSW, "Record of Application by a Non-Party for Access to Material held by the Court" (supplied by Local Court of NSW, 24 November 2020).
257. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) [10.48]–[10.49].
258. *Court Information Act 2010* (NSW) s 20 (uncommenced).
259. *Court Information Act 2010* (NSW) s 20 (uncommenced).

5.265 The offence in the *Court Information Act* may have been one of the main impediments to its commencement. There were strong concerns that court officers could be prosecuted if they made a mistake when providing a person with access to court records.[260] We suggested that if such an offence were considered necessary for the new access framework, it should:

- only capture intentional disclosures, made with knowledge that the disclosure is unauthorised, and
- not capture a disclosure where the court officer believes in good faith that it was permitted or required by the access framework.[261]

5.266 We received few submissions on this issue.[262] The ODPP suggested that intentional disclosures of personal information contained in court records by court officers could already be covered by the offence of corrupt disclosure and use of personal information by public sector officials in the *PPIPA*.[263]

5.267 This offence is committed where a public sector official, otherwise than in connection with the lawful exercise of their official functions, intentionally discloses or uses any personal information about another person to which the official has or had access in the exercise of their official functions. The maximum penalty is 100 penalty units ($11,000), imprisonment for 2 years, or both.[264]

5.268 However, *PPIPA* does not apply in relation to a court exercising the court's judicial functions.[265] This may include registry staff releasing court records containing personal details.[266] Further, the offence in *PPIPA* is limited to corrupt disclosure and use of personal information by public sector officials. It may not cover unauthorised disclosure of court records that do not contain personal information.

5.269 Nevertheless, our view is that it is unnecessary to include an offence of unauthorised disclosure of a court record by a court officer in the new access framework. Submissions and consultations did not indicate that court officers disclosing court records without authorisation is a current issue of concern. Further, if this was to occur,

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260. Local Court of NSW, *Preliminary Consultation PCIC12*; Supreme Court of NSW, *Consultation CIC14.*
261. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 10.14 [10.49].
262. NSW Office of the Director of Public Prosecutions, *Submission CI48*, 5; NSW Bar Association, *Submission CI56* [64]–[65].
263. NSW Office of the Director of Public Prosecutions, *Submission CI48*, 5.
264. *Privacy and Personal Information Protection Act 1998* (NSW) s 62(1).
265. *Privacy and Personal Information Protection Act 1998* (NSW) s 6(1), s 6(3).
266. *NZ v Attorney General's Department* [2005] NSWADT 103 [18]–[19]; *NZ v Director General, Attorney General's Department* [2005] NSWADTAP 62 [3], [8]; *Budd v Director, Attorney General's Department* [2006] NSWSC 1267 [20].

we envisage that the court officer could be dealt with according to internal disciplinary proceedings.

5.270 As we discuss above, the *GIPA Act* includes a range of liability protections for courts and court officers, and we recommend that similar protections should be included in the new access framework. However, the *GIPA Act* does not include an offence of unauthorised disclosure of information by a person exercising a function under the Act. It is appropriate that the recommended access framework takes the same approach.

5.271 We therefore do not recommend that the access framework include an offence of unauthorised disclosure of court records by court officers.

6. The new Act: Powers to make orders – powers, grounds and scope

In Brief

In NSW, legislation contains general powers to make non-publication and non-disclosure orders, but not exclusion or closed court orders. The new Act should include powers and grounds for making all of these types of orders. It should also outline requirements around the scope of such orders and allow them to include exceptions and conditions.

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6.1 This chapter contains our recommendations relating to general powers to make non-publication, non-disclosure, exclusion and closed court orders under the new Act. The grounds for making non-publication, non-disclosure, exclusion and closed court orders would be similar, with some variances to reflect the different purposes and effect of the respective orders. Courts would be required to define the scope of the order in several respects. Some standard exceptions would apply, and a court would be able to make an order subject to exceptions and conditions as it sees fit.

6.2 The following chapter 7 contains recommendations in relation to the procedures for making, reviewing and appealing non-publication, non-disclosure, exclusion and closed court orders under the new Act.

Safeguarding the public interest in open justice is a primary consideration

Recommendation 6.1: Safeguarding the public interest in open justice is a primary consideration

The new Act should provide that safeguarding the public interest in open justice is a primary consideration when considering whether to make a non-publication, non-disclosure, exclusion or closed court order.

6.3 Recommendation 6.1 is for the new Act to specify that a primary consideration for a court when making an order is safeguarding the public interest in open justice.

6.4 This recommendation is similar to s 6 of the *Court Suppression and Non-publication Orders Act 2010* (NSW) (*CSNPO Act*), which requires a court, when deciding whether to make an order, to "take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice". However, while some stakeholders expressed support for s 6,[1] others considered that the wording does not adequately reflect the place of open justice in the system.[2]

6.5 Recommendation 6.1 differs from our draft proposal, which was that the new Act should include a clause outlining principles that a court must take into account when deciding whether to make an order:

> (a) open justice is a fundamental aspect of the administration of justice and plays a critical role in:
>
> (i) maintaining public confidence in the administration of justice
>
> (ii) maintaining the integrity and impartiality of courts, and
>
> (iii) enabling the fair and accurate reporting of court proceedings
>
> (b) orders should only be made if, and to the extent necessary, on one or more of the grounds specified in [the new Act], and
>
> (c) orders should be made in a way that is clear, consistent and of limited scope and duration.[3]

6.6 Some stakeholders supported our proposed principles.[4] However, others considered that the principles did not sufficiently acknowledge the importance of open justice or repeated substantive clauses elsewhere the new Act.[5] In light of this feedback, we do not recommend a principles clause.

6.7 By stating that open justice is a primary, as distinct from a paramount, consideration, recommendation 6.1 recognises that while open justice is important, it does not prevent consideration of, nor necessarily prevail over, other important matters. It is well-established that the principle of open justice is not absolute.[6]

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1. NSW Office of the Director of Public Prosecutions, *Submission CI17*, 11; Legal Aid NSW, *Submission CI57*, 9.
2. Roundtable 1, *Consultation CIC02*.
3. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 4.2.
4. knowmore, *Submission CI43*, 6; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission CI49*, 2; NSW Bar Association, *Submission CI56* [7].
5. Australia's Right to Know, *Submission CI59*, 9–10; Legal Aid NSW, *Submission CI57*, 9.
6. *Scott v Scott* [1913] AC 417, 437–438; *Russell v Russell* (1976) 134 CLR 495, 520; *Hogan v Hinch* [2011] HCA 4, 243 CLR 506 [20]–[21].

6.8 Some stakeholders suggested that legislation should specify that the media have a right to publish information from court proceedings.[7] Legislation in South Australia (SA) includes a requirement to recognise "the public interest in open justice and the consequential right of the news media to publish information relating to court proceedings" when making a suppression order.[8]

6.9 We do not consider this needs to be included in the new Act. The objects of the new Act recognise the importance of promoting transparency of decision-making and public confidence in and understanding of the courts including by facilitating the fair and accurate reporting of proceedings.[9]

6.10 Some submissions suggested that legislation should set out other considerations that a court must balance against the principle of open justice when making an order, such as:

- the best interests of a child[10]
- privacy,[11] and
- the need to protect sensitive information and vulnerable people.[12]

6.11 We do not recommend including other considerations in the new Act. Rather, the circumstances where it may be necessary to depart from open justice should be set out as specific grounds (recommendations 6.4–6.6).

Powers to make orders

Recommendation 6.2: Powers to make orders

The new Act should provide:

(1) A court may, by making a non-publication or non-disclosure order on grounds permitted by this Act, prohibit or restrict the publication and/or disclosure of:

(a) information tending to identify 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 (including by requiring the use of a pseudonym)

(b) information, whether or not received into evidence, given in proceedings before the court, or

7. Australia's Right to Know, *Submission CI27*, 54–55; Roundtable 1, *Consultation CIC02*.
8. *Evidence Act 1929* (SA) s 69A(2)(a).
9. Recommendation 4.2.
10. knowmore, *Submission CI43*, 7, 26.
11. Roundtable 2, *Consultation CIC03*.
12. Rape and Domestic Violence Services Australia, *Submission CI61* [12].

(c) information that comprises evidence that may be adduced or given in proceedings before the court.

(2) A court may, by making an exclusion order on grounds permitted by this Act, exclude a specified person or class of people, or all people other than those whose presence is necessary, from the whole or any part of proceedings.

(3) A court may, by making a closed court order on grounds permitted in this Act:

(a) exclude all people, other than those whose presence is necessary, from the whole or any part of proceedings, and

(b) as a result, prohibit the disclosure (by publication or otherwise) of information from the closed part of proceedings.

6.12 Recommendation 6.2 is for the new Act to expressly confer powers on the court to make non-publication, non-disclosure, exclusion and closed court orders on the grounds permitted in the Act.

A court may make a non-publication or non-disclosure order

6.13 Recommendation 6.2(1) empowers a court to make a non-publication or non-disclosure order in relation to certain information. This recommendation is similar to the *CSNPO Act*,[13] with some amended and additional categories of information.

Information tending to identify a person

6.14 Recommendation 6.2(1)(a) is to allow a court to make a non-publication or non-disclosure order in relation to information tending to identify a party or witness in proceedings, or any other person who is related to or otherwise associated with a party or witness. In chapter 4, we recommend that a definition of "information tending to identify" a person should be included in the new Act.[14]

6.15 Recommendation 6.2(1)(a) also clarifies that requiring the use of a pseudonym is one way to give effect to a non-publication or non-disclosure order. Pseudonym orders are used to protect a person's identity by requiring that they are to be referred to by another name or initials. There is no express mention of pseudonym orders in the *CSNPO Act*. However, in practice, courts have made orders under that Act that a person be referred to by a pseudonym.[15] The Office of the Director of Public Prosecutions (ODPP) supported the explicit inclusion of pseudonyms in the new Act.[16]

6.16 Australia's Right to Know (ARTK) suggested that courts should allocate pseudonyms in a way that makes them identifiable from one another. For example, some courts frequently use the pseudonym "AB", "making it difficult to distinguish one AB matter

13. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 7.

14. Recommendation 3.3, 4.5(2).

15. See, eg, *Brown v R (No 2)* [2019] NSWCCA 69 [34]–[39], [45]; *Le v R* [2020] NSWCCA 238 [227]–[229]; *"X" v Sydney Children's Hospitals Specialty Network* [2011] NSWSC 1272. See also Australia's Right to Know, *Submission CI59*, 2.

16. NSW Office of the Director of Public Prosecutions, *Submission CI48*, 2.

from another".[17] We consider that this is a matter for the practice of the courts, rather than for legislative intervention.

Information given in proceedings

6.17 Recommendation 6.2(1)(b) is to allow a court to make a non-publication or non-disclosure order in relation to information given in proceedings, whether or not the information was received into evidence.

6.18 This is broader than s 7(b) of the *CSNPO Act,* which refers to "information that comprises evidence, or information about evidence, given in proceedings before the court". The recommendation intends that all information from court proceedings can be captured by an order.

6.19 The recommendation is similar to:

- Commonwealth legislation, which allows an order to be made in relation to "information that comprises evidence or information about evidence",[18] and
- legislation in SA, which defines "evidence" as including "any statement made before a court whether or not the statement constitutes evidence for the purposes of proceedings before the court".[19]

Information that may be adduced or given in proceedings

6.20 Recommendation 6.2(1)(c) is to allow a court to make a non-publication or non-disclosure order in relation to information that comprises evidence that may be adduced or given in proceedings before the court, such as material that will be served in the brief but has not yet been tendered. The *CSNPO Act* does not include an explicit reference to this type of information.[20]

6.21 In one case, the Supreme Court observed that an order could be made under the *CSNPO Act* in relation to the identity or evidence of a person who was going to be a witness, but who had not yet appeared, "[o]therwise, the protection of the Act would be rendered futile".[21] However, the Commonwealth Director of Public Prosecutions (CDPP) submitted that the current definition of evidence in the *CSNPO Act* has resulted in situations:

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17. Australia's Right to Know, *Submission CI59*, 2–3.
18. See, eg, *Federal Court of Australia Act 1976* (Cth) s 37AF(1)(b)(i); *Judiciary Act 1903* (Cth) s 77RE(1)(b)(i).
19. *Evidence Act 1929* (SA) s 68 definition of "evidence".
20. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 7.
21. *McLachlan v Browne (No 3)* [2018] NSWSC 830 [11].

where it was difficult for the Prosecution to obtain a non-publication order in relation to evidence that *will* be served as part of the brief of evidence, but it has not yet been given in proceedings before the court.[22]

6.22 For the avoidance of doubt, the new Act should clarify that a non-publication or non-disclosure order can be made in such circumstances.

6.23 Recommendation 6.2(1)(c) is similar to Commonwealth legislation, which allows for an order to be made in relation to information obtained during discovery, produced under subpoena, or lodged with or filed in the court.[23]

Scope of power to make orders over information extraneous to proceedings

6.24 The *CSNPO Act* generally empowers a court to make a non-publication or non-disclosure order in relation to information revealed during court proceedings.[24] These orders constitute exceptions to open justice, as they prevent publication or disclosure of such information.

6.25 This type of information can be distinguished from material that does not come from court proceedings, but that may result in prejudice to proceedings (that is, "extraneous prejudicial material"). It may include information about a defendant's prior conduct or convictions, or a related police investigation. The publication or disclosure of extraneous prejudicial material is generally subject to the law of sub judice contempt.[25]

6.26 Courts usually rely on the threat of sub judice contempt to deter publication of potentially prejudicial material. However, in exceptional circumstances, a superior court can also issue an injunction to restrain threatened sub judice contempt. For the court to issue an injunction, it must be considered that the sanctions provided by the law of sub judice contempt are inadequate to prevent publication.[26] This is consistent with the principle that equity should only intervene by way of injunction where the criminal law has proven to be an inadequate deterrent.[27]

6.27 However, the Court of Criminal Appeal observed in *Ibrahim* that the *CSNPO Act* provides the court with the power to make an order in relation to extraneous prejudicial material in certain circumstances. In that case, the Court considered orders made in

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22. Commonwealth Director of Public Prosecutions, *Submission CI21*, 1 (emphasis in original).
23. See, eg, *Federal Court of Australia Act 1976* (Cth) s 37AF(1)(b)(ii)–(iv); *Judiciary Act 1903* (Cth) s 77RE(1)(b)(ii)–(iv).
24. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 7.
25. J Bosland, "Restraining Extraneous Prejudicial Publicity: Victoria and New South Wales Compared" (2018) 41 *UNSW Law Journal* 1263, 1264–1265.
26. J Bosland, "Restraining Extraneous Prejudicial Publicity: Victoria and New South Wales Compared" (2018) 41 *UNSW Law Journal* 1263, 1277.
27. J Bosland, "Restraining Extraneous Prejudicial Publicity: Victoria and New South Wales Compared" (2018) 41 *UNSW Law Journal* 1263, 1264, 1269–1274.

respect of the details of a related police investigation and prosecution of the defendants for conspiracy to murder. The orders were made under the *CSNPO Act* and prohibited "disclosure, dissemination, or provision of access" by any means including "by means of the Internet".[28] The orders were not directed towards any specific person or persons.

6.28 The Court interpreted the ability to make an order in relation to information "otherwise concerning" a party or witness in s 7 of the *CSNPO Act*, combined with the ground for making an order where "necessary to prevent prejudice to the proper administration of justice",[29] as empowering a court to make an order in respect of extraneous prejudicial material. However, this power was not considered to extend beyond the power already available to a superior court to prevent sub judice contempt. That is, the *CSNPO Act* does not provide a court with the power to make a broad order to prevent an anticipated sub judice contempt that purported to bind the world at large.[30]

6.29 The phrase "otherwise concerning" would be retained in the powers clause of the new Act (recommendation 6.2(1)(a)). We also recommend that one of the grounds for making a non-publication or non-disclosure order is where the order is "necessary to prevent prejudice to the proper administration of justice" (recommendation 6.4(a)). The effect of this is that courts, including inferior courts, would continue to have a limited statutory power to make an order in relation to extraneous prejudicial material, as interpreted in *Ibrahim*.

Scope of power to make take down orders

6.30 The Court of Criminal Appeal also observed in *Ibrahim* that an order requiring removal of an existing webpage containing extraneous prejudicial material (a take down order) would fall within the scope of the power to make a non-publication order under the *CSNPO Act*. This is because, in relation to internet content, the Court held that publication is a continuing act for as long as the material is available online.[31] The definition of "publish" that we recommend,[32] is similar to the definition in the *CSNPO Act*,[33] which means this same interpretation may be applied.

6.31 However, as outlined above, an order purporting to bind the world at large would not fall within the scope of a court's powers under the new Act. An order requiring online

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28. *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125, 83 NSWLR 52 [11].
29. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 8(1)(a).
30. *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125, 83 NSWLR 52 [33]–[36], [51]–[55], [63]. See also J Bosland, "Restraining Extraneous Prejudicial Publicity: Victoria and New South Wales Compared" (2018) 41 *UNSW Law Journal* 1263, 1274–1277.
31. *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125, 83 NSWLR 52 [43]. See also J Bosland, "Restraining Extraneous Prejudicial Publicity: Victoria and New South Wales Compared" (2018) 41 *UNSW Law Journal* 1263, 1277.
32. Recommendation 3.2(1).
33. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 3 definition of "publish".

publishers to take down information from the internet "must be directed towards *particular publishers* in relation to *particular publications*".[34]

6.32 We envisage, therefore, that where a party (such as the prosecution) seeks removal of prejudicial information from the internet, they could first contact the publisher and request that the information be taken down. If the publisher does not remove the information within a reasonable time, then an order could be sought against that publisher in relation to the particular material.[35]

6.33 Some commentators have observed that this is a reasonable process for dealing with prejudicial information on the internet, as it:

> 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.[36]

A court may make an exclusion order

6.34 Recommendation 6.2(2) would enable a court to make an exclusion order to physically exclude an individual person or a class of people, or all people other than those whose presence is necessary, from proceedings, whether for the entirety or part of them, for example, while a particular person gives evidence. "Those whose presence is necessary" may include, for example, court staff or a support person who is entitled under legislation to be present while a vulnerable person gives evidence.[37]

6.35 As we discuss in chapter 3, an exclusion order does not have the effect of prohibiting publication or disclosure of information.

6.36 The primary purpose of making an exclusion order under the new Act would be to assist certain witnesses to give their best evidence, rather than to prevent publication or disclosure of information from the proceedings. Given this, an exclusion order made under the Act should not exclude journalists, unless it is in the interests of justice that they are excluded (recommendation 6.12).

6.37 Rape and Domestic Violence Services Australia (RDVSA) expressed concern that the effect of an exclusion order would mean that the identity, or other information relating to,

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34. J Bosland, "Restraining Extraneous Prejudicial Publicity: Victoria and New South Wales Compared" (2018) 41 *UNSW Law Journal* 1263, 1276 (emphasis in original). See also *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125, 83 NSWLR 52 [72].
35. *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125, 83 NSWLR 52 [94].
36. B Fitzgerald and C Foong, "Suppression Orders after *Fairfax v Ibrahim*: Implications for Internet Communications" (2013) 37 *Australian Bar Review* 175, 189.
37. See, eg, Legal Aid NSW, *Submission CI57*, 7.

vulnerable witnesses may be published or disclosed in most cases.[38] However, a number of statutory prohibitions on publication already protect the identity of certain vulnerable witnesses and victims (chapters 8–12).[39] Further, in an appropriate case, a court could, in addition to making an exclusion order, make a non-publication or non-disclosure order in relation to certain information (such as a witness's identity) on one or more of the grounds set out in the new Act.

A court may make a closed court order

6.38 Recommendation 6.2(3) would enable a court to make a closed court order that all people are to be physically excluded from proceedings, other than "those whose presence is necessary". As discussed above, "those whose presence is necessary" may include, among other people, court staff.

6.39 As outlined in chapter 3, a closed court order also has the effect of prohibiting the disclosure of all information from the proceedings or part of proceedings that are closed (that is, a suppression effect). However, a court may authorise publication or disclosure of specific information, by including certain exceptions in the order (recommendation 6.11).

6.40 The primary purpose of a closed court order would be to preserve the confidentiality of what occurs while the court is closed. Therefore, we do not recommend a standard exception for journalists to enter or remain in proceedings subject to a closed court order.

6.41 ARTK did not support including closed court orders in the new Act, due to concerns about the automatic suppression effect of such orders.[40]

6.42 We recognise that closed court orders constitute a significant exception to open justice. However, they are an established and necessary feature of the administration of justice, in limited circumstances (chapter 3).

6.43 To minimise their potential impact, a closed court order could only be made under the new Act where an exclusion, non-publication and/or non-disclosure order would not be sufficient to address the ground on which the order is to be made (recommendation 6.6(1)). Closed court orders are intended to be an option of last resort, to be used only in exceptional circumstances.

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38. Rape and Domestic Violence Services Australia, *Submission CI61* [35].
39. See, eg, *Crimes Act 1900* (NSW) s 578A; *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 45(1).
40. Australia's Right to Know, *Submission CI59*, 3–4, 17, 25.

Grounds for making an order

6.44 The *CSNPO Act* contains a list of grounds upon which a suppression or non-publication order may be made, all of which are prefaced with a requirement that the order be "necessary".[41] The *CSNPO Act* also requires an order to specify the ground or grounds on which the order is made.[42] These features would be carried over to the new Act (recommendations 6.3–6.6).

6.45 Under the new Act, the different types of orders would have some common grounds, based on the grounds in the *CSNPO Act*.[43] This means that there would be different options for addressing a particular ground depending on the intended purpose and effect of the order. The order made should be that which has the least impact on open justice, while achieving the desired effect.

6.46 We also recommend additional grounds, not currently in the *CSNPO Act*, that are unique to certain types of orders:

- additional grounds for making a non-publication or non-disclosure order where the proceedings involve or relate to a domestic violence offence or where a child is a party or a witness, and
- an additional ground for making an exclusion order to support a child or person with a mental health or cognitive impairment to give evidence.

The necessity test

6.47 The new Act would contain a necessity test for all grounds and for all types of orders (recommendations 6.4–6.6).

6.48 In 2003, the Law Reform Commission recommended new legislation empowering courts to prevent publication of information, incorporating the necessity test.[44] This informed the development of the *CSNPO Act*.[45]

6.49 The necessity test has long been used in relation to exceptions to open justice. In the exercise of a court's inherent jurisdiction or implied powers, a court can limit open justice where necessary to secure the proper administration of justice (chapter 2).[46]

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41. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 8(1).
42. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 8(2).
43. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 8(1).
44. NSW Law Reform Commission, *Contempt by Publication*, Report 100 (2003) rec 22.
45. NSW, *Parliamentary Debates*, Legislative Assembly, Agreement in Principle Speech, 29 October 2010, 27197.
46. *John Fairfax and Sons Pty Ltd v Police Tribunal of NSW* (1986) 5 NSWLR 465, 477.

6.50 The necessity test sets a high bar for making an order. The Court of Appeal has noted that the word "necessary" is a "strong word", and held that an order should only be made in "exceptional circumstances".[47] It is not enough for an order to be just "convenient, reasonable or sensible, or to serve some notion of public interest".[48] However, the order does not have to be "essential", as that is too high a threshold.[49]

6.51 Submissions indicated that the necessity test is workable and well understood.[50] The necessity test is also included in other similar legislation.[51]

6.52 Banki Haddock Fiora suggested that the concept of necessity could be expressly defined in legislation.[52] However, the approach to determining necessity is well-established in case law and applied by courts. The definition of an ordinary word would have limited utility and may produce undesirable inflexibility. It may also:

- impact a court's discretion to apply the necessity test in unique circumstances, and
- prevent courts from developing the necessity test, for example, to address the impact of emerging technology.

Impact of futility in applying the necessity test

6.53 We do not recommend that the new Act should address the impact of futility in determining the necessity of an order. As the following cases demonstrate, futility is a matter of degree, and depends on the circumstances and variables in each case.

6.54 In *Ibrahim*, the Court of Criminal Appeal held that an order that is futile cannot, as a matter of construction, be necessary. Justice Basten considered that the order in that case was futile because it was "addressed to the world at large", requiring a broad range of unidentifiable people (including internet service providers) to take down information from the internet. Enforcement of such an order "would be impracticable, if not impossible" and the fact that the order had to be so broad further demonstrated that it would not be effective.[53]

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47. *Rinehart v Welker* [2011] NSWCA 403, 93 NSWLR 311 [27] citing *Hogan v Australian Crime Commission* [2010] HCA 21, 240 CLR 651 [30].
48. *Rinehart v Welker* [2011] NSWCA 403, 93 NSWLR 311 [31] citing *Hogan v Australian Crime Commission* [2010] HCA 21, 240 CLR 651 [31].
49. *R v AB (No 1)* [2018] NSWCCA 113, 97 NSWLR 1015 [75], [78]–[79].
50. NSW, Public Defenders, *Preliminary Submission PCI33*, 4; NSW Office of the Director of Public Prosecutions, *Submission CI17*, 11; Australia's Right to Know, *Submission CI27*, 55.
51. See, eg, *Open Courts Act 2013* (Vic) s 18(1); *Federal Court of Australia Act 1976* (Cth) s 37AG(1); *Judiciary Act 1903* (Cth) s 77RF(1); *Contempt of Court Act 1981* (UK) s 4(2).
52. Banki Haddock Fiora, *Preliminary Submission PCI27*, 5.
53. *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125, 83 NSWLR 52 [72]–[80].

6.55 Justice Basten acknowledged that the meaning of "necessary" in this context was linked to a number of practical variables and factors.[54] It has been noted that these could include:

- the jury's adherence to directions not to search the internet
- alternative methods of restricting access to the relevant information
- whether offending parties were resident in or operating from NSW, and
- whether a notice and take down procedure could be used.[55]

6.56 A recent South Australian Court of Appeal case (which considered *Ibrahim*) held that a take down order was not futile, despite a search of the accused person's name returning over 270,000 results. The majority of the Court observed that, while a court would not ordinarily make an order that is futile:

> authorities also recognise that it is not necessarily fatal to the appropriateness of a take-down order that it may not be entirely effective in removing from the internet access to the adverse material.[56]

6.57 Ultimately, the Court held that the futility question is one of degree, "to be weighed against other relevant considerations",[57] including the risk of prejudice to a defendant if adverse material is readily accessible. In some circumstances, it may be appropriate for the court to make an order that reduces, rather than completely eliminates, the risk of prejudice. However, the Court observed that there must be a sufficient likelihood of the order materially reducing the risk that it seeks to address, so that a casual searcher will be substantially less likely to become aware of such material.[58]

6.58 The Court also acknowledged that requiring courts to engage in overly complex determinations of what might or might not be futile is an unfit use of resources.[59]

6.59 In the Victorian case of *Pell,* which we also discuss in chapter 2, the County Court of Victoria considered that it was necessary to make an order which applied throughout the Commonwealth, to prohibit publication of information about a trial in which Cardinal George Pell was a defendant. The Court considered the issue of futility in light of the significant interstate and international interest in the case, and observed that the proximity of, and economic and social ties between, Victoria and NSW meant that

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54. *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125, 83 NSWLR 52 [46].
55. B Fitzgerald and C Foong, "Suppression Orders after *Fairfax v Ibrahim*: Implications for Internet Communications" (2013) 37 *Australian Bar Review* 175, 185.
56. *Advertiser Newspapers Pty Ltd v Penhall* [2021] SASCA 76 [184].
57. *Advertiser Newspapers Pty Ltd v Penhall* [2021] SASCA 76 [184].
58. *Advertiser Newspapers Pty Ltd v Penhall* [2021] SASCA 76 [182]–[187], [195], [199]–[200].
59. *Advertiser Newspapers Pty Ltd v Penhall* [2021] SASCA 76 [9]–[10].

interstate publicity would have a more "significant and widespread impact upon Victorians than any indirect exposure to international coverage".[60]

6.60 The Court did not accept that the risk of contamination from overseas would render an Australia wide order futile, and observed that:

> Perfect justice may well be an aspiration, but it is not a requirement of a fair trial. The fact that an order does not guarantee perfect impartiality does not mean that such an order is unnecessary.[61]

Requirement to specify the ground or grounds on which the order is made

Recommendation 6.3: Requirement to specify ground or grounds on which the order is made

The new Act should provide that a non-publication, non-disclosure, exclusion or closed court order must specify the ground or grounds on which the order is made.

6.61 Recommendation 6.3 is to require the court to specify the ground or grounds on which an order is made. Doing so demonstrates that a court has considered the relevant grounds and applied the necessity test. It also provides context about the basis on which an order has been made, which may improve general understanding of orders. Further, it may assist parties, the media and others in determining whether to apply for a review or appeal particularly if publicly available reasons have not been released.

6.62 This recommendation is similar to the *CSNPO Act*.[62]

Grounds for making a non-publication or non-disclosure order

Recommendation 6.4: Grounds for making a non-publication or non-disclosure order

The new Act should provide that a court may make a non-publication or non-disclosure order on one or more of the following grounds:

(a) the order is necessary to prevent prejudice to the proper administration of justice

(b) the order is necessary to prevent prejudice to the interests of the Commonwealth or a state or territory in relation to national or international security

(c) the order is necessary to protect the safety of any person

(d) the order is necessary to avoid causing undue distress or embarrassment to a party to or witness (not including a defendant) in any criminal proceeding that involves a prescribed sexual offence or domestic violence offence

(e) the order is necessary to avoid causing undue distress or embarrassment to a party to or witness in any civil proceeding that involves, or relates to, a prescribed sexual offence or domestic violence offence

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60. *DPP (Vic) v Pell* [2018] VCC 905 [59].
61. *DPP (Vic) v Pell* [2018] VCC 905 [59].
62. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 8(2).

(f) the order is necessary to avoid causing undue distress or embarrassment to a child who is a party to or witness in any legal proceeding, or

(g) 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.

6.63 Recommendation 6.4 sets out grounds for making a non-publication or non-disclosure order under the new Act. These grounds are similar to those contained in the *CSNPO Act*,[63] with some amendments and additions.

6.64 Some grounds for making a non-publication or non-disclosure order may overlap with statutory prohibitions on publication and disclosure in subject-specific legislation (chapters 8–12). These grounds still have utility, as a court could make an order under the new Act:

- in relation to evidence or information that is not protected by the statutory prohibition, as several statutory prohibitions apply to a person's identity, but do not cover other information revealed in proceedings
- in relation to other people involved in a proceeding, or
- that information is not disclosed, as some statutory prohibitions prohibit publication, but not disclosure, of the relevant information.

Necessary to prevent prejudice to the proper administration of justice

6.65 The ground in recommendation 6.4(a) aligns with the *CSNPO Act*.[64] It also reflects the ground established at common law for prohibiting the publication of information where it is "really necessary to secure the proper administration of justice".[65]

6.66 The concept of the administration of justice has been interpreted broadly by the courts. In *Ibrahim,* Justice Basten observed that the administration of justice may include consideration of:

> consequences not just for the present case but for future cases, including the supply of information from victims of unlawful conduct and the willingness of witnesses to give evidence.[66]

6.67 Therefore, there is often overlap between the administration of justice ground and other grounds. This includes where the order is necessary to protect a person's safety or to

63. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 8(1).
64. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 8(1)(a).
65. *John Fairfax and Sons Pty Ltd v Police Tribunal (NSW)* (1986) 5 NSWLR 465, 477.
66. *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125, 83 NSWLR 52 [48].

avoid causing undue distress and embarrassment to a party or witness in a proceeding involving a sexual offence.[67]

6.68 However, this is the only ground that "appears to extend to the protection of the jury from inflammatory or irrelevant material while the proceedings are on foot".[68] The administration of justice ground in the *CSNPO Act* has been engaged where it was considered necessary to:

- prohibit the disclosure of certain information in one trial to prevent prejudice to subsequent or related trials[69]
- protect confidential police methods, undercover police or informers[70]
- protect witnesses from intimidation or retribution, and to ensure that future witnesses are not dissuaded from giving evidence,[71] and
- protect trade secrets or other information that may cause irreparable economic damage.[72]

6.69 A similar ground for making orders exists in other Australian states.[73]

Necessary to prevent prejudice to the interests of the Commonwealth or a state or territory in relation to national or international security

6.70 The ground in recommendation 6.4(b) aligns with the *CSNPO Act*.[74] Under that ground, courts have made orders to protect:

- the identity of a prosecution witness in a terrorism trial[75]
- investigation techniques used by the Australian Federal Police in relation to terrorist crimes,[76] and

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67. *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125, 83 NSWLR 52 [48]. See, eg, *Wilson v Basson* [2020] NSWSC 512 [57]; *R v Popovic (No 1)* [2017] NSWSC 1017 [53]; *R v Azari (No 8)* [2018] NSWSC 1674 [13]–[24].
68. *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125, 83 NSWLR 52 [36].
69. See, eg, *R v Dirani (No 23)* [2018] NSWSC 1200 [20]–[23].
70. See, eg, *R v Simmons (No 5)* [2015] NSWSC 333 [38]–[39]; *R v Musleh (No 2)* [2018] NSWSC 1221 [7].
71. See, eg, *Wilson v Basson* [2020] NSWSC 512 [53]; *R v Popovic (No 1)* [2017] NSWSC 1017 [42].
72. See, eg, *Re XY* [2013] NSWSC 1747 [4]–[7].
73. *Open Courts Act 2013* (Vic) s 18(1)(a); *Evidence Act 1929* (SA) s 69A(1)(a).
74. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 8(1)(b).
75. *R v Azari (No 8)* [2018] NSWSC 1674 [13]–[24].
76. *R v Musleh (No 2)* [2018] NSWSC 1221 [6].

- information about the manufacture and use of weapons intended for a terrorism offence.[77]

6.71 We did not receive any submissions that opposed this ground. Other legislation empowering courts to make similar orders includes national or international security as a ground.[78]

Necessary to protect the safety of any person

6.72 The ground in recommendation 6.4(c) is the same as a ground for making an order in the *CSNPO Act*.[79] In relation to that Act, safety has been interpreted to mean physical safety as well as psychological safety, including aggravation of a pre-existing mental health condition, and avoiding an increased risk of suicide or other self-harm.[80]

6.73 The correct test for determining whether an order is necessary to protect the safety of a person is the calculus of risk approach.[81] This approach:

> 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.[82]

6.74 Johnston and co-authors expressly supported the safety ground as it provides courts with a basis to supress vigilantism.[83]

6.75 In our survey, we asked respondents when information should be kept from the public. Of the 125 people who answered the question, 107 (85.60%) chose "to ensure a person's safety".[84]

6.76 Safety is also included as a ground for making similar orders in other legislation.[85]

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77. *R v Khayat (No 2)* [2019] NSWSC 1315 [5]–[10], [19].
78. *Open Courts Act 2013* (Vic) s 18(1)(b); *Federal Court of Australia Act 1976* (Cth) s 37AG(1)(b); *Judiciary Act 1903* (Cth) s 77RF(1)(b); *Criminal Procedure Act 2011* (NZ) s 200(2)(h), s 202(2)(f), s 205(2)(f).
79. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 8(1)(c).
80. *AB v R (No 3)* [2019] NSWCCA 46, 97 NSWLR 1046 [59].
81. *AB v R (No 3)* [2019] NSWCCA 46, 97 NSWLR 1046 [56]–[60]. See also *Brown v R* (No 2) [2019] NSWCCA 69 [36]–[38]; *Council of New South Wales Bar Association v EFA* [2021] NSWCA 339 [229].
82. *AB v R (No 3)* [2019] NSWCCA 46, 97 NSWLR 1046 [56].
83. J Johnston, P Keyzer and T Johnston, *Submission CI13*, 3.
84. *Open Justice: Survey Results*, Research Report 16 (NSW Law Reform Commission, 2022) table 2.2.
85. *Open Courts Act 2013* (Vic) s 18(1)(c); *Federal Court of Australia Act 1976* (Cth) s 37AG(1)(c); *Judiciary Act 1903* (Cth) s 77RF(1)(c); *Criminal Procedure Act 2011* (NZ) s 200(2)(e), s 202(2)(c), s 205(2)(c).

6.77 Some stakeholders argued that applications made under this ground in the *CSNPO Act* are frequently successful, and that orders are sometimes made in relation to minor threats to a person's safety.[86] However, in several cases courts have refused to make an order either where the risk to the person's safety was not significant or imminent, or where there was a lack of evidence that the person may be subject to physical or psychological harm.[87]

Necessary to avoid causing undue distress or embarrassment to a party or witness in criminal or civil proceedings involving or relating to a sexual offence

6.78 The ground in recommendation 6.4(d) is similar to s 8(1)(d) of the *CSNPO Act*, which enables a court to make an order to avoid causing undue distress or embarrassment to a party to or witness in criminal proceedings involving an offence of a sexual nature.

6.79 A key difference is that, under our recommendation, a court would not be able make a non-publication or non-disclosure order to avoid causing undue distress or embarrassment to a defendant in criminal proceedings involving a sexual offence. A court can currently do so under s 8(3) of the *CSNPO Act* in "exceptional circumstances".

6.80 Of the 125 survey respondents who answered the question of when information should be kept from the public, only 37 (29.60%) chose, "to prevent undue distress or embarrassment to a defendant in a sexual offence case".[88]

6.81 Several submissions supported removing or limiting the ability for defendants in criminal proceedings to rely on this ground.[89] Some suggestions included:

- amending s 8(3) of the *CSNPO Act* so that the court must be satisfied that there is a "sound evidentiary basis for finding that exceptional circumstances apply, which are unrelated to the nature or severity of the … alleged offending"[90]
- amending s 8(3) to prevent adults convicted of sexual offences from relying on this ground,[91] and
- removing s 8(3) entirely and amending the language in s 8(1)(d) so that a defendant cannot rely on this ground, even in exceptional circumstances.[92]

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86. Roundtable 2, *Consultation CIC03.*
87. See, eg, *NSW v Kay* [2017] NSWSC 274 [27]–[28]; *D1 v P1* [2012] NSWCA 314 [49]–[53], [67]–[69]; *A Lawyer v DPP (NSW)* [2020] NSWSC 1713 [83]–[111]; *BSM1 v Trustees of Vincentian Fathers* [2020] NSWSC 1439 [32].
88. *Open Justice: Survey Results*, Research Report 16 (NSW Law Reform Commission, 2022) table 2.2.
89. Legal Aid NSW, *Submission CI57*, 10; Australia's Right to Know, *Submission CI59*, 14.
90. Banki Haddock Fiora, *Preliminary Submission PCI27*, 5.
91. Law Society of NSW, *Preliminary Submission PCI31*, 1.
92. H Brown, *Preliminary Submission PCI10*, 4; Legal Aid NSW, *Submission CI57*, 10; Australia's Right to Know, *Submission CI59*, 14.

6.82 Reasons for removing this ground for criminal defendants included that:

- protecting a defendant's identity on the basis of mere embarrassment, without there being some other serious impact on the administration of justice, is not justifiable, given the primacy of open justice[93]
- some defendants have relied on this ground to silence their victims, which is particularly harmful in the context of coercive control and domestic and sexual abuse,[94] and
- enabling defendants to rely on this ground creates a perception that they are being protected from public scrutiny.[95]

6.83 Moreover, the public policy reasons for protecting complainants and witnesses in sexual offence proceedings, which are founded on encouraging victims to come forward and report offences (chapter 10), do not apply to defendants in criminal proceedings.

6.84 In a consultation, it was suggested that there may be circumstances where defendants should be able to rely on the ground of undue distress or embarrassment, including if they have acute mental illness and there are prospects for rehabilitation and reintegration into the community.[96] However, in such circumstances, defendants would still be able to apply for an order based on other grounds in the new Act. For example, a court could make a non-publication or non-disclosure order on the ground of:

- administration of justice (recommendation 6.4(a)), to protect a defendant's right to a fair trial, or
- safety (recommendation 6.4(c)), in relation to a defendant's psychological safety.

6.85 knowmore suggested that a court should consider "how the identification of a defendant can impact on a victim" for example, by causing undue distress or embarrassment.[97] Recommendation 6.4(d) would only remove a court's ability to make a non-publication or non-disclosure order to avoid undue distress or embarrassment to the defendant. A court could make an order prohibiting or restricting publication or disclosure of the defendant's identity, or other information, on the basis that it may cause undue distress and embarrassment to the complainant. This may occur in circumstances where the complainant and defendant are related, for example.

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93. Banki Haddock Fiora, *Submission CI29*, 3.
94. No to Violence, *Preliminary Submission PCI38*, 2; Women's Domestic Violence Court Advocacy Service NSW Inc, *Preliminary Submission PCI30*, 2–3; Legal Aid NSW, *Submission CI57*, 10.
95. H Brown, *Preliminary Submission PC10*, 4; No to Violence, *Preliminary Submission PCI38*, 2; Fighters Against Child Abuse Australia, *Submission CI32*, 30.
96. Roundtable 2, *Consultation CIC03.*
97. knowmore, *Submission CI43*, 11–12.

6.86 While recommendation 6.4(d) is limited to criminal proceedings, recommendation 6.4(e) would enable a non-publication or non-disclosure order to be made to avoid causing undue distress or embarrassment to a party or witness in civil proceedings that involve, or relate to, a prescribed sexual offence. This is intended to capture a broad range of situations, including civil proceedings that relate to both proven and unproven offences.

6.87 The *CSNPO Act* does not contain an equivalent ground to recommendation 6.4(e). However, sensitive information that may cause a person substantial distress or embarrassment may be revealed in civil proceedings that relate to a sexual offence. The Supreme Court has observed that there is a "very significant public interest" in ensuring complainants of alleged sexual offences are not deterred from litigating their claims due to a fear that this will "expose them to further psychological harm and embarrassment".[98]

6.88 In some civil matters, courts have considered whether to make an order to protect a person who has experienced a sexual offence on other grounds in the *CSNPO Act*, including the grounds of administration of justice and "otherwise necessary in the public interest".[99] While orders have been made in some cases,[100] in one case, the Court of Appeal refused to make an order on either of these grounds.[101]

6.89 Our conclusion is that it is appropriate to include a specific ground to apply in civil proceedings related to a sexual offence. Legal Aid supported including this ground.[102]

6.90 In distinction to criminal proceedings, recommendation 6.4(e) would enable a court to make a non-publication or non-disclosure order in relation to a defendant in civil proceedings. This is because the defendant in civil proceedings may not necessarily be the alleged offender.

6.91 Recommendation 6.4(d)–(e) uses the term "prescribed sexual offence" instead of "offence of a sexual nature". As we discuss in chapter 4, "prescribed sexual offence" would have the same meaning as in s 3(1) of the *Criminal Procedure Act 1986* (NSW) (*Criminal Procedure Act*), which includes a broad range of sexual offences.[103] This is intended to provide clarity around what offences are captured by this ground.

6.92 As in s 8(1)(d) of the *CSNPO Act,* recommendation 6.4(d)–(e) includes the threshold test of "undue" distress or embarrassment. Many stakeholders considered that the

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98. *BDN v McCoy* [2019] NSWSC 1723 [7].
99. See, eg, *NSW v Plaintiff A* [2012] NSWCA 248 [93]–[96]; *McLachlan v Browne* [2018] NSWSC 830 [18], [21]–[25]; *BDN v McCoy* [2019] NSWSC 1723 [6]–[7]; *BCS v NSW Civil and Administrative Tribunal* [2015] NSWSC 126 [3].
100. See, eg, *BDN v McCoy* [2019] NSWSC 1723 [9]; *BCS v NSW Civil and Administrative Tribunal* [2015] NSWSC 126 [3].
101. *NSW v Plaintiff A* [2012] NSWCA 248 [96].
102. Legal Aid NSW, *Submission CI57*, 10.
103. Recommendation 4.3(1)(d).

current test in the *CSNPO Act* sets too high a bar.[104] Some suggested that the word "undue" be removed completely.[105] However, we consider that the qualification of "undue" is appropriate.

6.93 Giving evidence in court is stressful for most people. However, given the importance of open justice in maintaining public confidence in the courts, it is unreasonable to prohibit publication or disclosure of information simply because it may cause some degree of distress or embarrassment.[106]

6.94 In relation to s 8(1)(d) of the *CSNPO Act,* the Court of Criminal Appeal has observed that:

> 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.[107]

6.95 Some stakeholders suggested alternative formulations. For example, some said that the word "re-traumatisation" should be included in addition to "distress" and "embarrassment", to recognise that giving evidence is frequently traumatising for victims and witnesses.[108] We consider that this inclusion is unnecessary as potential traumatisation of a victim is a form of distress and would be considered in evaluating "undue distress".

6.96 Section 578A of the *Crimes Act 1900* (NSW) (*Crimes Act*) prohibits the publication of identifying information about a complainant in a prescribed sexual offence proceeding, and s 294D(4) of the *Criminal Procedure Act* provides a discretion for a court to order that the same protection be given to a tendency witness in the proceedings (chapter 10). Recommendation 6.4(d)–(e) would enable the court to make an order in respect of additional information in relation to parties and witnesses in prescribed sexual offence proceedings.

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104. H Brown, *Preliminary Submission PCI10*, 4; Victims of Crime Assistance League Inc NSW, *Preliminary Submission PCI32*, 3; NSW Office of the Director of Public Prosecutions, *Preliminary Submission PCI12*, 7; NSW Office of the Director of Public Prosecutions, *Submission CI17*, 11–12; Roundtable 3, *Consultation CIC05*.
105. Roundtable 3, *Consultation CIC05*.
106. Roundtable 1, *Consultation CIC02*; Roundtable 2, *Consultation CIC03*.
107. *Liu v Fairfax Media Publications Pty Ltd* [2018] NSWCCA 159 [47].
108. Roundtable 3, *Consultation CIC05*.

Necessary to avoid causing undue distress or embarrassment to a party or witness in criminal or civil proceedings involving or relating to a domestic violence offence

6.97 The grounds in recommendation 6.4(d)–(e) would apply in criminal and civil proceedings relating to or involving a domestic violence offence respectively. There are no equivalent grounds in the *CSNPO Act*.

6.98 Many of the public policy reasons for protecting information about sexual offence complainants also apply to domestic violence complainants. These include preventing stigma and distress and encouraging participation in the justice system (chapter 11).

6.99 Several stakeholders supported enabling a party or witness in a legal proceeding that involves, or relates to, a domestic violence offence, to apply for a non-publication or non-disclosure order on the basis of avoiding undue distress or embarrassment.[109]

6.100 RDVSA observed that complainants in domestic violence matters could rely on the ground of "otherwise necessary in the public interest". However, it considered that "a specific reference to domestic violence matters … would more readily bring the issue to the court's attention".[110] Victorian legislation contains a similar ground to that in recommendation 6.4(d) for making a suppression order in criminal proceedings involving a family violence offence.[111]

6.101 The ground in recommendation 6.4(e) would apply in civil proceedings that involve or relate to an alleged or proven domestic violence offence. This could include apprehended violence order (AVO) proceedings but only where it is alleged an offence has been committed.

6.102 The *Crimes (Domestic and Personal Violence) Act 2007* (NSW) (*Crimes (Domestic and Personal Violence) Act*) enables a court to make an order to prohibit publication of the name of a person who is involved in AVO proceedings, as either a person for whose protection or against whom an order is sought, a witness in the proceedings, or any other person who is otherwise mentioned in the proceedings.[112] The Act also contains a statutory prohibition on publishing the name of a child involved in AVO proceedings (chapter 11).[113]

6.103 ARTK argued that the existence of these provisions in the *Crimes (Domestic and Personal Violence) Act* means that the grounds in recommendation 6.4(d)–(e) are not

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109. Rape and Domestic Violence Services Australia, *Submission CI08* [23], [34]; Legal Aid NSW, *Submission CI24*, 11–12; knowmore, *Submission CI43*, 6, 12–13; Legal Aid NSW, *Submission CI57*, 10; Women's Legal Service NSW, *Consultation CIC07*.

110. Rape and Domestic Violence Services Australia, *Submission CI08* [23].

111. *Open Courts Act 2013* (Vic) s 18(1)(d).

112. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 45(2).

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

necessary.[114] However, there is utility in the new Act including specific grounds for making a non-publication or non-disclosure order in proceedings related to domestic violence offences, as this would allow a court to make an order:

- in criminal proceedings for a domestic violence offence, and
- in relation to information in AVO proceedings, other than identifying information of those involved.

Necessary to avoid causing undue distress or embarrassment to a child who is a party or witness in criminal or civil proceedings

6.104 There is no similar provision to recommendation 6.4(f) in the *CSNPO Act.*

6.105 Our draft proposal was to enable courts to make an order where it is "necessary to avoid causing undue distress or embarrassment to a child who is a party or witness in any civil proceeding".[115] This is because in some, but not necessarily all, civil cases involving a child, it may be necessary to make an order to avoid causing them undue distress and embarrassment. Existing protections for children in relation to civil proceedings are limited (chapter 9). Our proposal was meant to address this gap, and some submissions supported it.[116]

6.106 We have concluded that the ground in recommendation 6.4(f) should also cover a child who is a party or witness in criminal proceedings. While there is a statutory prohibition on publishing the identity of children involved in criminal proceedings, including as defendants, victims and witnesses,[117] there may be situations where, for example, it is necessary to make an order in respect of evidence or information in the proceedings other than the child's identity.

6.107 Child defendants in both criminal and civil proceedings would be able to rely on the ground in recommendation 6.4(f). This is justifiable because children, including child defendants, are a particularly vulnerable group of people, and their interests should be protected, where necessary, in all types of proceedings (chapter 9). knowmore also supported this approach.[118]

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114. Australia's Right to Know, *Submission CI59*, 14.
115. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 4.14(1)(f).
116. knowmore, *Submission CI43*, 12; Legal Aid NSW, *Submission CI57*, 10.
117. *Children (Criminal Proceedings) Act 1987* (NSW) s 15A.
118. knowmore, *Submission CI43*, 12.

Otherwise necessary in the public interest, and that public interest significantly outweighs the public interest in open justice

6.108 The ground in recommendation 6.4(g) aligns with a ground for making an order in the *CSNPO Act*.[119]

6.109 In introducing the Court Suppression and Non-publication Orders Bill 2010 (NSW) to Parliament, the Parliamentary Secretary for Justice said that the intention of this ground was to capture situations that may not be covered by the other specified grounds. However, where there may be other reasons for making an order, they must significantly outweigh the public interest in open justice.[120]

6.110 This ground in the *CSNPO Act* has been relied upon in situations where the circumstances did not clearly fall under one of the other grounds, but it was nevertheless imperative to limit publication or disclosure of information. For example, this ground has been relied on to make orders to:

- Protect the identity of a complainant who was a sex worker, by enabling them to be referred to by a pseudonym. The Court of Criminal Appeal observed that there was significant public interest in encouraging sex workers to report crimes when they may otherwise be deterred through fear of being identified. Anonymisation of the complainant's name was seen to be a limited exception to open justice, which was outweighed by this much larger public benefit.[121]
- Prevent a recording in which an offender promotes extremism and violence from becoming public. The Supreme Court found that it was necessary in the public interest to prohibit such a recording from being published, due to concerns that it would be misused by certain groups for their own benefit.[122]
- Preserve the confidentiality of the terms of a settlement. The Supreme Court observed that there is a broad public interest in parties resolving disputes by settlement. In this case, the agreement to keep the terms of settlement confidential was critical to the resolution of the proceedings.[123]

6.111 Some submissions opposed this ground, citing arguments including:

- it is too broad and confers significant judicial discretion[124]

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119. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 8(1)(e).
120. NSW, *Parliamentary Debates*, Legislative Assembly, Agreement in Principle Speech, 29 October 2010, 27198.
121. *Le v R* [2020] NSWCCA 238 [227]–[229].
122. *R v Hraichie (No 1)* [2019] NSWSC 319 [9]–[18].
123. *Cannon v Griffiths (No 2)* [2015] NSWSC 1329 [14], [17].
124. L Patey, *Preliminary Submission PCI22* [4]–[5]; R Hannan, *Preliminary Submission PCI19*, 3; K Duggan, *Preliminary Submission PCI20* [2.15]–[2.16].

- it may be applied inappropriately by way of a "balancing exercise",[125] and
- legislation in other jurisdictions, such as Victoria and the Commonwealth, does not include an equivalent ground in relation to courts.[126]

6.112 We have concluded that the ground of "otherwise necessary in the public interest" should be included in the new Act. It provides courts with flexibility to make orders in novel or unique situations. The qualification that the public interest in making the order must "significantly" outweigh the public interest in open justice provides an important and sufficient safeguard against courts making an order in circumstances where it is inappropriate or unjustifiable.

No additional grounds

6.113 We considered whether to introduce a new ground, so that a non-publication or non-disclosure order could be made to protect any victim from distress or embarrassment. knowmore supported such a ground.[127] Arguments in favour of it include that victims and witnesses:

- have a greater need for protection from adverse publicity, as they do not have the opportunity to defend themselves against negative assertions that may arise in proceedings, and
- may be unwilling to testify unless they are protected from publicity.[128]

6.114 There was some support for this ground in consultations.[129] In our survey, 65 of the 125 people (52%) who answered the question of when information should be kept from the public chose "to prevent undue hardship to a victim or witness in any court case".[130]

6.115 Some other jurisdictions contain a similar ground. For example, in SA, a court may make a suppression order to prevent undue hardship to an alleged victim of a crime, a witness or potential witness in civil or criminal proceedings (excluding a party), or a child.[131] In the United Kingdom, the court may restrict reports about witnesses under the age of 18 in criminal proceedings if the court is satisfied that the quality of evidence of

125. K Duggan, *Preliminary Submission PCI20* [2.17].
126. L Patey, *Preliminary Submission PCI22* [6]; R Hannan, *Preliminary Submission PCI19*, 3. See also *Open Courts Act 2013* (Vic) s 18(1); *Federal Court of Australia Act 1976* (Cth) s 37AG(1); *Judiciary Act 1903* (Cth) s 77RF(1).
127. knowmore, *Preliminary Submission PCI35*, 3.
128. NSW Law Reform Commission, *Contempt by Publication*, Discussion Paper 43 (2002) [10.88].
129. Roundtable 3, *Consultation CIC05.*
130. *Open Justice: Survey Results*, Research Report 16 (NSW Law Reform Commission, 2022) table 2.2.
131. *Evidence Act 1929* (SA) s 69A(1)(b).

the witness is likely to be diminished due to fear or distress related to being identified as a person concerned in the proceedings.[132]

6.116 Nonetheless, we do not recommend including a specific ground for making orders where it is necessary to protect victims or witnesses from distress, embarrassment or hardship, beyond those relating to parties and witnesses in proceedings relating to a sexual offence or domestic violence offence, and a child involved in legal proceedings (recommendation 6.4(d)–(f)). Participating in criminal or civil proceedings as a victim or witness is frequently stressful, but it is insufficient to justify a specific exception to open justice.

6.117 Where appropriate, an order could be made to protect the identity of, or other information about, a victim or witness on one of the other grounds in the new Act, such as the ground of administration of justice (recommendation 6.4(a)) or safety (recommendation 6.4(c)).

6.118 We also considered whether there should be specific grounds for making non-publication or non-disclosure orders in relation to sex workers and people living with HIV.

6.119 The Sex Workers Outreach Project (SWOP) outlined the significant consequences that sex workers may suffer as a result of being identified in court proceedings, including experiencing violence and harassment, or becoming at risk of losing their housing or employment.[133] While orders have been made in relation to sex workers under the *CSNPO Act* in some cases,[134] SWOP submitted that in other situations, sex workers have been denied orders to protect their identity.[135]

6.120 In addition, the National Association of People Living with HIV Australia and HIV/AIDS Legal Centre submitted that people living with HIV are at risk of discrimination, harassment and violence if their HIV status is exposed.[136] While orders to protect the identity of people living with HIV can be made on existing grounds in the *CSNPO Act*,[137] we were told that judicial officers may be cautious about making orders, particularly in relation to defendants with HIV.[138] A new ground that specifically covers people living with HIV could encourage courts to make orders in appropriate cases.

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132. *Youth Justice and Criminal Evidence Act 1999* (UK) s 45A.
133. Sex Workers Outreach Project, *Preliminary Submission PCI16*, 1–4.
134. *Le v R* [2020] NSWCCA 238 [227]–[229].
135. Sex Workers Outreach Project, *Preliminary Submission PCI16*, 5.
136. National Association of People Living with HIV Australia, and HIV/AIDS Legal Centre Inc (NSW), *Preliminary Submission PCI28*, 2.
137. See, eg, *B v DPP (NSW)* [2014] NSWCA 232 [3]. See also National Association of People Living with HIV Australia, and HIV/AIDS Legal Centre Inc (NSW), *Preliminary Submission PCI28*, 3–4.
138. National Association of People Living with HIV Australia, and HIV/AIDS Legal Centre Inc (NSW), *Preliminary Submission PCI28*, 2; Roundtable 3, *Consultation CIC05*.

6.121 In our survey, we asked respondents, when information should be kept from the public. Of the 125 people who answered the question:

- 55 (44%) chose, "to protect the identity of a person whose occupation as a sex worker could be revealed in a court case", and
- 56 (44.8%) chose, "to protect the identity of a person whose HIV status could be revealed in a court case".[139]

6.122 We acknowledge the importance of ensuring that victims and witnesses report crime and participate in court processes without fearing that they may suffer consequences as a result of being identified as a sex worker or a person living with HIV. However, introducing specific grounds for particular groups of people, based on their occupation or health status, is too idiosyncratic. We did not identify any other jurisdictions where there is a specific ground for making a non-publication or non-disclosure order on this basis.

6.123 Orders could be made to protect the identity of these people on other grounds in the new Act. Consideration could also be given to including further guidance in the Judicial Commission of NSW *Criminal Trial Courts Bench Book*, outlining the public interest in ensuring vulnerable people (including sex workers and people living with HIV) are protected, and outlining relevant case law where orders have been made. The *Criminal Trial Courts Bench Book* already refers to one case where an order was made in respect of a complainant's name to ensure they would not be identified as a sex worker.[140]

Grounds for making an exclusion or closed court order

Recommendation 6.5: Grounds for making an exclusion order

The new Act should provide that a court may make an exclusion order on one or more of the following grounds:

(a) the order is necessary to prevent prejudice to the proper administration of justice

(b) the order is necessary to prevent prejudice to the interests of the Commonwealth or a state or territory in relation to national or international security

(c) the order is necessary to protect the safety of any person

(d) the order is necessary to support a child or a person with a mental health impairment or cognitive impairment to give evidence, or

(e) 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.

139. *Open Justice: Survey Results*, Research Report 16 (NSW Law Reform Commission, 2022) table 2.2.

140. Judicial Commission of NSW, *Criminal Trial Courts Bench Book* [1-354] (retrieved 20 May 2022); *Le v R* [2020] NSWCCA 238 [227]–[229].

Recommendation 6.6: Grounds for making a closed court order

The new Act should provide:

(1) A court may make a closed court order on one or more of the following grounds, and only where the ground cannot be addressed by other reasonably available means:

(a) the order is necessary to prevent prejudice to the proper administration of justice

(b) the order is necessary to prevent prejudice to the interests of the Commonwealth or a state or territory in relation to national or international security

(c) the order is necessary to protect the safety of any person, or

(d) 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.

(2) "Other reasonably available means" includes a non-publication, non-disclosure and/or exclusion order.

6.124 The grounds in recommendations 6.5 and 6.6 are based on those in the *CSNPO Act*, which relate only to non-publication and non-disclosure.[141]

6.125 The grounds that are common to both exclusion and closed court orders are where the order is:

- necessary to prevent prejudice to the proper administration of justice
- necessary to prevent prejudice to the interests of the Commonwealth or a state or territory in relation to national or international security
- necessary to protect the safety of any person, or
- otherwise necessary in the public interest and that public interest significantly outweighs the public interest in open justice.

6.126 We also recommend an additional ground for making an exclusion order where it is necessary to support a child or a person with a mental health or cognitive impairment to give evidence (recommendation 6.5(d)).

6.127 As we discuss in chapter 3, exclusion orders are less restrictive than closed court orders. A closed court order has a suppression effect, whereas an exclusion order does not, by itself, prevent disclosure of information from the part of the proceedings subject to the order.

6.128 If the purpose of the order is to preserve the confidentiality of the proceedings, then it may be more appropriate to make a closed court order. If the order has another purpose such as assisting a vulnerable witness to give evidence, then an exclusion order is likely to be sufficient. However, a non-publication or non-disclosure order could also be made to protect the witness's identity, for example.

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

6.129 Making a closed court order is a significant exception to open justice. In light of this, the new Act would specify that a closed court order can only be made where the ground cannot be addressed by other reasonably available means (recommendation 6.6(1)). This would include making a non-publication, non-disclosure or exclusion order (recommendation 6.6(2)). The recommendation is intended to encourage courts to consider taking less restrictive measures to address the relevant ground, so that a closed court order is a measure of last resort.

6.130 Courts, Tribunals and Service Delivery expressed concern that the grounds for making a closed court order do not cover circumstances where a court is exercising its protective jurisdiction. It observed that:

> the court is usually closed to protect the interests and privacy of the children who are the subjects of the proceedings. This is because these proceedings usually discuss very personal information about very vulnerable children.[142]

6.131 We have not recommended including a specific ground for making a closed court order that relates to the protective jurisdiction. Under s 71(c) of the *Civil Procedure Act 2005* (NSW) a court can conduct civil proceedings in the absence of the public where the business concerns the guardianship, custody or maintenance of a minor. As we discuss in chapter 2, we do not recommend that s 71 should be amended or repealed. Further, the new Act would not affect the court's inherent jurisdiction or implied powers to limit open justice.[143]

6.132 We also make a number of recommendations in relation to closing the court for categories of vulnerable people under subject-specific legislation in chapters 8–12.

Necessary to prevent prejudice to the proper administration of justice

6.133 The grounds in recommendations 6.5(a) and 6.6(1)(a) align with the ground for closing the court established at common law where it is necessary to secure the proper administration of justice (chapter 2).[144]

6.134 Legislation in Victoria and SA contains a similar ground for closing the court.[145]

Necessary to prevent prejudice to the interests of the Commonwealth or a state or territory in relation to national or international security

6.135 Our draft proposal was to enable a court to make a closed court order where it is necessary to prevent prejudice to the interests of the Commonwealth or a state or

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142. Courts, Tribunals and Service Delivery, NSW Department of Communities and Justice, *Submission CI53*, 3.

143. Recommendation 4.6.

144. See, eg, *Scott v Scott* [1913] AC 417, 437–438, 445–446; *John Fairfax and Sons Pty Ltd v Police Tribunal of NSW* (1986) 5 NSWLR 465, 476.

145. *Open Courts Act 2013* (Vic) s 30(2)(a); *Evidence Act 1929* (SA) s 69(1).

territory in relation to national or international security, but not an exclusion order.[146] Recommendations 6.5(b) and 6.6(1)(b) is that a court can make an exclusion or closed court order on this ground. This is to ensure flexibility.

6.136 Proceedings concerning national and international security often involve highly sensitive information about, for example, investigation and surveillance techniques, international relations, and the identities of informers and other witnesses. In many cases, it is likely that the primary purpose of an order made on the national or international security ground would be to ensure the confidentiality of the information.[147] The consequences of this information becoming available due to people being present in the courtroom or through publication or disclosure of this information may be severe. The ODPP observed that, in practice, criminal proceedings may be closed for national security purposes.[148]

6.137 Legal Aid said that, for the purposes of this ground for making a closed court order, "national security" should be defined in accordance with s 8 of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth).[149] Including a definition of national security in the new Act would be overly prescriptive. Courts are able to determine whether a particular situation involves national or international security issues, based on the circumstances of the case. There are also a range of exceptions to open justice contained in subject-specific legislation related to national security that have been excluded from this review (chapter 1 and appendix B).

6.138 Legislation in other jurisdictions includes a similar ground for closing the court.[150]

Necessary to protect the safety of any person

6.139 Recommendations 6.5(c) and 6.6(1)(c) would enable a court to make an exclusion or closed court order to protect the safety of any person. This may be appropriate in some situations. For example, the ODPP observed that the court may need to be closed in criminal proceedings to protect informer witnesses.[151] In our survey, we asked respondents when courts should be closed to the public. Of the 133 people who answered the question, 114 (85.71%) chose "to ensure a person's safety".[152]

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146. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 4.19(1), proposal 4.22(1)(b).
147. *Hogan v Hinch* [2011] HCA 4, 243 CLR 506 [21].
148. NSW Office of the Director of Public Prosecutions, *Submission CI17*, 5.
149. Legal Aid NSW, *Submission CI57*, 12.
150. *Open Courts Act 2013* (Vic) s 30(2)(b); *Criminal Procedure Act 2011* (NZ) s 197(2)(a)(ii).
151. NSW Office of the Director of Public Prosecutions, *Submission CI17*, 5.
152. *Open Justice: Survey Results*, Research Report 16 (NSW Law Reform Commission, 2022) table 2.1.

6.140 Legislation in Victoria and New Zealand also includes a similar ground for closing the court.[153]

Otherwise necessary in the public interest, and that public interest significantly outweighs the public interest in open justice

6.141 Recommendations 6.5(e) and 6.6(1)(d) would enable a court to make an exclusion or closed court order where it is otherwise necessary in the public interest, and that public interest significantly outweighs the public interest in open justice. This ground is appropriate as it enables a court to make an order in special situations that are not covered by other grounds.

6.142 To ensure exclusion or closed court orders are only made in appropriate circumstances, a court would only be able to make an order on the basis that another public interest "significantly" outweighs the public interest in open justice.

Necessary to support a child or a person with a mental health or a cognitive impairment to give evidence

6.143 Recommendation 6.5(d) would enable a court to make an exclusion order to support a child or person with a mental health or cognitive impairment to give evidence. This is the same as our draft proposal,[154] which some submissions supported.[155]

6.144 Of the 133 survey respondents who answered the question of when courts should be closed to the public, 117 (87.97%) chose "when a child victim or witness is giving evidence".[156]

6.145 Legislation in some other Australian jurisdictions permits the public or certain people to be excluded:

- when a child witness gives evidence,[157] or
- from proceedings involving people with a disability.[158]

6.146 In NSW, a court hearing criminal proceedings against a child defendant may direct any person, other than the child defendant, a family victim or any other person who is

153. *Open Courts Act 2013* (Vic) s 30(2)(c); *Criminal Procedure Act 2011* (NZ) s 197(2)(a)(iv).
154. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 4.19(1)(c).
155. knowmore, *Submission CI43*, 12–13; NSW Bar Association, *Submission CI56* [7].
156. *Open Justice: Survey Results*, Research Report 16 (NSW Law Reform Commission, 2022) table 2.1.
157. *Crimes Act 1914* (Cth) s 15Y(1), s 15YP(a); *Evidence Act 1977* (Qld) s 21AAA(1)–(2), s 21A(1) definition of "special witness", s 21A(2)(a)–(c), s 21AC definition of "affected child", s 21AU; *Open Courts Act 2013* (Vic) s 30(2)(e).
158. See, eg, *Crimes Act 1914* (Cth) s 15YAB(1)(a), s 15YAB(3)(g), s 15YP(c); *Evidence Act 1977* (Qld) s 21A(1) definition of "special witness" (b)(i), s 21A(2)(a)–(c), s 21AAA.

directly interested in the proceedings, to leave the place where the proceedings are being heard during the examination of any witness. The court may make such an order if it considers it is in the interests of the child defendant (chapter 9).[159]

6.147 However, there is no provision to exclude the public where a child is involved in other types of proceedings such as when they are a witness in adult criminal proceedings.[160] Further, there are no specific provisions that require or permit the public to be excluded from the court while a person with a cognitive or mental health impairment is giving evidence generally. Under the current law, a victim who has a cognitive impairment is entitled to give evidence "in camera" only in:

- proceedings for a prescribed sexual offence[161] or a domestic violence offence,[162] or
- AVO proceedings that are connected with proceedings for a domestic violence offence.[163]

6.148 This is despite the fact that children and people with a mental health or cognitive impairment are recognised as needing assistance to give evidence. For example, the *Criminal Procedure Act* includes certain provisions to assist a "vulnerable person" to give evidence, which includes a child and a person with a cognitive impairment.[164] Assistance includes an entitlement to give evidence in certain proceedings via closed-circuit television or using alternative arrangements.[165]

6.149 The ground in recommendation 6.5(d) is intended to address this gap, so that a court can make an exclusion order where this is necessary to support a child or person with a mental health or cognitive impairment to give evidence in any proceeding, civil or criminal. Excluding the public while a child or a person with a cognitive impairment gives evidence may prevent unnecessary distress and help them give their best evidence, to the benefit of the administration of justice.

6.150 The ODPP observed that people with a cognitive impairment "will in many cases have identical or analogous needs to those of a child".[166] It has been recognised that "such

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159. *Children (Criminal Proceedings) Act 1987* (NSW) s 10(2).
160. Legal Aid NSW, *Preliminary Submission PCI39*, 11–12. See also Legal Aid NSW, *Review of Protections for Certain Witnesses Giving Evidence,* Submission to the Department of Justice (2018) 7–8.
161. *Criminal Procedure Act 1986* (NSW) s 291(1).
162. *Criminal Procedure Act 1986* (NSW) s 289T(1)(a), s 289U(1).
163. *Criminal Procedure Act 1986* (NSW) s 289T(1)(b), s 289U(1).
164. *Criminal Procedure Act 1986* (NSW) s 306M definition of "vulnerable person".
165. See *Criminal Procedure Act 1986* (NSW) s 306U, s 306ZB, s 306ZH.
166. NSW Office of the Director of Public Prosecutions, *Submission CI17*, 24.

witnesses often suffer a deficit in the ability to communicate and find it harder to adapt to new environments and situations".[167]

6.151 To ensure they have some autonomy in the process, the new Act would also require the court to take into account the views of:

- the child, considered in the light of the child's age and understanding, or
- the person with a mental health or cognitive impairment, considered in light of that person's mental health or cognitive impairment (chapter 7).[168]

6.152 The power to make an exclusion order under the new Act should not affect existing entitlements available to children or people with a cognitive impairment under the *Criminal Procedure Act*. That is, the child or person should still be able to:

- give evidence remotely or by any alternative arrangements, even if a court declines to make an exclusion order,[169] and
- have a support person present while they give evidence.[170]

6.153 We have not included an equivalent ground to that in recommendation 6.5(d) as a ground for making a closed court order. This is because the purpose of excluding the public is to support a child or a person with a mental health or cognitive impairment to give evidence, rather than to preserve the confidentiality of the proceedings.

Scope of orders

6.154 Orders made under the new Act would be defined and confined in scope. This is because non-publication, non-disclosure, exclusion and closed court orders constitute an exception to open justice. Their application should be easy to understand and limited to what is necessary to achieve the purpose of the order.

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167. NSW, *Parliamentary Debates,* Legislative Assembly, Agreement in Principle Speech, 9 May 2007, 106.
168. Recommendation 7.6(1)(a).
169. *Criminal Procedure Act 1986* (NSW) s 306ZB, s 306ZH.
170. *Criminal Procedure Act 1986* (NSW) s 306ZK.

Scope of information to which a non-publication or non-disclosure order applies

Recommendation 6.7: Scope of information to which a non-publication or non-disclosure order applies

The new Act should provide:

(1) A non-publication or non-disclosure order must specify the information to which the order applies with sufficient particularity to ensure the order is limited to achieving the purpose for which the order is made.

(2) A court, in determining the scope of a non-publication or non-disclosure order, must ensure that the order does not apply to any more information than is reasonably necessary to achieve the purpose for which the order is made.

Specifying the information to which an order applies

6.155 Recommendation 6.7(1) is similar to s 9(5) of the *CSNPO Act*. Including it as a standalone provision in the new Act is intended to draw greater attention to it.

6.156 Consultations indicated that orders made under the *CSNPO Act* are sometimes unclear or do not appropriately describe the information to which they apply.[171] For example:

- The ODPP submitted that "poorly framed orders are frequently made" that can "frustrate the order being effective".[172]
- Banki Haddock Fiora submitted that an order may refer to court documents that are unavailable for the media to inspect. They said this resulted in the media being "bound by an order, the subject and effect of which they have no way of knowing".[173]
- ARTK provided examples of orders that had been distributed to the media which did not specify the information to which the order applied.[174]

6.157 We considered whether there should be more legislative guidance about how courts should specify the information to which an order applies. For example, the CDPP suggested that standard forms for framing orders could be included in regulations.[175]

6.158 There is a risk that a rigid framework for framing orders may have unintended consequences. A court should not, for example, be required to include certain information in an order as in some cases this may render the order ineffective.

171. Roundtable 1, *Consultation CIC02*; Roundtable 2, *Consultation CIC03*.
172. NSW Office of the Director of Public Prosecutions, *Submission CI17*, 14.
173. Banki Haddock Fiora, *Preliminary Submission PCI27*, 4.
174. Australia's Right to Know, *Submission CI27*, 35–40.
175. Commonwealth Director of Public Prosecutions, *Submission CI21*, 2.

6.159 Recommendation 6.7(1) would require a court to specify information subject to the order while also providing courts with the flexibility to draft orders in a way that is fit for the particular circumstances.

6.160 In chapter 16, we recommend further education and training for judicial officers, including guidance around framing clear and effective orders. For example, model orders could be included in bench books. In chapter 7, we recommend that a court should be required to give reasons for orders on request, in some circumstances.[176] This should also assist in providing additional context and information around the purpose and terms of an order.

An order must apply only to the information necessary to achieve its purpose

6.161 There is no equivalent to recommendation 6.7(2) in the *CSNPO Act*. However, it is common practice for courts to limit the scope of orders made under that Act.[177] For example, in one case, the Supreme Court made a non-publication order in respect of a high-risk offender's residence and employer only, observing that "because the order is of such limited scope, it infringes any interest in open justice only to the smallest extent".[178]

6.162 The recommendation is intended to ensure that a non-publication or non-disclosure order made under the new Act applies only to the information necessary to achieve the purpose of the order, in every case. It is similar to a provision in Victorian legislation.[179]

Where a non-publication or non-disclosure order applies

Recommendation 6.8: Where a non-publication or non-disclosure order applies

The new Act should provide:

(1) A non-publication or non-disclosure order must specify the place where the order applies.

(2) The place in which a non-publication or non-disclosure order applies need not be limited to NSW, and can be made to apply anywhere inside, or outside, the Commonwealth.

(3) A court, in determining the place in which a non-publication or non-disclosure order applies, must have regard to what is necessary for achieving the purpose for which the order is made.

6.163 Recommendation 6.8 is similar to a provision in the *CSNPO Act*,[180] but incorporates an important extension to provide for extra-territorial application.

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176. Recommendation 7.7.

177. See, eg, *Medich v R (No 2)* [2015] NSWCCA 331 [27]; *AB v Curry (No 3)* [2015] NSWSC 1677 [23], [33]; *Australian Broadcasting Corporation v Local Court of NSW* [2014] NSWSC 239 [42], [48].

178. *NSW v Williamson (No 2)* [2019] NSWSC 936 [43].

179. *Open Courts Act 2013* (Vic) s 13(1)(b).

Specifying where an order applies

6.164 Recommendation 6.8(1) requires a court to specify where a non-publication or non-disclosure order applies. The order would apply in the places specified in the order.

An order can apply worldwide

6.165 Unlike the *CSNPO Act*, recommendation 6.8(2) would expressly allow a court to make a non-publication order or non-disclosure order under the new Act that applies outside the Commonwealth.

6.166 The *CSNPO Act* currently provides that an order need not be limited to NSW, and may be made to apply anywhere in the Commonwealth.[181] While that Act does not specify whether orders can apply outside the Commonwealth, orders that apply to internet publications may capture publishers located overseas.[182] Yet specifying that an order applies throughout the Commonwealth might implicitly preclude their extra-territorial application.

6.167 To ensure information is protected effectively, it may be necessary in some cases for orders to be made to apply expressly outside Australia. In contemporary society, information is frequently and easily shared across borders via the internet and social media. This has had a significant impact on legal frameworks that historically depended on spatial and geographic boundaries, including the laws governing exceptions to open justice.

6.168 Some submissions pointed to the futility of making an order with limited geographic boundaries when information is so easily shared across state and international borders.[183] The *Pell* case,[184] discussed in chapter 2, also raised questions about the effectiveness of orders when information published overseas is easily accessible to people living in Australia.

6.169 An order of global application would only be appropriate where there is significant international interest in the matter, as there was in *Pell*, or where there was significant risk that publication outside Australia might come to the notice of people in Australia. In most cases, it is unlikely there would be substantial international interest, and it would be sufficient to make an order to apply throughout the Commonwealth, or even within NSW.

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180. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 11.
181. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 11(2).
182. *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125, 83 NSWLR 52 [76]. See also Australia's Right to Know, *Submission CI5*9, 15.
183. NSW Office of the Director of Public Prosecutions, *Submission CI17*, 9; Australia's Right to Know, *Submission CI27*, 49–50.
184. *DPP (Vic) v Pell* [2018] VCC 905.

6.170 It is important that breaches of orders made to apply overseas can be punishable as offences in NSW. Section 10C of the *Crimes Act* sets out the geographic limits of NSW offences. In chapter 7, we recommend that the new Act should provide that a geographical nexus exists, for the purposes of s 10C of the *Crimes Act*, if the offence involves a contravention of a non-publication or non-disclosure order made by a NSW court.[185]

6.171 The Supreme Court submission noted the difficulty in enforcing an order outside the Commonwealth.[186] However, as we discuss above in relation to the necessity test, difficulties in enforcement are not necessarily a reason for not making an order. We discuss avenues for overseas enforcement in chapter 7.

Court must have regard to what is necessary when determining where an order applies

6.172 Recommendation 6.8(3) is that a court, in determining the place in which an order applies, must have regard to what is necessary to achieve the purpose of the order. This wording is stronger than our draft proposal, which was that a court "should" have regard to what is necessary.[187]

6.173 ARTK expressed concern that our draft proposal would "water-down" the current requirement in the *CSNPO Act*,[188] which is that "an order is not to be made to apply outside New South Wales unless the court is satisfied that having the order apply outside New South Wales is necessary for achieving the purpose for which the order is made".[189]

6.174 We consider that, given the current media environment in Australia and the ease of information sharing via the internet, this is too stringent a test for an order to be made to apply beyond NSW. Courts should have the flexibility to make a non-publication or non-disclosure order that applies outside NSW, where appropriate.

6.175 The ODPP submitted that the reality of digital reporting dictates that all non-publication and non-disclosure orders should apply nationally.[190] We consider that, given the importance of open justice, courts should still be required to determine what is necessary to achieve the purpose of the order in the circumstances of the case, and orders should apply to the smallest geographic area possible. In some circumstances, it may be sufficient for an order to be confined to NSW, or even a region within NSW, for example, where the matter is only of local interest.

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185. Recommendation 7.12.
186. Supreme Court of NSW, *Submission CI55* [10].
187. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 4.16(3).
188. Australia's Right to Know, *Submission CI59*, 15.
189. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 11(3).
190. NSW Office of the Director of Public Prosecutions, *Submission CI17*, 9.

Duration of a non-publication or non-disclosure order

Recommendation 6.9: Duration of a non-publication or non-disclosure order

The new Act should provide:

(1) A non-publication or non-disclosure order (not including an interim order) must specify the period for which the order operates.

(2) A court, in deciding the period for which a non-publication or non-disclosure order is to operate, must ensure that the order operates for no longer than is reasonably necessary to achieve the purpose for which the order is made.

(3) The period for which a non-publication or non-disclosure order operates is to be determined by reference to:

(a) a fixed or ascertainable period, or

(b) the occurrence of a specified future event.

(4) A non-publication or non-disclosure order may be specified to operate indefinitely in exceptional circumstances or where it is not reasonably practicable to specify a duration.

6.176 Recommendation 6.9 is similar to a provision in the *CSNPO Act*.[191]

6.177 It would not apply to interim orders which are discussed below.

Specifying the duration of an order

6.178 Recommendation 6.9(1) would require a court to specify the period for which a non-publication or non-disclosure order is made. The order would only operate for as long as is specified in the order.

An order must not operate longer than necessary

6.179 As with the *CSNPO Act*,[192] recommendation 6.9(2) would require a court to ensure that a non-publication or non-disclosure order made under the new Act operates for no longer than is reasonably necessary to achieve its purpose.

Reference to a fixed or ascertainable period or future event

6.180 As with the *CSNPO Act*,[193] recommendation 6.9(3) is that the duration of a non-publication or non-disclosure order made under the new Act must be specified by reference to:

- a fixed or ascertainable period; for example, until a specific date, or for a period of 12 months,[194] or

191. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 12.
192. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 12(2).
193. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 12(3).
194. *R v Qaumi (No 8)* [2016] NSWSC 1730 [29].

- the occurrence of a specified future event; for example, the conclusion of a trial,[195] or the death of a person.[196]

6.181 This should provide a court with flexibility to set an appropriate duration depending on the circumstances. The ODPP supported enabling a court to determine the duration of an order, as the appropriate duration "is largely dependent on the issue the order is addressing".[197]

6.182 Some stakeholders preferred the duration of an order to be linked to an event, as this provides certainty about when the order will be lifted.[198] However, ARTK submitted that orders are sometimes made to apply until a specified future event (such as the conclusion of proceedings or a verdict) which, due to a change in circumstances, never occurs.[199] Courts should consider framing orders in a way that ensures the order would still have an end date, even if a particular event does not occur.

An order may operate indefinitely in some circumstances

6.183 Our draft proposal was for the new Act to prevent orders from being specified to operate indefinitely.[200] Several submissions raised concerns with this proposal, including that:

- There may be circumstances where it is appropriate for an order to be made indefinitely (for example, where the order protects evidence relating to a sexual offence or relates to a child).[201]
- If an order does not operate indefinitely, victims may have to apply for a new order or an extension of an order, which could be onerous and re-traumatising.[202]
- If a court is not able to make an indefinite order, it may have to impose orders with an arbitrary duration.[203]
- There is no clear evidence that indefinite orders have been misused.[204]

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195. *R v Qaumi (No 15)* [2016] NSWSC 318 [99].
196. *SG v NSW Crime Commission* [2015] NSWSC 881 [10]–[12].
197. NSW Office of the Director of Public Prosecutions, *Submission CI17*, 9–10. See also Roundtable 1, *Consultation CIC02*.
198. Roundtable 1, *Consultation CIC02*.
199. Australia's Right to Know, *Submission CI59*, 15.
200. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 4.17(2).
201. Legal Aid NSW, *Submission CI57*, 11; NSW Bar Association, *Submission CI56* [25]; NSW Office of the Director of Public Prosecutions, *Submission CI48*, 2–3; Children's Court of NSW, *Consultation CIC25*.
202. Legal Aid NSW, *Submission CI57*, 11.
203. NSW Bar Association, *Submission CI56* [24].
204. NSW Bar Association, *Submission CI56* [26].

6.184 Other stakeholders expressed concern about orders operating indefinitely, including that this "may result in the effective practical denial of the principle of open justice".[205] Some suggested that there would be very few situations where an indefinite order could be justifiable, even in relation to national security.[206] ARTK submitted that an order should not be allowed to last longer than five years.[207]

6.185 There were also concerns about orders made to apply "until further order". These orders may sometimes effectively operate indefinitely, if no further order is made.[208]

6.186 A recent Court of Appeal judgment observed that it would be difficult to reconcile the making of an order "until further order" with the obligations to specify a duration imposed by the *CSNPO Act*. However, the Court acknowledged that "there may be cases where it is genuinely impossible to identify a time frame for the order to operate".[209]

6.187 After further consideration, we have concluded that courts should be able to make orders that apply indefinitely, but only in exceptional circumstances or where it is not reasonably practicable to specify a duration. Recommendation 6.9(4) provides a balance between the need to:

- ensure orders are not made indefinitely unless absolutely necessary, and
- enable courts to make an indefinite order if it is the most, or only, appropriate solution.

6.188 Recommendation 6.9(4) is similar to New Zealand legislation, which allows a suppression order to be made permanently, with the qualification that it may be revoked by the court at any time.[210]

6.189 Consideration should be given to the introduction of policies or procedures for the periodic review of orders that have been made to last indefinitely.

Orders should not have a default duration

6.190 ARTK submitted that orders are sometimes made under the *CSNPO Act* without a duration being specified.[211]

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205. NSW Society of Labor Lawyers, *Submission CI52*, 2.
206. Roundtable 1, *Consultation CIC02*.
207. Australia's Right to Know, *Submission CI59*, 19.
208. Banki Haddock Fiora, *Submission CI29*, 6–7; Roundtable 2, *Consultation CIC03*; Supreme Court of NSW, *Consultation CIC14*.
209. *DRJ v Commissioner of Victims Rights* [2020] NSWCA 136 [47]–[48].
210. *Criminal Procedure Act 2011* (NZ) s 208(1)(a), s 208(1)(c).
211. Australia's Right to Know, *Submission CI27*, 50.

6.191 In consultations, there was some support for including a default duration in legislation, which would come into effect if the court does not specify a duration in an order.[212] Some of the benefits of setting a default duration include that:

- it could encourage courts to set a duration
- if a duration is not specified, the media and other interested parties can still determine how long the order lasts, and
- it may reduce the need for reviews or appeals where a court does not specify the duration of an order.

6.192 Some stakeholders suggested that a default duration could be short, so that the court that made the order must revisit it if it wishes to extend it.[213] Banki Haddock Fiora suggested a period of 10 years.[214] The ODPP suggested a potential default duration in criminal matters of 75 years as being consistent with the *State Records Act 1998* (NSW).[215]

6.193 We do not support including a default duration for non-publication and non-disclosure orders in the new Act. This could result in all orders being made to apply for this duration, instead of the length of time that is necessary in the circumstances of the particular case. Alternatively, it may result in orders operating for a much shorter time than is appropriate.

Orders that do not state a duration not invalid

6.194 ARTK suggested that orders that do not state a duration should be invalid.[216] On the one hand, this may encourage courts to set a duration in every case. On the other hand, it is likely that the absence of a specified duration would be unintentional in most cases. If the order was automatically invalid because of this, it may result in sensitive information, such as potentially prejudicial information or information about a vulnerable person's identity, being published or disclosed. This would undermine the purpose of the order, could cause irreparable damage and would be unfair to the person protected by the order.

6.195 Therefore, we do not recommend that an order should be invalid if it does not specify a duration. If an order does not specify a duration, a court could review the order, either on its own initiative or on application and vary it so that it does state a duration.[217]

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212. Roundtable 1, *Consultation CIC02*; Roundtable 2, *Consultation CIC03*.
213. Roundtable 1, *Consultation CIC02*.
214. Banki Haddock Fiora, *Submission CI29*, 7.
215. NSW Office of the Director of Public Prosecutions, *Submission CI17*, 10.
216. Australia's Right to Know, *Submission CI27*, 50.
217. Recommendation 7.2.

Proceedings or part of proceedings to which an exclusion or closed court order applies

Recommendation 6.10: Proceedings or part of proceedings to which an exclusion or closed court order applies

The new Act should provide:

(1) When making an exclusion or closed court order, a court must specify the proceedings or part of proceedings to which the order applies.

(2) A court, in determining the proceedings or part of proceedings to which an exclusion or closed court order applies, must ensure that the order operates for no longer than is reasonably necessary to achieve the purpose for which the order is made.

6.196 There is no equivalent to recommendation 6.10 in the *CSNPO Act*, as that Act does not cover exclusion and closed court orders.

Specifying the proceedings or part of proceedings to which an order applies

6.197 Our draft proposals were for the new Act to provide that:

- an exclusion order must specify the period for which it operates, to be determined by reference to a fixed or ascertainable period or the occurrence of a specified future event,[218] and
- a closed court order must specify the proceedings, or part of the proceedings, from which all people, except those whose presence is necessary, are excluded.[219]

6.198 Recommendation 6.10(1) requires both exclusion and closed court orders to specify the proceedings or part of proceedings to which they apply.

6.199 We consider that it would rarely be appropriate for an exclusion order to be tied to a fixed or ascertainable period such as a day. In many circumstances, an exclusion order would be made to assist a particular witness to give evidence, and it may not always be clear how long that evidence will last.

An order must apply only to the proceedings or part of proceedings necessary to achieve its purpose

6.200 Recommendation 6.10(2) would require a court to ensure that an exclusion or closed court order operates for no longer than is reasonably necessary to achieve its purpose. It is similar to our draft proposal in relation to exclusion orders.[220]

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218. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 4.20(1), proposal 4.20(3).

219. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 4.23(a).

220. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 4.20(2).

6.201 For example, if an exclusion order is made for the purpose of assisting a child witness to give evidence, then the order should only apply to the part of the proceedings in which that witness is giving evidence.

The suppression effect of a closed court order is indefinite

6.202 As we discuss in chapter 3, a "closed court order" is an order that:

- excludes all people from the whole or any part of proceedings, other than those whose presence is necessary, and
- has the effect of prohibiting disclosure (by publication or otherwise) of information from the closed part of the proceedings.

6.203 When a court makes a closed court order, all people, other than those whose presence is necessary, would be physically excluded from the court for the proceedings or part of proceedings specified in the order.

6.204 However, the suppression effect of a closed court order would, by default, have an implied indefinite duration. No person, anywhere, would be able to disclose information from closed proceedings, including those people who were present in the proceedings. This is because closed court orders would be made in situations where the court intends information from those proceedings to remain confidential.

6.205 A court would be able to depart from this default position, as it could make an order subject to such exceptions and conditions it sees fit (recommendation 6.11). For example, a closed court order could specify that the suppression effect of the order lasts for a certain period of time. In addition, in chapter 7 we discuss mechanisms for the review or appeal of a closed court order. Alternatively, a person who wishes to be able to disclose information given in closed court could seek the court's leave to do so.

Exceptions and conditions

6.206 The new Act should:

- enable a court to make a non-publication, non-disclosure, exclusion or closed court order subject to such exceptions and conditions as it sees fit and specifies in the order (recommendation 6.11), and
- include standard exceptions, to allow journalists to be present in proceedings when an exclusion order is made (recommendation 6.12) and to allow certain disclosures in particular circumstances when a non-disclosure or closed court order is made (recommendation 6.13).

6.207 We do not recommend including other standard exceptions. In most cases, it is appropriate for a court to determine what exceptions and conditions are appropriate in the circumstances of the case.

An order may be made subject to exceptions and conditions

Recommendation 6.11: An order may be subject to exceptions and conditions

The new Act should provide that a non-publication, non-disclosure, exclusion or closed court order may be made subject to such exceptions or conditions as the court thinks fit and specifies in the order.

6.208 Recommendation 6.11 is similar to a provision in the *CSNPO Act.*[221]

6.209 The following types of exceptions have been included in orders made under the *CSNPO Act*:

- allowing certain people to disclose the relevant information to each other for the purpose of proceedings, including the court and court staff and the defendant and the defendant's legal representative[222]
- allowing general details of proceedings to be published, but not specific identifying information,[223] and
- providing that the order does not apply to media outlets that have already published the restricted information.[224]

6.210 It may also be appropriate for a closed court order to include exceptions. For example, an exception to the order could:

- enable certain people (other than those whose presence is necessary) to be present
- limit the duration of the suppression effect of the closed court order, or
- allow the disclosure of certain information from closed proceedings to specified people.

6.211 A non-publication, non-disclosure or closed court order could also include an exception enabling publication or disclosure of the information in an "official report of proceedings". This would include a report of proceedings authorised by a court or tribunal.[225]

6.212 The Australian Legal Information Institute proposed that there should be a standard exception for an official report of proceedings in the *CSNPO Act*.[226] Although we

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221. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 9(4).
222. *R v Musleh (No 2)* [2018] NSWSC 1221 [16].
223. *R v NK (No 2)* [2015] NSWSC 1282 [3].
224. *R v Qaumi (No 8)* [2016] NSWSC 1730 [31].
225. Recommendation 3.6.
226. Australasian Legal Information Institute, *Submission CI20*, 5.

recommend an exception for an official report of proceedings in relation to various statutory prohibitions on publication and disclosure (chapters 8–12), we do not recommend including such an exception in the new Act. This is because, when making an order, a court should retain the flexibility to tailor any exception regarding reports of proceedings in a way that best fits the purpose of the order.

6.213 In some circumstances it may be appropriate for a court to make an order with an exception for an official report of proceedings. In other circumstances, a court may wish to make a more limited exception, such as an exception that certain information may be published only on a specified legal website for use by legal practitioners.[227]

6.214 Consideration should be given to including a note in the new Act or guidance in the Judicial Commission of NSW *Criminal Trial Courts Bench Book* and *Civil Trials Bench Book* about the types of exceptions or conditions that could be made, including, for example, an exception for an official report of proceedings.

Exception for journalists when an exclusion order is made

Recommendation 6.12: Exception for journalists when an exclusion order is made

The new Act should provide that an exclusion order made under the Act does not exclude a journalist unless the court is satisfied that it is in the interests of justice that they are excluded.

6.215 The new Act would include a standard exception enabling journalists to be present in proceedings when an exclusion order is made. This is appropriate because an exclusion order does not have the effect of prohibiting disclosure of information.

6.216 The media also play a special role in facilitating open justice by producing fair and accurate reports of proceedings (chapter 1). Our view is that, wherever appropriate, journalists should be allowed to remain in proceedings.

6.217 However, there may be some situations where it is not appropriate for journalists to be present; for example, if the proceedings relate to a sensitive national security matter or if the presence of journalists would cause a witness significant distress. Courts should retain a discretion to order that journalists are excluded if it is in the interests of justice.

6.218 The recommendation is similar to a provision in New Zealand legislation.[228]

6.219 There would not be a standard exception allowing journalists to remain when a closed court order has been made, as such an order also prohibits disclosure of information in the closed part of proceedings. Such an exception would defeat the purpose of making the order; to preserve the confidentiality of the proceedings.

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227. 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].

228. *Criminal Procedure Act 2011* (NZ) s 198.

Disclosures of certain information in specified circumstances

Recommendation 6.13: Disclosures that are not prevented by a non-disclosure order or closed court order

The new Act should provide:

(1) A non-disclosure or closed court order does not prevent a person from disclosing information if it is not by publication and is in the course of performing duties or exercising powers in a public official capacity:

(a) in connection with the conduct of proceedings or the recovery or enforcement of any penalty imposed in proceedings, or

(b) in compliance with any procedure adopted by a court for informing journalists or news media organisations of the existence and content of a non-publication, non-disclosure, exclusion or closed court order made by the court.

(2) A non-disclosure or closed court order does not prevent disclosure of information to the Bureau of Crime Statistics and Research if it is not by publication and the disclosure is made for the purposes of the compilation of statistical data about crime and criminal justice.

6.220 Recommendation 6.13 is similar to a provision in the *CSNPO Act*.[229] We did not receive any submissions suggesting that the exceptions in this provision should be removed or amended.

Interim non-publication and non-disclosure orders

Recommendation 6.14: Interim non-publication and non-disclosure orders

The new Act should provide:

(1) If an application is made to a court for a non-publication or non-disclosure order, the court may, without determining the merits of the application, make an interim order to operate until the application is determined.

(2) If an interim order is made, the court must determine the application as a matter of urgency.

6.221 Interim orders are an important mechanism to enable information to be protected in the short-term before an application for a non-publication or non-disclosure order is finally determined.

6.222 Recommendation 6.14 aligns with a provision in the *CSNPO Act*.[230] Similar legislation elsewhere provides for making interim orders.[231]

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229. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 15.

230. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 10.

231. See, eg, *Open Courts Act 2013* (Vic) s 20; *Evidence Act 1929* (SA) s 69A(3); *Federal Court of Australia Act 1976* (Cth) s 37AI; *Judiciary Act 1903* (Cth) s 77RH; *Criminal Procedure Act 2011* (NZ) s 199C(2)–(3), s 200(4)–(5).

6.223 Under recommendation 6.14(1), a court would not need to determine the merits of an interim order before making it, including whether the order is necessary on one or more grounds. To mitigate the impact on open justice, interim orders should operate for the shortest time possible. In most circumstances, they should not last more than a few days. Given this, interim orders need not be reviewable or appealable.

6.224 Fighters Against Child Abuse Australia suggested that interim orders should be time restricted.[232] ARTK submitted that they should be required to be relisted within 72 hours,[233] or that they should be time-limited by a sunset of, for example, 48 hours.[234] South Australian legislation provides that if an interim order is made, the court must determine the application as a matter of urgency and, wherever practicable, within 72 hours after making the order.[235]

6.225 We do not recommend including a time limitation for interim orders in the new Act. Such a limitation would not account for complexities in scheduling, particularly in jurisdictions located in regional or rural areas. The requirement in recommendation 6.14(2) for the court to determine the application as a matter of urgency should provide sufficient guidance to courts and mitigate the risk of an interim order operating for a lengthy period.

6.226 Unlike final orders, it is appropriate in many cases for courts to specify that an interim order applies "until further order", as these orders are intended to last until the application for the order is finally determined.

232. Fighters Against Child Abuse Australia, *Submission CI32*, 13.

233. Australia's Right to Know, *Submission CI27*, 56.

234. Australia's Right to Know, *Submission CI59*, 14.

235. *Evidence Act 1929* (SA) s 69A(3).

7. The new Act: Powers to make orders – procedures

In Brief

The new Act should include clear procedures for making, reviewing and appealing non-publication, non-disclosure, exclusion and closed court orders. To promote transparency about decision-making, a court should be required to give reasons for decisions relating to orders when requested to do so by certain people, and subject to certain exceptions. To promote compliance with orders, the new Act should outline how breaches of orders made under the Act can be enforced.

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7.1 This chapter contains our recommended procedures for making, reviewing and appealing non-publication, non-disclosure, exclusion and closed court orders under the new Act.

7.2 The new Act would outline the persons who have standing (that is, persons who are entitled to apply and/or appear and be heard by the court) in applications, reviews and appeals. It would also require the court to consider the views of the person who would be, or is, protected by an order (where relevant) and to provide reasons when requested to do so, subject to some limitations.

7.3 Costs would be awardable in applications for and reviews of orders only where a person's involvement is frivolous or vexatious, but the ordinary rules relating to costs in appeals would apply.

7.4 In addition, the new Act would set out the consequences of breaching an order.

Standing and procedures for making orders

Recommendation 7.1: Procedure for making a non-publication, non-disclosure, exclusion or closed court order

The new Act should provide:

(1) A court may make a non-publication, non-disclosure, exclusion or closed court order on its own initiative or on the application of:

(a) a party to the proceedings, or

(b) any other person who the court considers has a sufficient interest in the making of the order.

(2) The following persons are entitled to appear and be heard when a court is considering whether to make a non-publication, non-disclosure, exclusion or closed court order, either on its own initiative or on the application of a person referred to in recommendation 7.1(1):

(a) the applicant for the order

(b) a party to the proceedings

(c) the government (or an agency of the government) of the Commonwealth or of a state or territory

(d) a journalist

(e) a news media organisation, and

(f) any other person who, in the court's opinion, has a sufficient interest in the question of whether an order should be made.

(3) An order may be made:

(a) at any time during proceedings or after proceedings have concluded, if it is a non-publication or non-disclosure order, or

(b) at any time during proceedings, if it is an exclusion or closed court order.

7.5 Recommendation 7.1 is similar to the *Court Suppression and Non-publication Orders Act 2010* (NSW) (*CSNPO Act*).[1] The Office of the Director of Public Prosecutions (ODPP) said that the procedures set out in the *CSNPO Act* are generally "informed and fair".[2]

Standing to apply for, and appear and be heard on, an application for an order

7.6 Recommendation 7.1(1)(a) would enable a party to proceedings to apply for an order. Under recommendation 7.1(1)(b), other persons who want to apply for an order would have to establish they have sufficient interest in the making of the order.

7.7 Recommendation 7.1(2) contains a list of persons who would be entitled to appear and be heard when a court is considering whether to make an order.

1. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 9(1)–(3).
2. NSW Office of the Director of Public Prosecutions, *Submission CI17*, 28.

A party to proceedings

7.8 Recommendations 7.1(1)(a) and 7.1(2)(b) are that a party to proceedings could apply for an order under the new Act and appear and be heard on an application for an order. A party to proceedings would also be entitled to apply for a review or leave to appeal, and to appear and be heard on a review of an order (other than an exclusion order) or appeal (recommendations 7.2(2)(b), 7.3(1)(b) and 7.5(3)(b)).

7.9 A "party" to proceedings would include:

- a complainant, victim or protected person, or a person named in evidence, and
- a person who was a party to proceedings before the proceedings concluded.[3]

7.10 This definition is intended to capture people who are involved in proceedings, but who may not be parties in the traditional sense (for example, they are not the prosecution or the defendant in criminal proceedings). These people may need an order to be made for their protection.

Governments and government agencies

7.11 Recommendation 7.1(2)(c) is that a Commonwealth, state or territory government or government agency would be entitled to appear and be heard on an application for an order. They would also be entitled to apply for, and appear and be heard on, a review of a non-publication, non-disclosure or closed court order (recommendation 7.2(2)(c)), and to apply for leave to appeal, and appear and be heard on an appeal (recommendation 7.5(3)(c)).

7.12 Legal Aid argued that governments should only have standing if their "interests are materially impacted by the order".[4] Their concern was that governments and their agencies could intervene in proceedings regardless of whether they have a direct interest in the orders sought.

7.13 Similar legislation in South Australia does not include governments or government agencies in the list of persons with standing to make submissions on an application for an order.[5] Victorian legislation includes only the Attorney General or the Attorney General of another state or territory or the Commonwealth, in the list of persons who may appear and be heard on applications.[6]

7.14 Governments and government agencies should have standing under the new Act because issues relevant to government agencies are often raised in applications for orders, such as orders relating to national security. This is a current feature of the

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3. Recommendation 4.5(1)(d).
4. Legal Aid NSW, *Submission CI57*, 9.
5. *Evidence Act 1929* (SA) s 69A(5)(a).
6. *Open Courts Act 2013* (Vic) s 19(2)(c)–(d).

CSNPO Act,[7] and we have not identified any case where the government has intervened inappropriately in an application for an order. The University of Sydney Policy Reform Project supported government agencies (particularly the Commonwealth Department of Foreign Affairs and Trade) being able to argue for orders in the national interest.[8]

A journalist or news media organisation

7.15 Unlike the *CSNPO Act,* which only confers standing on a news media organisation,[9] recommendation 7.1(2)(d)–(e) would enable both a journalist and a news media organisation to appear and be heard in relation to an application for an order. This was supported in submissions and consultations.[10] Journalists and news media organisations would also be entitled to apply for, and appear and be heard on, a review of a non-publication, non-disclosure or closed court order (recommendation 7.2(2)(d)–(e)), and to apply for leave to appeal, and appear and be heard on an appeal (recommendation 7.5(3)(d)–(e)).

7.16 Consultations indicated that, when there is an application for an order under the *CSNPO Act*, journalists are not always permitted to appear and be heard, as they are not considered to fall within the definition of "news media organisation". This sometimes means they have to request and wait for legal representation, which can be expensive and time-consuming.[11]

7.17 It is appropriate for the media (that is, a journalist or a news media organisation) to have standing to appear and be heard in applications for, and reviews and appeals of, orders. This is because the media have a special interest in the making of orders that prohibit or restrict the publication or disclosure of information in court proceedings or limit access to proceedings. As we discuss in chapter 1, the media play a significant role in facilitating open justice by attending court and publishing "fair and accurate" reports of proceedings.[12]

7.18 Providing the media with an entitlement to appear and be heard on an application for an order allows them to act as a contradictor and make the case as to why information should be publicly available. Given the public interest in open justice and its role in maintaining public confidence in the administration of justice, it is appropriate for the question of whether an order should be made to be subject to scrutiny and debate.

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7. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 9(2)(c).
8. University of Sydney Policy Reform Project, *Preliminary Submission PCI11*, 7.
9. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 9(2)(d).
10. NSW Office of the Director of Public Prosecutions, *Submission CI17*, 28; Australia's Right to Know, *Submission CI27*, 93; Roundtable 2, *Consultation CIC03.*
11. Roundtable 2, *Consultation CIC03*.
12. *John Fairfax and Sons Pty Ltd v Police Tribunal of NSW* (1986) 5 NSWLR 465, 481.

A person that the court considers has sufficient interest

7.19 Under recommendations 7.1(1)(b) and 7.1(2)(f), a court could allow a person that it considers has sufficient interest in an order to apply for, and appear and be heard in relation to, it. A person with sufficient interest would also be able to apply for a review or leave to appeal, and to appear and be heard on a review of an order (other than an exclusion order) or appeal (recommendations 7.2(2)(f), 7.3(1)(b) and 7.5(3)(f)).

7.20 This should provide flexibility to enable certain persons who may have an interest in the making of an order (such as, a witness, a person who produces documents on subpoena, or an agency claiming public interest immunity) to apply for and/or appear and be heard in relation it.

Standing is not limited to those with a direct or sufficient interest

7.21 Some submissions considered that an entitlement to appear and be heard on an application for, or a review or appeal of, an order should be limited to:

- those with a direct interest (that is, the applicant for an order or a party), and
- any other person the court considers has sufficient interest.[13]

7.22 For the reasons outlined above, we consider that governments, government agencies and the media, should also have standing. As orders under the new Act raise important questions about open justice, broader standing provisions are justified.

No standing for additional categories of persons

7.23 Some submissions suggested that additional persons should be able to appear and be heard in relation to orders, including:

- a (non-legal) representative of a child[14]
- a researcher,[15] and
- a “citizen journalist”.[16]

7.24 Johnston and co-authors said that there should be open standing; that is, any person with a genuine argument about why an order should be made, or not made, should be

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13. Supreme Court of NSW, *Submission CI55*, 3. See also Legal Aid NSW, *Submission CI57*, 9; Rape and Domestic Violence Services Australia, *Submission CI61* [13].
14. knowmore, *Submission CI43*, 7–8.
15. T Sourdin, *Submission CI40*, 1–2.
16. M Douglas, *Submission CI35*, 1.

entitled to appear and be heard. This is because "[s]uppression orders affect everyone and anyone, so, correlatively, anyone and everyone should have standing".[17]

7.25 We do not recommend extending the entitlement to appear and be heard to other persons nor recommend open standing. A person excluded from one of the other listed categories could appear and be heard if the court considered they had a sufficient interest.

No public interest monitor or contradictor

7.26 We do not recommend introducing a public interest monitor or contradictor under the new Act.

7.27 The Council for Civil Liberties submitted that a public interest monitor could appear if requested by a judge, to help frame the scope of the order.[18] They suggested that people could also refer their concerns to the monitor, who could then intervene to review or appeal the order.[19] The Law Society also recommended 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".[20] A comparable position exists at the federal level in relation to journalist information warrants.[21]

7.28 We have concluded that the benefits of a public interest monitor or contradictor do not outweigh the resourcing it would require. The main purpose of the monitor would be to identify the relevance of the public interest in open justice and draw together appropriate evidence that may have been overlooked by the parties to the proceedings. However, it is incumbent on parties to proceedings to ensure the court is equipped with the evidence and facts relevant to the court's assessment. Courts would usually require persuasive evidence and reasons before making an order.

When an order can be made

7.29 Recommendation 7.1(3)(a) aligns with the *CSNPO Act.*[22]

7.30 Recommendation 7.1(3)(b) is that a court should be able to make an exclusion or closed court order at any time during proceedings, but not after proceedings have concluded. Exclusion and closed court orders involve the physical exclusion of people from the court, which can only occur while the proceedings are taking place.

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17. J Johnston, P Keyzer, A Wallace and M Pearson, *Preliminary Submission PCI26*, 5–6.
18. NSW Council for Civil Liberties, *Preliminary Submission PCI29*, 5.
19. NSW Council for Civil Liberties, *Preliminary Submission PCI29*, 5.
20. NSW Law Society, *Preliminary Submission PCI31*, 4.
21. *Telecommunications (Interception and Access) Act 1979* (Cth) ch 4 pt 4–1 div 4C. See NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Consultation Paper 22 (2020) [13.17].
22. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 9(3).

Review of orders

Recommendation 7.2: Review of non-publication, non-disclosure and closed court orders

The new Act should provide:

(1) A court that made a non-publication, non-disclosure or closed court order may review the order on:

- (a) the court's own initiative, or
- (b) the application of a person who is entitled to apply for a review as listed in recommendation 7.2(2).

(2) The following persons are entitled to apply for, and appear and be heard on, the review of a non-publication, non-disclosure or closed court order:

- (a) the applicant for the order
- (b) a party to the proceedings in which the order was made
- (c) the government (or an agency of the government) of the Commonwealth or of a state or territory
- (d) a journalist
- (e) a news media organisation, and
- (f) any other person who, in the court's opinion, has a sufficient interest in the question of whether an order should have been made or continue to operate.

(3) On a review, the court may confirm, vary or revoke the order and may in addition make any other order that the court can make under the Act.

Recommendation 7.3: Review of exclusion orders

The new Act should provide:

(1) A court that made an exclusion order may review the order on:

- (a) the court's own initiative, or
- (b) the application of:
  - (i) the applicant for the order
  - (ii) a party to the proceedings in which the order was made, or
  - (iii) any other person who, in the court's opinion, has a sufficient interest in the question of whether an order should have been made or continue to operate.

(2) On a review, the court may confirm, vary or revoke the order and may in addition make any other order that the court can make under the Act.

7.31 A review, as distinct from an appeal, is heard by the court that made the original order. Including review mechanisms in the new Act is intended to:

- provide a clear and efficient avenue for challenging and reassessing an order, as the need for an order, or for it to contain particular restrictions or exceptions, may vary over time,[23] and people may only learn of an order after it has been made
- help to ensure orders are only made when necessary on one or more of the specified grounds, and that they are appropriately limited in scope,[24] and
- promote openness and transparency in the making of orders.

7.32 We received support in submissions and consultations for a review mechanism.[25]

Different review mechanisms for non-publication, non-disclosure and closed court orders, and exclusion orders

7.33 Recommendation 7.2 outlines the procedures for reviewing non-publication, non-disclosure and closed court orders, and is similar to the *CSNPO Act*.[26]

7.34 Recommendation 7.3 contains more limited procedures for reviewing an exclusion order. An exclusion order should only be reviewed on the court's own initiative or on the application of:

- the applicant for the original order
- a party to the proceedings in which the original order was made, or
- a person that the court considers has sufficient interest.

7.35 There would be no entitlement for certain persons, such as a news media organisation or a government agency, to appear and be heard on a review of an exclusion order. This is because the effect of an exclusion order is limited to the proceedings or a part of the proceedings to which it applies, and, unlike other types of orders, does not have any effect on publication or disclosure of information from the proceedings.

7.36 If the wider range of persons were entitled to apply for, and appear and heard on, a review of an exclusion order, it may result in delays to proceedings, impose

23. *JB v R* [2019] NSWCCA 48 [29].
24. Recommendation 6.4–6.10.
25. NSW Bar Association, *Submission CI56* [7]; Australia's Right to Know, *Submission CI27*, 56; Roundtable 2, *Consultation CIC03*.
26. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 13.

unreasonable costs on parties and impact court resources.[27] This is because courts would often have to stay proceedings to review of an exclusion order.

7.37 We consider that the inclusion of a limited review mechanism for exclusion orders would provide an appropriate balance between mitigating the potential resource impact, and enabling exclusion orders to be reviewed, where appropriate.

Standing to apply for, appear and be heard on a review of a non-publication, non-disclosure or closed court order

7.38 Recommendation 7.2(2) sets out the list of persons who would be entitled to apply for, and appear and be heard on, a review of a non-publication, non-disclosure or closed court order. It is similar to the *CSNPO Act.*[28]

7.39 The recommended list of persons is the same as those who would be entitled to appear and be heard on an application for an order (recommendation 7.1(2)).

7.40 The ODPP expressed concern about the possibility of multiple applications being made by different persons on a similar basis.[29] This is unlikely to occur in relation to applications for orders, as only a party would be entitled to apply for an order, and other persons would have to establish a sufficient interest in the proceedings to do so (recommendation 7.1(1)). However, it is possible that multiple applications could be made for reviews of non-publication, non-disclosure and closed court orders, given the list of persons (including journalists and news media organisations) who would be entitled to apply for a review (recommendation 7.2(2)).

7.41 The ODPP suggested that courts should be able to "summarily refuse" an application that has previously been the subject of a ruling, unless new circumstances justify the making of a further application.[30] We consider there is already scope for this under recommendation 7.2(1), which provides that a court "may" review an order. Whether an order is reviewed, and the scope of any such review, would be a matter for the court depending on the circumstances.

Possible outcomes of a review

7.42 Recommendations 7.2(3) and 7.3(2) are similar to the *CSNPO Act*.[31]

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27. Local Court of NSW, *Submission CI58*, 5–7.
28. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 13(2).
29. NSW Office of the Director of Public Prosecutions, *Submission CI48*, 2.
30. NSW Office of the Director of Public Prosecutions, *Submission CI48*, 2.
31. *Court Suppression and Non-publication Orders Act* (NSW) s 13(3).

Revocation of a non-publication or non-disclosure order in certain circumstances

Recommendation 7.4: Revocation of a non-publication or non-disclosure order on review

The new Act should provide:

(1) On a review, a court must revoke a non-publication or non-disclosure order if:

(a) unless the review is on the court's own motion, the application for the review is made by:

(i) a complainant or victim of a prescribed sexual offence or a domestic violence offence or a protected person in an apprehended violence order proceeding, and

(ii) the order was made in relation to information tending to identify the complainant, victim or protected person, and

(b) the court is satisfied that the complainant, victim or protected person:

(i) is aged 18 years or over and consents to the revocation of the order, or

(ii) is aged 16 years or over but under 18 years and consents to the revocation of the order after receiving legal advice from an Australian legal practitioner about the implications of consenting, and

(c) the court is satisfied that it is otherwise appropriate in all the circumstances for the order to be revoked.

(2) Despite recommendation 7.4(1), the court must not revoke an order if:

(a) the revocation of the order would result in the publication or disclosure of the identity of any other person:

(i) against whom a prescribed sexual offence or domestic violence offence was allegedly committed and that was dealt with in the same proceeding, or

(ii) who is, or was, a protected person in the same apprehended violence order proceeding, and

(b) that person:

(i) does not give permission to that publication or disclosure, or

(ii) is aged under 18 years, unless the person is aged 16 years or over and has consented to publication or disclosure after receiving advice from an Australian legal practitioner about the implications of consenting, or

(c) the court is not satisfied it is appropriate in all the circumstances.

7.43 Several submissions said that victims can feel silenced by restrictions on publication and disclosure.[32] This is of particular concern in the context of sexual assault and domestic violence because:

- these crimes are based around power and control, and victims may feel further silenced and re-traumatised by the justice system if they are not able to publicly name themselves or share their stories[33]

32. Victims of Crime Assistance League Inc NSW, *Preliminary Submission PCI32*, 4; Women's Domestic Violence Court Advocacy Services NSW Inc, *Preliminary Submission PCI30*, 2–3, 5; No to Violence, *Preliminary Submission PCI38*, 2; knowmore, *Preliminary Submission PCI35*, 3–4.

- there may be practical consequences; for example, if a victim needs to provide evidence of domestic violence to access support services,[34] and
- some victims may want to prevent the defendant from receiving the benefit of a restriction where, for example, both the victim and the defendant's identities are protected as they are related, and identification of one may result in identification of the other.[35]

7.44 Recommendation 7.4(1) would enable a complainant or victim of a prescribed sexual offence or domestic violence offence, or a protected person in an apprehended violence order proceeding, to compel the revocation of a non-publication or non-disclosure order over their identity, in certain circumstances.

7.45 Submissions and consultations supported this.[36]

7.46 There is no equivalent provision in the *CSNPO Act*. Recommendation 7.4 is similar to a provision in the *Open Courts Act 2013* (Vic) (*Open Courts Act*), inserted in 2019.[37]

7.47 There are circumstances where it may not be appropriate for a person's identity to be published or disclosed, such as where it may result in the identification of other victims.[38] Recommendation 7.4(2)(a)–(b) is that a court should not be able to revoke the order if it would identify another victim, complainant or protected person in the same proceeding, unless:

- that person is 18 or over and consents to publication or disclosure of their identity, or
- that person is 16 or 17 and consents to the publication or disclosure of their identity, after receiving advice from an Australian legal practitioner about the implications of consenting.

7.48 Further, under recommendation 7.4(2)(c), the court would retain a discretion to refuse to revoke an order if it was not appropriate in all the circumstances. This could be the case

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33. Victims of Crime Assistance League Inc NSW, *Preliminary Submission PCI32*, 4; Women's Domestic Violence Court Advocacy Services NSW Inc, *Preliminary Submission PCI30*, 2–3, 5; No to Violence, *Preliminary Submission PCI38*, 2; knowmore, *Preliminary Submission PCI35*, 3–4.
34. Women's Domestic Violence Court Advocacy Services NSW Inc, *Preliminary Submission PCI30*, 5.
35. Victims of Crime Assistance League Inc NSW, *Preliminary Submission PCI32*, 3–4. See also F Vincent, *Review of the Open Courts Act 2013 (Vic)* (2017) [270].
36. knowmore, *Preliminary Submission PCI35*, 4; Office of the Advocate for Children and Young People, *Submission CI05*, 2; Feminist Legal Clinic Inc, *Submission CI16*, 2; Legal Aid NSW, *Submission CI24*, 10; knowmore, *Submission CI43*, 17; Fighters Against Child Abuse Australia, *Submission* CI32, 7, 10; Legal Aid NSW, *Submission CI57*, 11; Roundtable 1, *Consultation CIC02*; Roundtable 2, *Consultation CIC03*; Roundtable 3, *Consultation CIC05*.
37. *Open Courts Act 2013* (Vic) s 15(1B)–(1C).
38. Fighters Against Child Abuse Australia, *Submission CI32*, 7, 10; Roundtable 3, *Consultation CIC05*.

where, for example, lifting the order would result in the publication or disclosure of information other than the identity of the complainant, victim or protected person.[39]

7.49 As we discuss below, the views of the person who is, or would be, protected by an order would be taken into account when a court is considering whether to make an order (recommendation 7.6). This is intended to prevent orders that may later be revoked from being made in the first place, where the relevant person does not support the order being made at the outset.

No automatic review of orders

7.50 Concerns were expressed about orders made under the *CSNPO Act,* unintentionally operating indefinitely.[40] This may occur where, for example, an order was made "until further order", but another order is never made.

7.51 Some stakeholders supported the introduction of an automatic review requirement.[41] South Australian legislation includes a provision under which suppression orders become liable for review in certain circumstances, including, in criminal proceedings:

- on the completion or termination of committal proceedings, or
- on the acquittal of the defendant.[42]

7.52 We do not recommend the new Act should require reviews of orders in specified circumstances. This may be overly onerous for the courts and impact court resources. The recommendations in relation to duration of orders,[43] and introduction of a register of orders,[44] together with the capacity to apply for a review, should mitigate the risk that orders operate indefinitely without legitimate reason.

7.53 However, courts could consider introducing policies or procedures that provide for the periodic review of orders that have been expressed to be of an indefinite duration. Such orders could be identified in the register of orders, which we recommend in chapter 13.

39. Local Court of NSW, *Submission CI58*, 4.
40. Banki Haddock Fiora, *Submission CI29*, 6–7; Roundtable 2, *Consultation CIC03*.
41. Roundtable 2, *Consultation CIC03*.
42. *Evidence Act 1929* (SA) s 69AB(1).
43. Recommendation 6.9.
44. Recommendation 13.8.

Appeals

Recommendation 7.5: Appeals of non-publication, non-disclosure, exclusion and closed court orders

The new Act should provide:

(1) With leave of the appellate court, an appeal can be made against:

(a) a decision of the original court to make, or not make, a non-publication, non-disclosure, exclusion or closed court order

(b) a decision by the original court made on the review of a non-publication, non-disclosure, exclusion or closed court order, or

(c) a decision by the original court not to review a non-publication, non-disclosure, exclusion or closed court order.

(2) Appeals should be heard in the following courts:

(a) if the decision under appeal was made in the Supreme Court, the Land and Environment Court or the District Court – the Court of Appeal, or

(b) if the decision under appeal was made in the Local Court or Children's Court – the District Court.

(3) The following persons are entitled to apply for leave to appeal, and to appear and be heard on an application for leave to appeal, and an appeal:

(a) the applicant for the order

(b) a party to the proceedings in which the order or decision subject to appeal was made

(c) the government (or an agency of the government) of the Commonwealth or of a state or territory

(d) a journalist

(e) a news media organisation, and

(f) any other person who, in the appellate court's opinion, has a sufficient interest in the decision that is the subject of appeal.

(4) On appeal, the appellate court may confirm, vary or revoke the order or decision and may in addition make any order or decision that could have been made in the first instance.

(5) An appeal is to be by way of rehearing and fresh evidence may be given by leave.

7.54 Recommendation 7.5 is similar to the appeal provision in the *CSNPO Act*.[45] In submissions, we received support for including clear appeal mechanisms.[46]

7.55 Review and appeal provisions "operate harmoniously"[47] but would have some key differences. For example:

45. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 14.

46. Australia's Right to Know, *Preliminary Submission PCI27*, 56; NSW Bar Association, *Submission CI56* [7]; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission CI49*, 2.

47. *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125, 83 NSWLR 52 [5].

- a review would be heard by the original court (that is, the court that made the decision to make or not make an order), whereas an appeal would be heard by a higher court
- a review would be confined to a review of the order, whereas an appeal could also be made against a decision made on review of an order (such as a decision to confirm, vary or revoke the order) and a decision not to review an order, and
- unlike a review of an order, no person would be entitled to appeal a decision as of right, but an appeal would be only by leave of the appellate court.

7.56 In chapter 4, we recommend that the rules committee of each court would be empowered to make rules that supplement the new Act, including procedural rules for the application and hearing of applications for leave and appeals.[48]

All types of orders may be appealed

7.57 Recommendation 7.5(1) is that decisions about non-publication, non-disclosure, exclusion and closed court orders should be appealable.

7.58 The Local Court expressed concern about the potential resource impact of including an appeal mechanism for exclusion orders, particularly given the volume of matters dealt with by the that court. An appeal of an exclusion order may require proceedings to be stayed, resulting in "significant disruption in this jurisdiction while any such application is determined".[49]

7.59 Recommendation 7.5(1), which requires leave of the appellate court for an appeal, should provide a sufficient control over numerous or unnecessary appeals. It would also be a matter for the first instance judicial officer as to whether proceedings are stayed while the appeal is determined.

7.60 The Supreme Court suggested that the new Act could confine appeals to an error of law, because appeals "will generally be urgent and perhaps need to be conducted during the course of a trial".[50]

7.61 We do not recommend that appeals should be confined to an error of law. Most decisions made under the *CSNPO Act* involve findings of fact and exercises of discretion, not questions of legal principle. Confining an appeal to an error of law would practically make most decisions unappealable. The requirement for leave to appeal should provide a sufficient control on appeals.

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48. Recommendation 4.12.
49. Local Court of NSW, *Submission CI58*, 5.
50. Supreme Court of NSW, *Submission CI55* [8].

Appellate courts

7.62 The *CSNPO Act* defines appellate court as "the court to which appeals lie against final judgments or orders of the original court or, if there is no such court, the Supreme Court".[51] The ODPP submitted that this definition lacks clarity, as there may be more than one court to which judgments or orders of the original court lie, and the correct appellate court may differ depending on the type of proceeding.[52]

7.63 Recommendation 7.5(2) sets out that:

- decisions under appeal from the Supreme Court, Land and Environment Court or District Court, would go to the Court of Appeal, or
- decisions under appeal from the Local Court or Children's Court, would go to the District Court.

7.64 We considered whether appeals from the Supreme Court or District Court exercising criminal jurisdiction, and the Land and Environment Court exercising Class 5, 6 or 7 jurisdiction,[53] should go to the Court of Criminal Appeal. This would be consistent with:

- case law in which appeals from orders made under the *CSNPO Act* have gone to the Court of Criminal Appeal,[54] and
- legislation governing appeals of interlocutory judgments or orders made in some criminal proceedings also having gone to the Court of Criminal Appeal.[55]

7.65 However, we conclude that it would be simpler for appeals from all decisions by the Supreme Court, Land and Environment Court and District Court to go to the Court of Appeal. The Court of Appeal includes judicial officers who are experienced in both civil and criminal matters and would be well placed to consider these appeals. Further, unlike the Court of Criminal Appeal, the Court of Appeal is a standing court and can be more readily convened to deal with urgent matters.[56]

Standing to apply for leave to appeal, and to appear and be heard on an appeal

7.66 While the *CSNPO Act* outlines who is entitled to appear and be heard on an appeal,[57] it does not set out who is entitled to apply for leave to appeal.

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51. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 14(2).
52. NSW Office of the Director of Public Prosecutions, *Submission CI17*, 13–14.
53. *Land and Environment Court Act 1979* (NSW) s 21–21B.
54. *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125, 83 NSWLR 52 [15]; *Nationwide News Pty Ltd v Qaumi* [2016] NSWCCA 97, 93 NSWLR 384 [14].
55. *Criminal Appeal Act 1912* (NSW) s 5F.
56. Supreme Court of NSW, *Consultation CIC22*.
57. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 14(3).

7.67 Recommendation 7.5(3) sets out the persons who could apply for leave to appeal, and who could appear and be heard on an appeal. These persons would be the same as those entitled to appear and be heard on an application for an order (recommendation 7.1(2)).

7.68 This recommendation is intended to provide clarity and specificity around who can apply for leave to appeal.

Possible outcomes of an appeal

7.69 Recommendation 7.5(4) is similar to the *CSNPO Act*.[58]

Appeals to be by way of rehearing and fresh evidence may only be given by leave

7.70 The Court of Criminal Appeal has highlighted a potential inconsistency in the *CSNPO Act,* which provides that an appeal is "by way of rehearing", but also that "fresh evidence or evidence in addition to, or in substitution for, the evidence given on the making of the decision may be given".[59] The Court observed that the ability of a court to take evidence again may be more accurately described as an appeal by way of "hearing de novo".[60]

7.71 These types of appeals can be distinguished as follows:

- An appeal by way of rehearing involves the appellate court making a new determination, according to the laws at the time of the appeal, but usually by reference to evidence given at first instance. Fresh evidence may be given by leave in some circumstances.[61]
- An appeal by way of hearing de novo involves the appellate court hearing the matter afresh and making a new determination based on the evidence given at that hearing.[62]

7.72 To provide clarity, recommendation 7.5(5) is that an appeal under the new Act would be by way of rehearing, but, unlike the *CSNPO Act*, fresh evidence may only be given by leave. This is intended to resolve any potential inconsistency and ensure that appeals are not de novo hearings. The facility of a review makes a de novo hearing inappropriate.

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58. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 14(4).
59. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 14(5).
60. *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125, 83 NSWLR 52 [22].
61. *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* [2000] HCA 47, 203 CLR 194 [13] cited in *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125, 83 NSWLR 52 [22].
62. *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* [2000] HCA 47, 203 CLR 194 [13] cited in *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125, 83 NSWLR 52 [22].

No equivalent to s 14(6) of the *CSNPO Act*

7.73 We do not recommend that the new Act should include an equivalent to s 14(6) of the *CSNPO Act,* which provides:

> If judgments or orders of the original court are subject to review by another court (rather than appeal to another court), this section provides for a review of the original court's decisions instead of an appeal and in such a case references in this section to an appeal are to be read as references to a review.

7.74 The Court of Criminal Appeal has observed that the use of the word "review" was not a reference to a review by the original court under s 13 of the *CSNPO Act*, but rather it was likely concerned with a situation where there is a statutory right of review to another court or tribunal. Section 14(6) "makes clear that whatever procedure is adopted the evidentiary provision in relation to new or substituted evidence will apply".[63]

7.75 The Court observed that while this would not be applicable to any court defined by s 3 of the *CSNPO Act*, the "definition envisages prescription of other courts, tribunals or bodies as falling within the definition and hence the scope of the Act".[64] For example, the term review is often used in relation to reconsideration of administrative decisions.

7.76 In the new Act, the definition of "court" would include a defined list of courts and other judicial bodies could be prescribed in regulations.[65] The court to which an appeal lies against is defined. We conclude, therefore, that a clause akin to s 14(6) of the *CSNPO Act* is unnecessary and potentially confusing.

Court must consider the views of the person

Recommendation 7.6: Court must consider the views of the person who is, or would be, protected by an order when making a decision

The new Act should provide:

(1) When making a decision under the Act, the court must take into account, where relevant and practicable:

(a) the views of the person who is, or would be, protected by a non-publication, non-disclosure, exclusion or closed court order, considered in light of:

(i) if the person has a mental health impairment or cognitive impairment, their mental health impairment or cognitive impairment, or

(ii) if the person is a child, their age and understanding, and

63. *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125, 83 NSWLR 52 [5], [19]–[20].

64. *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125, 83 NSWLR 52 [5], [19]–[20].

65. Recommendation 4.3(1)(a).

(b) any other factor that the court considers relevant.

(2) "A decision" includes making a non-publication, non-disclosure, exclusion or closed court order, as well as making an order to confirm, vary or revoke an order on review or appeal.

7.77 There is no similar requirement to recommendation 7.6 in the *CSNPO Act*. In practice, courts will sometimes confer with the prosecution about a victim's wishes in relation to their identity being protected by a non-publication or non-disclosure order.[66]

7.78 A legislative requirement to take into account the views of the person who is, or would be protected by an order, would encourage courts to take a proactive approach to determining and considering their views in every case. Some submissions supported such a requirement.[67]

7.79 Unlike our draft proposals,[68] recommendation 7.6(1) would require the court to take into account the views of the relevant person when making a decision under the new Act. Under recommendation 7.6(2), "a decision" would include making a non-publication, non-disclosure, exclusion or closed court order, as well as making an order to confirm, vary or revoke an order on review or appeal.

7.80 Submissions and consultations indicated that non-publication and non-disclosure orders may result in a person being unable to identify themselves as the victim of a crime or share their story and experiences.[69] Some stakeholders expressed concern that applications for orders are sometimes brought against the wishes of victims, and that they sometimes wished they were able to express their views about whether an order should be made.[70] As such, in relation to non-publication, non-disclosure and closed court orders, a court should consider the person's views particularly where the order relates to their identity.

7.81 In relation to exclusion orders, it may also be appropriate for a court to consider the views of the witness that the order is intended to protect. Some witnesses may feel that they can give better evidence if certain people, or categories of people, are excluded from the proceedings. Others may not feel that they need an exclusion order to be

66. See, eg, *Noonan v R* [2021] NSWCCA 35 [46]; *Culbert v R* [2021] NSWCCA 38 [1]. See also H Brown, *Preliminary Submission PCI10*, 4.

67. Rape and Domestic Violence Services Australia, *Submission CI08* [34]; knowmore, *Submission CI10*, 9–10; Legal Aid NSW, *Submission CI24*, 3.

68. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 4.14(2), proposal 4.19(2).

69. Victims of Crime Assistance League Inc NSW, *Preliminary Submission PCI32*, 3; knowmore, *Submission CI10*, 5–6; Roundtable 3, *Consultation CIC05*.

70. Victims of Crime Assistance League Inc NSW, *Preliminary Submission PCI32*, 4; Roundtable 2, *Consultation CIC03*.

made, or they may prefer to rely on other forms of support, such as those available under the *Criminal Procedure Act 1986* (NSW) (*Criminal Procedure Act*).[71]

7.82 Recommendation 7.6(1)(a) is that:

- if the person has a mental health or cognitive impairment, the court must take their views into account in light of their mental health or cognitive impairment, or
- if the person is a child, the court must take their views into account in light of their age and understanding.

7.83 This is intended to ensure consideration is given to a person's decision-making capacity. It is similar to a provision in the *Criminal Procedure Act.*[72]

7.84 In addition to considering the person's views, recommendation 7.6(1)(b) requires a court to consider any other factor that the court considers relevant. In some circumstances, an order may be made to protect a particular person, as well as for other reasons. For example, a non-publication or non-disclosure order may be made to protect the identity of a witness as well as sensitive information about police operations.[73] In this situation, the witness's views should not be the determinative factor for the court.
The Children's Court supported a court having discretion to consider other factors.[74]

7.85 Recommendation 7.6(1) specifies that a court should be required to take the person's views into account only where these views are relevant and it is practicable to do so. This responds to the Police Force's concerns about the practical difficulties in obtaining a person's views in some proceedings. For example, where police seek an order in relation to the identity of an informant, "seeking the informant's views at court regarding a non-publication order may be a risk to their safety (unless it is done confidentially)".[75]

Requirement to give reasons on request

Recommendation 7.7: Requirement to give reasons on request

The new Act should provide:

(1) The following persons may request reasons for a decision made under the new Act within 14 days of the making of the decision or such further time as the court may permit:

71. *Criminal Procedure Act 1986* (NSW) s 306U, s 306ZB, s 306ZH. See also NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Consultation Paper 22 (2020) [8.43]–[8.48], [8.67].
72. *Criminal Procedure Act 1986* (NSW) s 306T(1).
73. NSW Police Force, *Submission CI38*, 1.
74. Children's Court of NSW, *Consultation CIC25*.
75. NSW Police Force, *Submission CI38*, 1.

(a) the applicant for the order

(b) a party to the proceedings in which the order was made

(c) the government (or an agency of the government) of the Commonwealth or of a state or territory

(d) a journalist

(e) a news media organisation, or

(f) any other person who, in the court's opinion, has a sufficient interest in whether an order should have been made or should continue to operate.

(2) A court is not required to give reasons on request:

(a) for an interim non-publication or non-disclosure order, or

(b) if giving reasons would render the order ineffective.

(3) "A decision" includes making a non-publication, non-disclosure, exclusion or closed court order, as well as making an order to confirm, vary or revoke an order on review or appeal.

7.86 The purpose of recommendation 7.7 is to:

- promote open justice and transparency about decision-making under the new Act[76]
- support the media and other persons in determining whether to apply for a review or appeal of an order or decision,[77] and
- encourage compliance with orders.[78]

7.87 Several submissions supported a requirement to give reasons on request, in principle.[79] The Local Court acknowledged that:

> [p]roviding access to these reasons is essential to upholding transparency, promoting accountability, and facilitating access to the material necessary for proper consideration of possible grounds for appeal and review.[80]

7.88 There is no similar provision regarding reasons in the *CSNPO Act*, although there is a requirement for the order to state the grounds on which it is made.[81]

Reasons may be requested

7.89 Many submissions argued that reasons should be given in every case.[82] Australia's Right to Know (ARTK) said:

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76. Local Court of NSW, *Submission CI58*, 3.
77. Australia's Right to Know, *Submission CI27*, 55–56; Local Court of NSW, *Submission CI58*, 3.
78. University of Sydney Policy Reform Project, *Preliminary Submission PCI11*, 10.
79. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission CI49*, 2; NSW Bar Association, *Submission CI56* [7]; Local Court of NSW, *Submission CI58*, 3.
80. Local Court of NSW, *Submission CI58*, 3.
81. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 8(2).

> We believe that the times where open justice is restricted should be so few as to require the court to be required to provide, and make available, sufficiently detailed reasons.[83]

7.90 However, giving reasons in every case is not necessary or desirable. In many cases, the making of an order is uncontroversial,[84] and there would be limited benefit in the court giving reasons. In addition, a requirement to give reasons during proceedings may be impractical. Courts may need to adjourn proceedings so that reasons can be drafted and delivered. This is likely to be disruptive, particularly in jury trials.[85]

7.91 There was opposition from the courts to any requirement to give written reasons in every case, given the significant resource implications.[86] The Local Court submitted that "magistrates generally deliver *ex tempore* reasons" which are recorded, and a "transcript can be made available upon request".[87] Magistrates in the Children's Court also frequently give ex tempore judgments,[88] as do higher trial courts. As outlined below, recommendation 7.7 allows flexibility in how and when reasons should be provided, once requested.

7.92 Recommendation 7.7 is similar to our draft proposal,[89] and strikes an appropriate balance between enabling access to reasons and minimising the burden to the courts.

Who can make a request for reasons

7.93 Under recommendation 7.7(1), the persons entitled to make a request for reasons would be the same as those who have standing to appear and be heard on an application for an order (recommendation 7.1(2)), apply for, and appear and be heard on, a review of a non-publication, non-disclosure or closed court order (recommendation 7.2(2)) and apply for leave to appeal, and appear and be heard on an appeal of an order (recommendation 7.5(3)). These persons all have a particular interest in decisions made under the new Act.

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82. University of Sydney Policy Reform Project, *Preliminary Submission PCI11*, 4; Banki Haddock Fiora, *Preliminary Submission PCI27*, 5; Banki Haddock Fiora, *Submission CI29*, 6; Australia's Right to Know, *Submission CI27*, 55–56; Australia's Right to Know, *Submission CI59*, 11–12; Fighters Against Child Abuse Australia, *Submission CI32*, 13; knowmore, *Submission CI43*, 8–9.
83. Australia's Right to Know, *Submission CI59*, 12.
84. Supreme Court of NSW, *Consultation CIC14*.
85. Supreme Court of NSW, *Submission CI55* [7]; Supreme Court of NSW, *Consultation CIC22.*
86. Supreme Court of NSW, *Submission CI26*, 1; Local Court of NSW, *Submission CI25*, 2; Local Court of NSW, *Submission CI58*, 3; Children's Court of NSW, *Submission CI28*, 3; Children's Court of NSW, *Submission CI62*, 2–3.
87. Local Court of NSW, *Submission CI58*, 3.
88. Children's Court of NSW, *Submission CI62*, 2–3.
89. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 4.8.

14-day timeframe for requesting reasons

7.94 Recommendation 7.7(1) specifies a time limit of 14 days from the making of the decision under the Act, or such further time as the court permits, for a person to request reasons for that decision. Other legislation includes time limits for requesting reasons in certain circumstances.[90]

7.95 Some stakeholders expressed concern about reasons being requested long after an order has been made.[91] The Children's Court said that if there was a long period of time between when the decision was made and when reasons were requested, it is likely a judicial officer would have to obtain a transcript in order to refresh their mind, which "could contribute to an increase in time delay and cost".[92]

7.96 The 14-day time limit is intended to:

- prevent courts from becoming unduly burdened with requests for reasons, and
- ensure that the order is fresh in the judicial officer's mind, which is particularly important if reasons were not given during proceedings.

No requirement for reasons to be provided in a particular form

7.97 We do not recommend that courts should be required to provide reasons in a particular form.

7.98 Instead, courts would have flexibility as to how reasons are provided. A court would be able to provide reasons as a written statement, a sound recording (if reasons were delivered ex tempore) or a transcript of a sound recording.

7.99 In relation to transcripts, Courts, Tribunals and Service Delivery outlined various practical requirements that should be considered on implementation of this recommendation. These include:

- A request for a transcript must clearly specify what part of proceedings are to be transcribed, and whether and what information must be redacted. Otherwise, irrelevant or unauthorised information may be included.[93]
- Capacity to accept a request for a redacted transcript will depend on the time and resources available, including the availability of suitably skilled staff.[94]

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90. See, eg, *Civil and Administrative Tribunal Act 2013* (NSW) s 62(2).
91. Confidential, *Submission CI51*; Children's Court of NSW, *Submission CI62*, 2–3; Supreme Court of NSW, *Consultation CIC22*.
92. Children's Court of NSW, *Submission CI62*, 3.
93. Courts, Tribunals and Service Delivery, NSW Department of Communities and Justice, *Submission CI53*, 9.

No requirement for reasons to be provided in a particular timeframe

7.100 One confidential submission raised concerns about the absence of any time limitations on when reasons would have to be provided.[95] knowmore supported introducing timeframes for providing reasons, to mitigate lengthy delays.[96]

7.101 We do not recommend that a court should be required to provide reasons within a specified timeframe. Such a requirement may be overly prescriptive and does not account for the high volume of matters dealt with by some judicial officers.

7.102 Further, certain parts of the reasons may need to be redacted if, for example, personal identification information is included. CTSD noted that redaction may increase the time required to prepare a transcript.[97]

7.103 While we do not recommend a legislative timeframe for providing reasons, courts should be encouraged to provide reasons as soon as practicable. The timely provision of reasons is important to enable a person to exercise their entitlement to apply for review or leave to appeal.

Exceptions to the requirement to give reasons on request

7.104 There are circumstances where it is not appropriate for a court to give reasons. Under recommendation 7.7(2), a court would not be required to give reasons on request:

- for making an interim non-publication or non-disclosure order. As a court does not need to determine the merits of an interim order,[98] reasons would not be appropriate, and
- if giving reasons would render the order ineffective. In some cases, the reasons for making an order would reveal the information that cannot be disclosed.

7.105 These are similar to exceptions in the Victorian *Open Courts Act*.[99]

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94. Courts, Tribunals and Service Delivery, NSW Department of Communities and Justice, *Submission CI53*, 9.
95. Confidential, *Submission CI51*.
96. knowmore, *Submission CI43*, 8–9.
97. Courts, Tribunals and Service Delivery, NSW Department of Communities and Justice, *Submission CI53*, 9.
98. Recommendation 6.14(1).
99. *Open Courts Act 2013* (Vic) s 14A(2).

Costs

Recommendation 7.8: Costs in proceedings for orders

The new Act should provide:

(1) In proceedings on the application for or review of a non-publication, non-disclosure, exclusion or closed court order (including an interim order), a court may make an order for costs against a person only if the court is satisfied that the person's involvement in the application or review is frivolous or vexatious.

(2) In proceedings on an appeal from an order, a court may make an order for costs.

7.106 A costs order is an order made by the court determining which party must bear all or some of the legal costs of a proceeding. As a general rule, costs are not awarded in criminal proceedings, subject to certain statutory exceptions.[100] However, costs are usually awardable in civil proceedings, and courts generally have the power to determine who pays, to what extent, and on what basis.[101]

7.107 The *CSNPO Act* does not include a costs provision. Whether a costs order is made under the *CSNPO Act* depends on factors including:

- the type of proceeding (for example, whether it is an application for an order or an appeal)
- whether the order arose in the context of criminal or civil proceedings, and
- the jurisdiction of the court hearing the proceeding.

7.108 Case law has confirmed:

- The Supreme Court does not have jurisdiction to make a costs order in relation to proceedings for an application for an order under the *CSNPO Act*, made in the context of criminal proceedings.[102]
- The Court of Criminal Appeal cannot make an order for costs in an appeal against an order under the *CSNPO Act* made by the District Court exercising criminal jurisdiction. Such proceedings fall under the no costs regime provided by s 17(1) of the *Criminal Appeal Act 1912* (NSW) (*Criminal Appeal Act*).[103]

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100. Judicial Commission of NSW, *Local Court Bench Book* [56-00]–[56-120] (retrieved 23 May 2022). See also *R v Martinez (No 7)* [2020] NSWSC 361 [34]; *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125, 83 NSWLR 52 [104].
101. Judicial Commission of NSW, *Civil Trials Bench Book* [8-0010] (retrieved 23 May 2022). See also *Civil Procedure Act 2005* (NSW) s 98.
102. *R v Martinez (No 7)* [2020] NSWSC 361 [26], [31]–[34].
103. *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125, 83 NSWLR 52 [104].

- The Supreme Court has jurisdiction to award costs in an appeal against a *CSNPO Act* order made by the Local Court exercising criminal jurisdiction.[104]

7.109 ARTK and Banki Haddock Fiora submitted that the current situation is inconsistent and potentially inequitable. These stakeholders supported including a costs provision in the new Act to resolve this issue.[105]

7.110 Recommendation 7.8(1) is similar to our draft proposal, which was that costs should be awardable in all types of proceedings under the new Act, but only where the person's involvement is frivolous or vexatious. Several submissions supported this proposal,[106] whereas others opposed limiting a court's discretion to award costs.[107] One confidential submission expressed concern that limiting availability of costs orders may result in a significant increase in applications for, or reviews and appeals of, orders, as persons would not have a financial stake in the outcome.[108]

7.111 As a qualification of our draft proposal, recommendation 7.8(1) applies only in relation to applications for and reviews of orders. The threat of costs orders may deter persons from applying for or seeking reviews of orders, particularly those with limited financial resources.[109] Persons, including the media, should not be discouraged from applying for, or opposing, an order or a review of an order when they are acting in good faith. This is an important part of promoting open justice.

7.112 Recommendation 7.8(2) does not impose any limit on a court's powers to make costs orders in appeals. The Supreme Court submitted that there is no reason to take away the discretion of the court to order costs in unsuccessful appeals.[110]

7.113 An appeal, as distinct from a first instance proceeding, involves a second bite at the cherry for the unsuccessful party. While limiting the court's discretion to award costs in proceedings for an application for, or review of, an order is important for promoting open justice under the new Act, we do not consider that this extends to appeals.

7.114 Recommendation 7.8(2) would also assist in resolving the current discrepancy where costs are awardable in some appeal proceedings but not others. As explored above, all appeals under the new Act would either go to the Court of Appeal or District Court, but

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104. *Australian Broadcasting Corporation v Local Court of NSW (No 2)* [2014] NSWSC 515 [18]–[21], [35].
105. Australia's Right to Know, *Submission CI27*, 54; Banki Haddock Fiora, *Submission CI29*, 7.
106. NSW Office of the Director of Public Prosecutions, *Submission CI48*, 2; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission CI49*, 2; NSW Bar Association, *Submission CI56* [7]. See also Banki Haddock Fiora, *Preliminary Submission PCI27*, 4–5.
107. Confidential, *Submission CI51*; Supreme Court of NSW, *Submission CI55* [8].
108. Confidential, *Submission CI51*.
109. Confidential, *Submission CI51*; Fighters Against Child Abuse Australia, *Submission CI32*, 11.
110. Supreme Court of NSW, *Submission CI55* [8].

not the Court of Criminal Appeal. Therefore, appeals will not be subject to the no costs regime in s 17(1) of the *Criminal Appeal Act*.

Requirement to post notice of a closed court order

Recommendation 7.9: Requirement to post notice of a closed court order

In relation to closed court orders, the new Act should provide that a court must post notice of a closed court order, whether the proceedings are held in a courtroom or virtually.

7.115 Recommendation 7.9 is the same as our draft proposal,[111] which some submissions supported.[112] It is intended to increase awareness of the existence of the order and reduce the likelihood that it will be breached (for example, by someone inadvertently walking into a closed court).[113] The Victorian *Open Courts Act* has a similar requirement.[114]

7.116 While it would be at the court's discretion as to how the notice is posted, it could include placing a sign on, or in front of, the door of the courtroom, as often currently happens. In relation to a virtual court, a notice could be put up on the screen before proceedings commence, or in a caption. Consultations indicated that this already occurs in practice.[115]

7.117 This recommendation would only apply to closed court orders, as these orders exclude all people other than those whose presence is necessary for the proceedings and their effect is to prohibit disclosure of information from the closed part of proceedings. There would not be a requirement to post notice of an exclusion order in every case, as such orders can be made to apply to a specified person or class of people, or all people other than those necessary for the proceedings, and do not have the effect of prohibiting disclosure. It should be left to the courts to notify the people who are excluded from proceedings.

111. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 4.25.

112. Supreme Court of NSW, *Submission CI55* [11]; NSW Bar Association, *Submission CI56* [7].

113. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) [4.96].

114. *Open Courts Act 2013* (Vic) s 31.

115. Technology Operations, Enterprise Audio Visual Technology, NSW Department of Communities and Justice, *Consultation CIC19*.

Service and notice requirements

7.118 The new Act should not contain service and notice requirements, as this would be inflexible. As discussed in chapter 4, the rules committee of a court would be able to make rules that supplement the new Act. This could include rules about service and notice.[116] This approach would allow service and notice requirements to be tailored to the individual court.

No requirement to notify the media

7.119 Some submissions supported a requirement to notify news media organisations of applications for orders. Banki Haddock Fiora and ARTK submitted that notification would enable news media organisations sufficient time to appear and challenge the making of orders, and their scope.[117] ARTK suggested that a court should not be able to hear an application for an order until after the media have been notified.[118]

7.120 The Victorian *Open Courts Act* includes a similar requirement. It provides that "the court or tribunal must take reasonable steps to ensure that any relevant news media organisation is notified of the application for a suppression order".[119]

7.121 The new Act should not require courts to notify news media organisations. If there was such a requirement, a separate listing of the application may be necessary, which could result in delays and increased costs.[120] Moreover, many orders are made in circumstances of no interest to media organisations.

7.122 We acknowledge that notifying news media organisations, as well as other persons, of orders, may help improve knowledge of and compliance with them. In chapter 13, we recommend a register of orders that would include notification procedures.[121]

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116. Recommendation 4.12.
117. Banki Haddock Fiora, *Submission CI29*, 1, 9–10; Australia's Right to Know, *Submission CI27*, 51.
118. Australia's Right to Know, *Submission CI27*, 51.
119. *Open Courts Act 2013* (Vic) s 11(1).
120. NSW Office of the Director of Public Prosecutions, *Submission CI17*, 10, 31–32.
121. Recommendation 13.8.

Enforcing orders

Breaches of orders punishable as statutory offences or contempt

Recommendation 7.10: Breaches of orders made under the new Act

The new Act should provide:

(1) A person commits an offence if the person contravenes a non-publication, non-disclosure, exclusion or closed court order and knows of, or is reckless as to, the existence of the order.

(2) Conduct that constitutes an offence may be punished as a contempt of court or as an offence.

(3) The offender is not liable to be punished both for contempt and an offence with respect to the same conduct.

(4) If a corporation contravenes the offence, each person who is a director of the corporation or who is concerned in the management of the corporation is taken to have committed the same offence, unless the person satisfies the court that:

  (a) the person was not in a position to influence the conduct of the corporation in relation to its contravention, or

  (b) the person, if in such a position, used all due diligence to prevent the contravention.

(5) Proceedings for this offence must be commenced within two years of the date of the alleged offence.

7.123 Under recommendation 7.10(1) breaching an order made under the new Act constitutes an offence if the person knows of or is reckless as to the existence of the order. A person would not be liable for the offence in recommendation 7.10(1) if an exception applies.[122]

7.124 Recommendation 7.10(2)–(3) makes it clear that conduct that constitutes the offence could be punishable as an offence or as contempt, but not both.

7.125 The elements of the offence are similar to the *CSNPO Act*.[123] They also align with the recommendations relating to breaches of orders made under subject-specific legislation, which we outline in chapter 13.

7.126 Unlike the *CSNPO Act*, recommendation 7.10(4) provides for personal liability of company directors in certain contexts. This is intended to provide that the controllers of corporations, including media corporations, are responsible for compliance. It also aligns with our recommendations in relation to breaches of orders made under subject-specific legislation.[124]

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122. Recommendation 6.11–6.13.

123. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 16(1).

124. Recommendation 13.5.

7.127 Recommendation 7.10(5) requires proceedings for an offence to be commenced within two years. This is similar to the *CSNPO Act*.[125]

Maximum penalties

Recommendation 7.11: Maximum penalties for the offence in the new Act

The offence in the new Act for breaching a non-publication, non-disclosure, exclusion or closed court order should provide:

(1) The maximum penalty for the offence is:

(a) for an individual: 1,000 penalty units or imprisonment for 12 months, or both, or

(b) for a corporation: 5,000 penalty units.

(2) Proceedings for the offence are to be dealt with:

(a) summarily before the Local Court, or

(b) summarily before the Supreme Court in its summary jurisdiction.

(3) If proceedings are brought in the Local Court, the maximum monetary penalty that the Local Court may impose for the offence, despite any higher maximum monetary penalty provided by this Act in respect of the offence, is:

(a) for a corporation: 100 penalty units, or

(b) for a corporation: 500 penalty units.

7.128 Recommendation 7.11 is similar to the *CSNPO Act*,[126] with the additional inclusion of exclusion and closed court orders.

7.129 While most prosecutions for this offence would be dealt with in the Local Court, recommendation 7.11(2)(b) provides for prosecutions to be dealt with in the summary jurisdiction of the Supreme Court. This flexibility to hear serious matters, which are analogous to contempts of the Supreme Court, in the Supreme Court's summary jurisdiction, should be retained for appropriate cases.

Geographic limit of the offence of breaching a non-publication or non-disclosure order

Recommendation 7.12: Geographic limit of the offence of breaching a non-publication or non-disclosure order under the new Act

The new Act should provide that, for the purposes of s 10C of the *Crimes Act 1900* (NSW), the necessary geographical nexus exists between NSW and an offence if the offence involves a contravention of a non-publication order or non-disclosure order made by a NSW court.

7.130 Non-publication and non-disclosure orders made under the new Act would be capable of applying outside the Commonwealth.[127] For such orders to be effective, it is important

125. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 17(3).

126. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 16(1), s 17(1)–(2).

127. Recommendation 6.8(2).

that breaches that occur overseas can be punishable as offences in NSW. This also accords with our aim of updating legislation in response to societal and technological changes (chapter 1).

7.131 Section 10C of the *Crimes Act 1900* (NSW) (*Crimes Act*) sets out the geographic limits of NSW offences. It states that a person is guilty of a NSW offence if:

- all elements necessary to constitute the offence exist, and
- there is a geographical nexus between NSW and the offence.[128]

7.132 A geographical nexus exists if:

- the offence is committed wholly or partly in NSW (whether or not the offence has any effect in NSW), or
- the offence is committed wholly outside NSW, but the offence has an effect in NSW.[129]

7.133 Legislation may set out further ways in which a "geographical nexus" can be established. For example, the *Surrogacy Act 2010* (NSW) provides that the necessary geographical nexus exists, for certain offences under that Act, "if the offence is committed by a person ordinarily resident or domiciled in the State".[130]

7.134 It is likely that breaches of non-publication and non-disclosure orders made by NSW courts that occur overseas would have an effect in NSW and therefore satisfy the test for a geographical nexus in s 10C of the *Crimes Act*. For example, a breach of an order could result in prejudicial information becoming available to a jury in NSW. However, to clarify that all such breaches are to be treated as offences in NSW, the new Act would provide that a geographical nexus exists if the offence involves a contravention of a non-publication order or non-disclosure order made by a NSW court.

Prosecuting overseas breaches

7.135 The combined intended effect of our recommendations is that:

- NSW courts can make non-publication and non-disclosure orders that apply overseas, and
- breaches of those orders constitute offences in NSW.

128. *Crimes Act 1900* (NSW) s 10C(1).
129. *Crimes Act 1900* (NSW) s 10C(2).
130. *Surrogacy Act 2010* (NSW) s 11(2).

7.136 This means that breaches overseas of orders made by NSW courts could be prosecuted in NSW. However, this does not necessarily mean that it will be practical to do so.

7.137 Enforcing breaches that occur overseas requires Australian agencies to investigate and prosecute overseas entities. Capacity to do this depends on the resources and willingness of such agencies. It requires cooperation on the part of the foreign country hosting an alleged perpetrator. Prosecution in NSW may also require the perpetrator to be extradited, which will depend on the extradition arrangements (if any) between the host country and Australia.

7.138 The international enforcement of non-publication and non-disclosure orders is a complex issue and will not be solved solely by providing that orders made by NSW courts apply overseas and that breaches constitute offences in NSW. Nonetheless, these recommendations have potential benefits, in particular, placing overseas publishers on notice of NSW laws and encouraging compliance.

7.139 A potential solution may be an international system of mutual recognition and enforcement of non-publication and non-disclosure orders. This was considered by the Commonwealth Law Ministers' meeting in 2019.[131] In 2021, the Commonwealth Secretariat was directed to establish an expert working group to assess the need for a formal structure for mutual recognition of orders in the Commonwealth.[132]

131. Meeting of Commonwealth Law Ministers and Senior Officials, "Outcome Statement" (Colombo, Sri Lanka, 4–7 November 2019) [20]–[21].

132. Meeting of Senior Officials of Commonwealth Law Ministries, "Outcome Statement" (Videoconference, 16–17 February 2021) [14]–[16].

8. Exceptions to open justice in other legislation: Introduction

In Brief

We have applied our classification framework to exceptions to open justice in existing subject-specific legislation. To promote consistency across these exceptions, there should be a standard approach to certain issues, such as mechanisms for lifting statutory prohibitions and exceptions for journalists in certain proceedings from which the public are excluded.

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8.1 In this chapter, we explain how we apply our framework for classifying exceptions to open justice to subject-specific legislation. This framework, outlined in chapter 3, establishes standard classifications for all exceptions to open justice, grouped in four broad categories:

- Non-publication provisions: statutory prohibitions on publication, and requirements and discretions to make non-publication orders.
- Non-disclosure provisions: statutory prohibitions on disclosure, and requirements and discretions to make non-disclosure orders.
- Exclusion provisions: statutory exclusion provisions, and requirements and discretions to make exclusion orders.
- Closed court provisions: statutory closed court provisions, and requirements and discretions to make closed court orders.

8.2 This chapter also explains our standard approach to issues such as:

- duration of statutory prohibitions on publication
- mechanisms for lifting statutory prohibitions on publication or disclosure
- an exception to statutory prohibitions on publication for official reports of proceedings
- exceptions to statutory exclusion provisions and exclusion orders for journalists, and
- the interaction between lifting mechanisms for statutory prohibitions on publication and closed court provisions and orders.

8.3 Finally, we explain why we are not recommending standard procedural, appeal and other provisions for discretions to make non-publication, non-disclosure, exclusion and closed court orders in subject-specific legislation.

8.4 Specific recommendations tailored to each legislative context are found in the next four chapters.

Non-publication provisions

8.5 We classify a number of provisions in subject-specific legislation that provide that publication of information is automatically prohibited or that a court may prohibit publication of information, as:

- statutory prohibitions on publication, and
- discretions to make a non-publication order.

8.6 A list of these provisions, grouped according to their classification, is at appendix G.

8.7 We do not classify any existing provision in subject-specific legislation as a requirement to make a non-publication order. However, this classification may be used for other provisions enacted in the future. In addition, some provisions that we have excluded from the report (chapter 1 and appendix B) may fit this classification.

8.8 As we discuss in chapter 3, "non-publication" means a restriction or prohibition on publishing certain information (to the public or a section of the public) that does not otherwise prohibit or restrict the disclosure of information.

8.9 In the following four chapters, we recommend that these provisions should be amended to adopt the uniform definitions we recommend in chapter 3 of "non-publication order", "publish" and "information tending to identify" a person.

8.10 We also recommend incorporating some standard procedural provisions in discretions to make non-publication orders.

Non-disclosure provisions

8.11 We classify a number of provisions in subject-specific legislation that state that information is automatically prohibited from being disclosed, or that a court must prohibit disclosure of information, as:

- statutory prohibitions on disclosure, and
- requirements to make a non-disclosure order.

8.12 A list of these provisions, grouped according to their classifications, is at appendix G.

8.13 In the following four chapters, we do not classify any existing provision in subject-specific legislation as a discretion to make a non-disclosure order. However, this classification may be used for other provisions enacted in the future. In addition, some provisions that we have excluded from the report (chapter 1 and appendix B) may fit this classification and some provisions used by tribunals receive this classification (chapter 15).

8.14 As we discuss in chapter 3, "non-disclosure" means a restriction or prohibition on disclosing certain information by any means, including by publication. In the following four chapters, we recommend that these provisions should be amended to include our recommended definitions of "non-disclosure order" and "disclose".

Statutory prohibitions in subject-specific legislation should be retained

8.15 In our consultation paper, we asked whether legislation should ever prohibit publication or disclosure of certain information automatically. If there were no statutory prohibitions, courts would still have the power to make a non-publication or non-disclosure order in an appropriate case. Leaving it to courts to make orders could allow them to balance competing principles and interests.[1]

8.16 We have concluded that, in some contexts, it is appropriate that legislation automatically prohibits the publication or disclosure of certain information.

8.17 Statutes that automatically prohibit publishing or disclosing certain information typically have a strong public policy reason for doing so. For example, several statutes prohibit publishing information that would identify certain vulnerable people involved in court proceedings, to ensure they are not subject to further distress.

8.18 Some submissions supported retaining statutory prohibitions in general.[2] A number of submissions specifically supported the existing prohibitions that protect the identities of:

- children involved in criminal proceedings[3]
- complainants in prescribed sexual offence proceedings,[4] and
- people involved in mental health proceedings.[5]

8.19 The Children's Court observed that such prohibitions are:

> an important mechanism to facilitate substantive equality and equitable access to our justice system for those who are vulnerable, at risk of violence, stigma, discrimination and harassment.[6]

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1. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Consultation Paper 22 (2020) [3.5] question 3.1.
2. Information and Privacy Commission NSW, *Submission CI09*, 1–2; NSW Office of the Director of Public Prosecutions, *Submission CI17*, 5–6.
3. See, eg, Office of the Advocate for Children and Young People, *Submission CI05*, 1–2; Youth Justice NSW, NSW Department of Communities and Justice, *Submission CI07*, 1–2. See also chapter 9.
4. See, eg, Rape and Domestic Violence Services Australia, *Submission CI08* [10]–[11], [34]; knowmore, *Submission CI10*, 5; NSW Office of the Director of Public Prosecutions, *Submission CI17*, 25. See also chapter 10.
5. NSW, Mental Health Review Tribunal, *Submission CI06*, 1; Legal Aid NSW, *Submission CI24*, 4–5. See also chapter 15.
6. Children's Court of NSW, *Submission CI28*, 1.

8.20 Departing from a default position of non-publication or non-disclosure of the relevant information may also undermine awareness of, and compliance with, the prohibition.[7] Unlike a non-publication or non-disclosure order, the prohibition operates automatically in every case, meaning that the public, including journalists and news media organisations, are on notice that a restriction is in place.

8.21 As the protection applies automatically, courts do not have to make an assessment about whether it is needed in a particular case. In the case of prohibitions that protect the identities of certain vulnerable people involved in court proceedings, a key benefit is that such people do not have to bear the burden of applying for an order to keep their identity private.[8]

8.22 The Office of the Director of Public Prosecutions (ODPP) said that a downside of statutory prohibitions is that the effect or purpose of the prohibition is not explained in court proceedings. Parties, witnesses and supporters may need assistance in understanding why the prohibition is in place and what they can and cannot say or do.[9] We do not consider that this is a sufficient reason to abolish such provisions. Improved understanding of statutory prohibitions can be achieved through education initiatives, which we discuss in chapter 16.

Duration of statutory prohibitions

8.23 In the draft proposals, we sought feedback about whether it is appropriate for statutory prohibitions on publication to state a duration or whether some should operate indefinitely.[10]

8.24 We also proposed amending the statutory prohibitions on publication in s 15A of the *Children (Criminal Proceedings) Act 1987* (NSW) (*Children (Criminal Proceedings) Act*), s 45(1) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) (*Crimes (Domestic and Personal Violence) Act*) and s 65 of the *Young Offenders Act 1997* (NSW), so that they would not apply to publishing the identity of a person once they were deceased (as long as such a publication did not identify any other living person whose identity is protected).[11]

8.25 The Children's Court said that prohibitions relating to children and young people should have an indefinite duration for the following reasons:

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7. Victorian Law Reform Commission, *Contempt of Court,* Consultation Paper (2019) [9.54].
8. See, eg, Victorian Law Reform Commission, *Contempt of Court,* Consultation Paper (2019) [9.54].
9. NSW Office of the Director of Public Prosecutions, *Submission CI17*, 6.
10. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) [5.17]–[5.19].
11. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 5.5(b).

- all the prohibitions relating to children prevent a person and their family from being stigmatised
- one rationale behind the prohibitions is that a person's future prospects should not be limited by something that happened when they were a child
- limiting the duration of these prohibitions would undermine legislative principles which afford special consideration to children, and
- it is important to adopt a consistent approach to the duration of all statutory prohibitions involving children, particularly because a person may be dealt with under more than one of the relevant statutes.[12]

8.26 In response to this feedback, we recommend that all statutory prohibitions on publication applying to children and young people should be indefinite and apply even if the person whose identity is protected by the prohibition is deceased. Protecting the identities of children indefinitely aligns with our guiding principle that exceptions to open justice are appropriate where they are necessary to protect vulnerable people (chapter 1). This is discussed further in chapters 9 and 11.

8.27 We also recommend that the statutory prohibition on publishing the identity of complainants in prescribed sexual offence proceedings, contained in s 578A of the *Crimes Act 1900* (NSW) (*Crimes Act*), should apply even if the complainant is deceased. This recognises the ongoing impact of sexual assault on the complainant's family and the prospect of identification after death being a deterrent to reporting (chapter 10).

8.28 However, we recommend that:

- the prohibition on publishing the identity of a child involved in criminal proceedings should not apply where there has been prior lawful publication of the child's identity and the child is a victim of an alleged homicide (chapter 9), and
- the prohibition on publishing the identity of a complainant in prescribed sexual offence proceedings should not apply where the victim of the sexual offence is also the victim of an associated homicide (chapter 10).

8.29 This recognises the public interest in reporting of such crimes.

8.30 We discuss the durations of other statutory prohibitions in chapter 12.

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12. Children's Court of NSW, *Submission CI62*, 4; Children's Court of NSW, *Consultation CIC25*.

Mechanisms for lifting statutory prohibitions

8.31 We use the term “lifting mechanism” to refer to a provision enabling:

- the court to grant leave for a publication or disclosure, or
- the person protected by the prohibition to consent to the publication or disclosure.

This language highlights the active role of the court or person.

8.32 We have developed a standard approach for lifting mechanisms, outlined in figures 8.1 and 8.2 below. In the following chapters, we have only modified the standard approach where it is appropriate to suit a specific legislative context.

Mechanism for the court to grant leave to lift a statutory prohibition

Figure 8.1: Standard lifting mechanism with leave of the court

A court may grant leave to publish the identity of a person protected by the prohibition before, during and after the proceedings.

- This element may be modified for some statutes according to the duration of the statutory prohibition.

Before proceedings have commenced, applications to lift the prohibition can be heard by any court in which the proceedings could be commenced.

- This element only applies if the duration of the statutory prohibition includes the period before proceedings have commenced.

If the person protected by the statutory prohibition is alive

Before granting leave to lift the prohibition, a court must take into account:

(a) the views of the person and of any other person who is protected by the prohibition and who may be identified by the publication (if these views are known or ascertainable), and

(b) the public interest.

A court cannot grant leave to lift a prohibition if the person protected by the prohibition is under 16 at the time of publication.

If the person protected by the statutory prohibition is deceased

Before granting leave to lift the prohibition, a court must take into account:

(a) what the deceased person would have wanted if they had been alive

(b) the views of family members of the deceased person (unless the family member is also the alleged or convicted offender)

(c) the views of any other person who is protected by the prohibition and who may be identified by the publication (if these views are known or ascertainable), and

(d) the public interest.

- This element only applies where the duration of the statutory prohibition is applies even if the person protected by the prohibition is deceased at the time of publication.

8.33 Many statutes contain provisions enabling a court to give “consent” to or to “authorise” a publication. We recommend a new mechanism for courts to grant leave to lift a statutory prohibition. In most cases where such a mechanism does not exist in a statute, we recommend it should be created.

8.34 There are several elements to our standard lifting mechanism with leave of the court. A court would be:

- the only mechanism for lifting the prohibition when proceedings are ongoing

- able to grant leave for a publication or disclosure where the person protected by the prohibition is either living or deceased, and
- required to take into account certain considerations when deciding whether to grant leave to lift the prohibition (which differ depending on whether the person is living or deceased).

Only a court should be able to lift the prohibition when proceedings are ongoing

8.35 The ODPP, the Bar Association and Legal Aid supported a court being able to grant leave to lift a statutory prohibition while proceedings are ongoing.[13] The ODPP observed that in these circumstances, publication about a matter has the capacity to re-traumatise a victim and prejudice an accused person's ability to receive a fair trial.[14]

8.36 It is appropriate for the court to retain control over whether to lift a statutory prohibition while proceedings are ongoing.

Where an application to lift a prohibition can be heard and determined if proceedings have not been commenced

8.37 In some circumstances, statutory prohibitions on publication or disclosure of information apply before legal proceedings have commenced. We have also made recommendations for an earlier commencement of certain statutory prohibitions (chapters 9–10).

8.38 Where proceedings have not commenced, it may be unclear where an application to lift the prohibition can be made and there will be no existing presiding judicial officer to hear the application.

8.39 To address this, these statutory prohibitions should specify that if legal proceedings have not commenced, and a person applies to lift the prohibition, the application can be heard in any court in which proceedings could be commenced. This approach is intended to provide certainty without being overly prescriptive (for example, by specifying a particular court).

The court should be required to consider certain factors when exercising its discretion to lift a prohibition

8.40 Under the standard mechanism for lifting a statutory prohibition with leave, a court would be required to consider certain factors.

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13. NSW Office of the Director of Public Prosecutions, *Submission CI48*, 3; NSW Bar Association, *Submission CI56* [7]; Legal Aid NSW, *Submission CI57*, 18.
14. NSW Office of the Director of Public Prosecutions, *Submission CI48*, 3.

8.41 In relation to circumstances where the person protected by the prohibition is alive, where a provision does not refer to any relevant factors, we recommend that the court should be required to take into account:

- the views of the person and of any other person who is protected by the prohibition and who may be identified by the publication, if these views are known or ascertainable, and
- the public interest.

8.42 The first factor differs from our draft proposal in relation to complainants in sexual offence matters, which was that a court should not be able to grant leave to lift the prohibition if doing so would identify any other complainant who did not consent or who was under 18.[15]

8.43 We now consider it is more appropriate to require the court to consider the views of each person who may be identified by the publication. This recognises that people protected by the prohibition may have different views about publication. In such a case, the court could make an order permitting publication or disclosure of the first person's identity in a way that does not identify the second person (for example, by using a pseudonym to refer to the second person).

8.44 The second factor recognises that there is often a public interest element, both in non-publication (because of the interests it serves), and in publication (because of the open justice principle). Whether the public interest favours non-publication or publication of the person's identity would depend on the circumstances of the case.

8.45 For statutory prohibitions that operate indefinitely, such that they protect the identity of a person even if they are deceased, it may sometimes be appropriate for the prohibition to be lifted. Our standard mechanism for this situation provides that, before granting leave to lift the prohibition, the court must take into account:

- what the deceased person would have wanted if they had been alive
- the views of family members (other than the alleged or convicted offender)
- the views of any other person who is protected by the prohibition and who may be identified by the publication (if these views are known or ascertainable), and
- the public interest.

8.46 The first factor highlights the importance of the deceased person's perspective. A person may not have turned their mind explicitly to whether they would want their

15. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication,* Draft Proposals (2021) proposal 5.13(c).

identity published after their death or have communicated their wishes. However, a court may postulate what a deceased person would have wanted if they were alive.

8.47 The second factor recognises that in some cases, the surviving family members may have strong views about publication of the deceased person's identity, which should be considered.

8.48 Legal Aid supported this approach in relation to the statutory prohibition in s 578A of the *Crimes Act* as it:

- allows consideration of the views of both the deceased person and their family members, rather than relying solely on the family's views (which may not reflect the deceased person's wishes), and
- gives the court wide discretion to make appropriate inquiries, as there may be conflicting views among the deceased's family.[16]

8.49 The third factor ensures that the views of any other person who is protected by the statutory prohibition, and who may be identified as a result of the publication of the deceased person's identity, are taken into account. To minimise the burden on the court, these views would only have to be taken into account if they are "known or ascertainable".

8.50 The fourth factor reflects the public interest element in both non-publication and publication of the deceased person's identity.

16. Legal Aid NSW, *Submission CI57*, 19.

Mechanism for a person to consent to lifting the statutory prohibition

Figure 8.2: Standard lifting mechanism by consent

The person protected by the prohibition cannot consent to publication of their identity if they are under 16 at the time of publication.

If the person protected by the prohibition is aged 16 or 17 at the time of publication, they can consent to the publication of their identity after receiving advice from an Australian legal practitioner about the implications of consenting.

If the person protected by the prohibition is aged 18 or over at the time of publication, they can consent to the publication of their identity.

However, a person cannot consent to the publication of their identity if:

(a) the publication may identify:

(i) a child who is protected by the prohibition and who is under 16, or

(ii) any other person protected by the prohibition and who has not consented to the publication of their identity, or

(b) the proceedings are ongoing.

8.51 We recommend a new mechanism for lifting a statutory prohibition with the consent of the person protected by the prohibition. The mechanism aims to strike a balance between allowing people the autonomy to tell their stories and ensuring that:

- young people understand the implications of allowing publication of their identity, and
- one person's wish to consent to publication of their identity does not intrude on the protection afforded to any other person by the prohibition.

8.52 A person aged 18 or over at the time of publication would be able to consent to publication of their identity. However, a young person aged 16 or 17 at the time of publication would only be able to do so after receiving advice from an Australian legal practitioner about the implications of consenting.

8.53 This approach is based on s 15D of the *Children (Criminal Proceedings) Act*. However, we recommend a requirement for consent to be given "after receiving advice from an Australian legal practitioner" rather than "in the presence of a legal practitioner". This is to signify the importance of receiving advice about the implications of giving consent. It is the fact that this advice about consent was provided, rather than the circumstances in which the young person gives consent, which is important.

8.54 There are two limitations on the consent mechanism:

- The person protected by a prohibition would not be able to consent to publication of their identity if this may identify any other person protected by the prohibition who is

under the age of 16, or who has not given consent to publication of their identity. This limitation is found in some existing NSW legislation.[17]

- The person protected by the prohibition would not be able to consent to the publication while proceedings are ongoing. Only a court would be able to grant leave to lift the prohibition at this stage.

8.55 Australia's Right to Know (ARTK) opposed these limitations, stating that people should always be able to consent independently to a publication in order to encourage people to tell their stories.[18]

8.56 Statutory prohibitions serve a public policy purpose that is broader than an individual's desire to speak about their experience. It would be unfair if a person, by consenting to publication of their own identity, compromised the protection afforded by the statutory prohibition to another person. This is particularly important in proceedings where the parties are related to each other.

No lifting mechanism where the person is aged under 16

8.57 We recommend that a court should not be able to grant leave to lift a prohibition when the person protected by the prohibition is alive, nor should a person be able to consent to a publication, where the person is under 16 at the time of publication.

8.58 This is different to our draft proposal, which was that a court should be able to grant leave for a prohibition to be lifted where the person who is protected by the prohibition is under 16. The court would have been required to take into account the child's views, considered in light of their age and understanding.[19]

8.59 The Bar Association opposed this proposal, highlighting:

- young people's "youth, immaturity and lack of appreciation of consequences", and
- that the consequences of lifting a prohibition are more significant in the age of social media, as information cannot be recalled once published.[20]

8.60 We accept this submission and no longer consider that a court should be able to grant leave to lift a statutory prohibition in respect of a child under 16. We also note the risk that any purported application in relation to a child under 16 for leave to lift the prohibition may be unduly influenced by an adult.

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17. See, eg, *Adoption Act 2000* (NSW) s 180(4)(b); *Surrogacy Act 2010* (NSW) s 52(3)(b).
18. Australia's Right to Know, *Submission CI59*, 21–22.
19. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication,* Draft Proposals (2021) proposal 5.10, proposal 5.12.
20. NSW Bar Association, *Submission CI56* [30]–[31], [35]–[36].

8.61 For the same reasons, we also consider that a child under 16 should not be able to consent to the publication of their identity.

An exception to statutory prohibitions for official reports of proceedings

8.62 Many statutory prohibitions have an exception to allow publication of the relevant information in an official report of proceedings. To create consistency, we recommend also inserting this exception into the following statutory prohibitions that protect certain information in, or relating to, court proceedings:

- *Crimes (Appeal and Review) Act 2001* (NSW) s 111 (chapter 12)
- *Status of Children Act 1996* (NSW) (*Status of Children Act*) s 25 (chapter 9)
- *Supreme Court Act 1970* (NSW) (*Supreme Court Act*) s 101A(8) (chapter 12), and
- *Surrogacy Act 2010* (NSW) (*Surrogacy Act*) s 52 (chapter 9).

8.63 All relevant statutory prohibitions should also incorporate the uniform definition of "official report of proceedings" recommended in chapter 3.

8.64 However, we do not recommend that an exception for an official report of proceedings should be introduced into:

- *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 29(1)(f) (chapter 9)
- *Crimes (Forensic Procedures) Act 2000* (NSW) s 43 (chapter 12), or
- *Criminal Procedure Act 1986* (NSW) (*Criminal Procedure Act*) s 80 (chapter 12).

Exclusion provisions

8.65 We classify a number of provisions in subject-specific legislation that state that a court may or must be closed, or that certain people may or must be excluded from proceedings, as:

- statutory exclusion provisions,
- requirements to make an exclusion order, and
- discretions to make an exclusion order.

8.66 A list of these provisions, grouped according to their classification, is at appendix G.

8.67 As we discuss in chapter 3, "exclusion" means the exclusion of a specified person or class of people, or all people other than those whose presence is necessary, from the whole or any part of proceedings.

8.68 Unlike closing the court, excluding people from proceedings does not have the additional effect of prohibiting disclosure (including by publication) of information.

8.69 In many cases, we recommend that these provisions should be amended to adopt language consistent with their classification and provide that "exclusion order" has the same meaning and effect as it does in chapter 3. In some cases, in response to submissions and consultations, we recommend further substantive changes to specific provisions in certain statutes.

Exceptions for journalists when the public is excluded

8.70 Exceptions allowing the media to remain in proceedings from which the public are excluded have an important role in promoting open justice. These exceptions enable the media to act as the "eyes and ears of the public" by observing and reporting on proceedings (chapter 1).

Retain existing exceptions for journalists

8.71 Legislation contains exceptions for the media when the public is excluded in certain proceedings involving children. These include criminal proceedings to which a child is a party, and care and protection proceedings.[21]

8.72 These exceptions are supported in submissions and should be retained. They are necessary to enable the media to report on, and the public to learn about, proceedings involving children, which are often a matter of public interest. They can also help instil public confidence in the Children's Court, given that the public are generally excluded from Children's Court proceedings (chapter 9).

8.73 In chapter 9, we recommend that these provisions should incorporate the uniform definition of "journalist".

Limited exceptions in sexual offence and domestic violence related proceedings

8.74 Our draft proposal was to enable journalists to be present in certain types of proceedings concerning children, domestic violence and sexual offences from which the public have been excluded.[22] The purpose was to enable journalists to report on such proceedings, which could generate public awareness and discussion, encourage

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

22. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication,* Draft Proposals (2021) proposal 7.3–7.5.

reporting of domestic violence and sexual offences, and reduce the stigma that might otherwise lead to underreporting.

8.75 We now recommend more limited exceptions for journalists, in the following types of proceedings from which the public have been excluded:

- prescribed sexual offence proceedings (including the part of proceedings in which the victim reads a victim impact statement) (chapter 10)
- domestic violence offence proceedings (chapter 11)
- apprehended violence order (AVO) proceedings involving an apprehended domestic violence order (ADVO) concerning adults (chapter 11), and
- all AVO proceedings involving young people aged 16 or 17 (chapter 11).

8.76 The recommended exception is similar to the current exception for the media when the public is excluded in prescribed sexual offence proceedings.[23] However, there are some key differences.

8.77 Where the relevant person (such as the complainant in sexual offence or domestic violence offence proceedings, or the protected person in ADVO proceedings) is 18 or over, a journalist would only be able to view or hear the proceedings, or view or hear a record of the proceedings, if:

- the person consents, or
- the court is satisfied the public interest in allowing the journalist to view or hear the proceedings, or view or hear a record of the proceedings significantly outweighs the person's wishes.

8.78 If the person is a young person aged 16 or 17, a journalist would only be able to view or hear the proceedings, or view or hear a record of the proceedings, if:

- the young person consents to this, after receiving the advice of an Australian legal practitioner about the implications of consenting, or
- the court is satisfied that the public interest in allowing the journalist to view or hear the proceedings, or a record of the proceedings, significantly outweighs the young person's wishes.

8.79 The first limb is consistent with our aim of empowering people to tell their stories, should they wish to and subject to necessary limits (chapter 1). The second limb recognises that there may be some cases where the public interest in proceedings is so strong that it is appropriate for journalists to be permitted to view or hear the evidence, even if the

23. *Criminal Procedure Act 1986* (NSW) s 291C.

person does not consent to this. However, this public interest should have to "significantly outweigh" the person's wishes, to ensure these wishes are overridden only in exceptional cases.

8.80 If the person is a child under 16, neither the child nor the court would be able to permit a journalist to view or hear the proceedings, or a recording of the proceedings. This recognises the lack of maturity of children under 16, the risk of their being subject to undue influence and the long-term consequences of allowing journalists to view or hear and report on the proceedings. This is consistent with our approach to mechanisms for lifting statutory prohibitions involving children and young people discussed above.

8.81 The recommended exceptions would also use the standard definition of "journalist" we recommend in chapter 3.

8.82 In all cases where a journalist is permitted to view or hear the proceedings, they would not be permitted to be present in the courtroom or other place where the evidence is given. This is consistent with the existing exception for media in sexual offence proceedings.[24] It is intended to avoid any distress that the presence of journalists may create for the complainant, protected person, child or young person involved in proceedings.

8.83 Ensuring that exceptions for journalists are broadly consistent across sexual offence and domestic violence offence proceedings, ADVO proceedings concerning adults and AVO proceedings involving young people reflects our guiding principle that legislation containing exceptions to open justice should (so far as practicable) be uniform and consistent (chapter 1).

Exception for journalists when an exclusion order is made for the reading of a victim impact statement

8.84 In chapter 12, we recommend an exception to s 30K of the *Crimes (Sentencing Procedure) Act 1999* (NSW), enabling journalists to remain when an exclusion order is made for the reading of a victim impact statement. This is to enable media reporting of statements, which can help victims' voices to be heard and increase general knowledge about the impact of offending on victims.

8.85 However, a journalist would not be permitted to remain if the court is satisfied that it is in the interests of justice that they are excluded.

No exceptions for journalists in certain types of proceedings

8.86 ARTK suggested that there should be exceptions for the media in:

24. *Criminal Procedure Act 1986* (NSW) s 291C.

- adoption proceedings[25]
- proceedings for a declaration of parentage and proceedings for a parentage order[26]
- certain proceedings under the *Public Health Act 2010* (NSW)[27]
- proceedings for questions of law concerning criminal contempt[28]
- proceedings for questions of law arising from an acquittal[29]
- proceedings for the appointment of a receiver under the *Conveyancers Licensing Act 2003* (NSW) (*Conveyancers Licensing Act*) or the *Property and Stock Agents Act 2002* (NSW) (*Property and Stock Agents Act*),[30] and
- proceedings in the Land and Environment Court.[31]

8.87 We do not recommend creating exceptions for the media in any of these provisions. We have considered each and formed the view that creating an exception for the media would be of limited utility (because, for example, the provisions are used infrequently, or arise in a highly specialised area of law). In addition, in the case of provisions that we classify as discretions or requirements to make closed court orders, an exception for the media would be inappropriate, as information given in the closed proceedings could not be disclosed due to the suppression effect of closing the court, discussed below.

Closing the court

8.88 We classify a number of provisions in subject-specific legislation that state that a court may or must be closed, or that certain people may or must be excluded from proceedings, as:

- requirements to make a closed court order, and
- discretions to make a closed court order (chapter 3).

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25. Australia's Right to Know, *Submission CI27*, 74. See *Adoption Act 2000* (NSW) s 119(1).
26. Australia's Right to Know, *Submission CI27*, 76. See *Status of Children Act 1996* (NSW) s 24(1); *Surrogacy Act 2010* (NSW) s 47.
27. Australia's Right to Know, *Submission CI27*, 7. See *Public Health Act 2010* (NSW) s 58(3), s 59, s 80.
28. Australia's Right to Know, *Submission CI27*, 8. See *Supreme Court Act 1970* (NSW) s 101A(7).
29. Australia's Right to Know, *Submission CI27*, 5. See *Crimes (Appeal and Review Act) 2001* (NSW) s 108(5).
30. Australia's Right to Know, *Submission CI27*, 14, 16. See *Conveyancers Licensing Act 2003* (NSW) s 107(1); *Property and Stock Agents Act 2002* (NSW) s 140(1).
31. Australia's Right to Know, *Submission CI27*, 12, 16. See *Land and Environment Court Act 1979* (NSW) s 62.

A list of these provisions, grouped according to their classifications, is at appendix G.

8.89 We do not classify any existing provision in subject-specific legislation as a statutory closed court provision. However, the classification of "statutory closed court provision" may apply to legislative provisions that are enacted in future. In addition, some provisions that we have excluded from the report (chapter 1 and appendix B) may fit this classification.

8.90 As we discuss in chapter 3, a "closed court" involves excluding all people from the whole or any part of proceedings, other than those whose presence is necessary for the proceedings (such as parties, legal representatives, judicial officers, court staff, witnesses and support people). Closing the court also has the effect of prohibiting disclosure (including by publication) of information from the closed part of the proceedings.

8.91 In this report, we recommend that some provisions should be amended to adopt terminology that is consistent with their classification as a discretion or requirement to make a closed court order and include the uniform definition of "closed court order" recommended in chapter 3.

8.92 We do not make any recommendation about a requirement to post a notice of a closed court order, as our draft proposals included.[32] This is to allow flexibility for the courts to determine this matter.

8.93 We recommend that some provisions in subject-specific legislation should confer a discretion to make either an exclusion order or a closed court order (chapter 12). This is to provide flexibility to a court to determine the type of order that is appropriate in the circumstances of the case. The provisions are:

- *Co-operative Housing and Starr-Bowkett Societies Act 1988* (NSW) s 214(5)(a)
- *Conveyancers Licensing Act* s 107(1)
- *Land and Environment Court Act 1979* (NSW) s 62, and
- *Property and Stock Agents Act* s 140(1).

No exception for journalists when the court is closed

8.94 We do not recommend an exception for journalists to remain in any proceedings where a closed court order has been made, as this would undermine the suppression effect of a closed court order (chapter 3).

32. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 8.8.

8.95 In particular, there should not be exceptions for journalists in closed adoption proceedings, proceedings for a declaration of parentage, or proceedings for a parentage order.

8.96 Our draft proposal was that in certain proceedings under the *Adoption Act 2000* (NSW) (*Adoption Act*), *Surrogacy Act* and *Status of Children Act*, a journalist should be entitled to enter or remain in the proceedings, unless the court directs otherwise.[33] This was in recognition of:

- the significant public interest in how these proceedings are conducted, and
- the analogy to family law proceedings, which are conducted in open court, but where there is also a statutory prohibition on publishing the identity of certain people involved in the proceedings.[34]

8.97 ARTK supported exceptions for journalists in these types of proceedings.[35]

8.98 However, Courts, Tribunals and Service Delivery observed in relation to adoption proceedings that having journalists present is unlikely to be in the child's best interest, and:

> Often these hearings are extremely emotional, akin to a significant family event like a birth or marriage. Allowing a journalist to be present makes the proceedings less personal and private.[36]

8.99 The Supreme Court submitted that s 119 of the *Adoption Act* should be retained as it is, as "there is no reason for journalists to have the right to attend those matters which are inherently personal".[37]

8.100 Although the conduct of adoption proceedings, proceedings for a declaration of parentage and proceedings for a parentage order is of social importance and interest, on balance we do not support an exception allowing the media to be present in such proceedings. The private nature of the proceedings, and the confidence of the participants, could be undermined by the presence of a journalist.

8.101 We also note that in adoption proceedings and proceedings relating to a parentage order, the court can, in an appropriate case, already permit additional people to be present,[38] or order that the proceedings not be heard in closed court[39] (chapter 9).

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33. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 7.3.
34. *Family Law Act 1975* (Cth) s 97(1)–(2), s 121(1).
35. Australia's Right to Know, *Submission CI27*, 74, 76.
36. Courts, Tribunals and Service Delivery, NSW Department of Communities and Justice, *Submission CI53*, 11.
37. Supreme Court of NSW, *Submission CI55* [16].

Interaction between mechanisms for lifting statutory prohibitions and closed court orders

8.102 In chapter 3, we explain that closing the court has the effect of prohibiting disclosure (by publication or otherwise) of information from the closed part of proceedings. We sometimes refer to this as the "suppression effect" of these orders.

8.103 In the following four chapters, we consider statutes that contain both:

- statutory prohibitions on publication that protect a person's identity, and
- requirements to make closed court orders.

8.104 Where they apply to the same information (being information tending to identify a person), it means that publication of the person's identity is prohibited under both the statutory prohibition on publication and the closed court order.

8.105 Some of these statutory prohibitions on publication of a person's identity contain mechanisms for lifting them, and others are subject to recommendations to insert such mechanisms. These mechanisms allow information to be published if the court grants leave or the person protected by the prohibition consents.

8.106 Where a lifting mechanism is used, it should have the effect of lifting both:

- the statutory prohibition on publication, and
- the suppression effect of the closed court order (that is, the associated prohibition on publishing or disclosing information from the closed part of proceedings),

but only in relation to the information covered by the statutory prohibition (that is, information tending to identify a person).

8.107 This is necessary to give effect to the purpose of the lifting mechanism, which is to allow publication of the relevant information. If the lifting mechanism only lifted the statutory prohibition, publication of the information would still be prohibited under the closed court order.

8.108 However, the lifting mechanism should only lift the statutory closed court provision to the extent that it overlaps with the statutory prohibition on publication. It should not operate to allow publication of other types of information covered by the suppression effect of closing the court.

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38. *Adoption Act 2000* (NSW) s 119(2).
39. *Surrogacy Act 2010* (NSW) s 47.

8.109 We recommend that this approach should be taken in the following statutes, which contain overlapping statutory prohibitions on publication and requirements to make closed court orders or statutory closed court provisions:

- proceedings under the *Adoption Act* (chapter 9):
  - *Adoption Act* s 119(1) (requirement to make a closed court order), and
  - *Adoption Act* s 180 (statutory prohibition on publication)
- applications for a declaration of parentage or an annulment order (chapter 9):
  - *Status of Children Act* s 24(1) (requirement to make a closed court order), and
  - *Status of Children Act* s 25 (statutory prohibition on publication)
- proceedings in respect of a parentage order (chapter 9):
  - *Surrogacy Act* s 47 (requirement to make a closed court order), and
  - *Surrogacy Act* s 52 (statutory prohibition on publication)
- incest offence proceedings (chapter 10):
  - *Criminal Procedure Act* s 291B (requirement to make a closed court order), and
  - *Crimes Act* s 578A (statutory prohibition on publication), and
- proceedings concerning a question of law arising from an acquittal for criminal contempt (chapter 12):
  - *Supreme Court Act* s 101A(7) (requirement to make a closed court order), and
  - *Supreme Court Act* s 101A(8)(b) (statutory prohibition on publication).

Limited changes to discretions to make orders

8.110 Our draft proposals included that powers to make non-publication, non-disclosure, exclusion or closed court orders in subject-specific legislation should contain standard provisions.

8.111 We now do not recommend that these standard provisions should be included in discretions to make orders in subject-specific legislation. The main exception is our recommendation to include a standard provision relating to the duration of non-publication orders in certain provisions in subject-specific legislation.

Procedures for making orders

8.112 We do not recommend standard procedures for making non-publication, non-disclosure, exclusion and closed court orders in subject-specific legislation. This differs from our draft proposals.[40]

8.113 In relation to non-publication and non-disclosure orders, no submissions raised concerns about procedures for making orders.

8.114 In relation to exclusion and closed court orders, such orders are often made quickly and informally, to respond to a particular issue in proceedings. Requiring a court to undertake a formal procedure of hearing submissions about whether an order should be made would be unnecessarily onerous.

8.115 The only exception is our recommendation to include procedures for applying for and reviewing orders made under s 45(2) of the *Crimes (Domestic and Personal Violence) Act* (chapter 11).

The duration of orders

8.116 Our draft proposals included standard provisions relating to the duration of non-publication, non-disclosure and exclusion orders in subject-specific legislation.

8.117 In relation to non-publication and non-disclosure orders, we proposed that legislation should be amended to provide that:

- a non-publication or non-disclosure order must specify the period for which it operates
- an order must not be specified to operate indefinitely
- a court, in deciding the period for which an order is to operate, must ensure that the order operates for no longer than is reasonably necessary to achieve its purpose, and
- the period for which an order operates is to be determined by reference to a fixed or ascertainable period, or the occurrence of a specified future event (not including the making of a further order).[41]

8.118 However, an examination of the context and purpose of the provisions has led us to recommend two different approaches.

8.119 For some discretions to make orders, it is appropriate to include a duration provision that is consistent with that in the new Act.[42] This would mean that a court would have to

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40. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 6.1, proposal 7.7, proposal 8.3.

41. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 6.3.

specify the period for which an order operates, which is no longer than is reasonably necessary to achieve its purpose. The period for which an order operates should be determined by reference to a particular period or event. However, an order could be specified to operate indefinitely in exceptional circumstances or where it is not reasonably practicable to specify a duration.

8.120 We recommend that this duration provision should be included in the following discretions to make non-publication orders in subject-specific legislation:

- *Crimes (Domestic and Personal Violence) Act* s 45(2) (chapter 11)
- *Conveyancers Licensing Act* s 107(2) (chapter 12)
- *Lie Detectors Act 1983* (NSW) s 6(3) (chapter 12), and
- *Property and Stock Agents Act* s 140(2) (chapter 12).

8.121 However, we recommend the following legislation should not adopt this approach:

- *Adoption Act* s 186(2) (chapter 9)
- *Criminal Procedure Act* s 294D(4) (chapter 10), and
- *Minors (Property and Contracts) Act 1970* (NSW) s 43(5) (chapter 9).

Orders under these discretions are made to protect the confidentiality of parties in a personal and sensitive context, so a fixed or limited duration would not be appropriate.

8.122 Unlike our draft proposal,[43] we do not recommend a standard duration provision for exclusion orders because, in the majority of cases, a court will make it clear how long an order applies for. This is because the order would need to be linked to the duration of the proceedings or part of proceedings subject to the exclusion. Requiring this expressly under legislation is unnecessary.

Where an order applies

8.123 We do not recommend a standard provision for where a non-publication, non-disclosure or closed court order applies, as our draft proposals included.[44] While we have made such a recommendation in relation to non-publication and non-disclosure orders in the new Act,[45] this level of detail is inappropriate to include in all subject-specific legislation.

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42. Recommendation 6.9.
43. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 7.8.
44. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 6.2, proposal 8.4.
45. Recommendation 6.8.

Reviews and appeals of orders

8.124 We do not recommend standard provisions for reviews of non-publication, non-disclosure, exclusion and closed court orders in subject-specific legislation, nor appeals of non-publication and non-disclosure orders in subject-specific legislation, as our draft proposals included.[46]

8.125 In relation to non-publication and non-disclosure orders, we note that most of the provisions relate to very specific contexts. Our draft proposal would have introduced complex review and appeal mechanisms into provisions that operate in only a small number of matters, in very specific contexts, and where there is no demonstrated need for reform. Accordingly, it is sufficient to rely on the review and appeal pathways provided by the applicable subject-specific legislation.

8.126 In relation to exclusion or closed court orders, such orders would have an immediate effect in that they require certain people to leave the court for that part of the proceedings. A court may have to stay proceedings to hear the review or appeal of the order, which could have significant resource implications.

A requirement to give reasons on request

8.127 We do not recommend standard requirements to give reasons on request, for making a non-publication, non-disclosure, exclusion or closed court order in subject-specific legislation, as our draft proposals included.[47]

8.128 The primary purpose of these proposals was to facilitate applications for reviews and appeals of orders, particularly by non-parties who may not have access to the reasons for orders (such as the media). As we are no longer recommending a standardised procedure for reviews and appeals, such a recommendation would have little utility.

Costs provisions

8.129 We do not recommend standard provisions relating to costs in proceedings for the application, review or appeal of a non-publication or non-disclosure order, or application or review of an exclusion or closed court order in subject-specific legislation, as our draft proposals included.[48]

8.130 The primary purpose of these proposals was to ensure the risk of a costs order would not discourage people from seeking review or appeal of orders. As we are no longer

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46. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 6.5, proposal 6.6, proposal 7.10, proposal 8.6.

47. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 6.4, proposal 7.9, proposal 8.5.

48. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 6.7, proposal 7.11, proposal 8.7.

recommending that a wide class of persons should have standing to apply for a review or appeal, the proposals relating to costs would have limited utility.

8.131 In appropriate cases, parties to proceedings can seek costs orders under applicable provisions; for example, part 42 of the *Uniform Civil Procedure Rules 2005* (NSW).

A requirement to consider the public interest in open justice

8.132 We do not recommend a standard requirement to consider the public interest in open justice when deciding whether to make a non-publication, non-disclosure, exclusion or closed court order under subject-specific legislation, as our draft proposals included.[49]

8.133 Courts invariably consider the public interest in open justice as a factor, without this being needed to be restated in every subject-specific Act.

49. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 6.8, proposal 7.12, proposal 8.9.

9. Legislation relating to children and young people

In Brief

There is a range of exceptions to open justice in existing subject-specific legislation that relate to children and young people, which recognise their particular vulnerability. We classify these provisions according to our classification framework in chapter 3. These provisions should adopt uniform terminology and definitions in line with these classifications. Amendments should be made in some cases to increase consistency across the provisions. This includes adopting standard mechanisms for lifting statutory prohibitions on publication relating to children and young people.

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9.1 In this chapter, we deal with a range of exceptions to open justice in subject-specific legislation that apply to proceedings involving or relating to children or young people. These include provisions that prohibit the publication and disclosure of identifying information and restrict public access to hearings.

9.2 We classify these provisions based on our framework for exceptions to open justice (chapter 3). We recommend that these provisions adopt uniform terminology consistent with those classifications and relevant definitions from chapter 3. We also make other recommendations in response to submissions and consultations.

9.3 We consider a statutory prohibition in relation to the identities of complainants in prescribed sexual offence proceedings, who in some circumstances may be children or young people, in chapter 10. We consider exceptions to open justice in proceedings for

domestic violence offences or apprehended violence orders involving children or young people in chapter 11.

Exceptions to open justice in proceedings relating to children or young people

9.4 There is a range of long standing protections for children involved in proceedings. These protections recognise the particular vulnerability of children and young people.

9.5 Many of the protections aim to shield children's identities in order to reduce distress and trauma and avoid stigmatisation as a result of being associated with court proceedings.

9.6 Some of these protections relate to children's involvement in criminal proceedings, including as a defendant, victim or witness. Publicising children's involvement in criminal proceedings:

- may lead to stigma and psychological stress
- may damage rehabilitation prospects, and
- is inconsistent with Australia's international obligations.[1]

9.7 In addition, some civil proceedings involving children are particularly sensitive, such as care and protection and adoption proceedings. Many of the concerns listed above apply to civil proceedings involving children. This includes that publicly identifying a child or young person may lead to stigmatisation and significant distress and embarrassment.[2]

9.8 Retaining special protections for children and young people involved in court proceedings is consistent with our guiding principle that exceptions to open justice are appropriate where they are necessary to protect certain vulnerable people (chapter 1).

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1. NSW Council for Civil Liberties, *Submission CI02*, 5–6; NSW, Office of the Advocate for Children and Young People, *Submission CI05*, 1–2; Youth Justice NSW, NSW Department of Communities and Justice, *Submission CI07*, 1–2; Public Interest Advocacy Centre, *Submission CI14*, 1–2; Children's Court of NSW, *Submission CI28*, 9–12; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission CI22*, 1; Legal Aid NSW, *Submission CI24*, 14–15. 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) [2.50], [3.1]–[3.60].
2. Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report 108 (2008) vol 3 [69.86]. See also Legal Aid NSW, *Submission CI24*, 19–21.

Non-publication provisions

Statutory prohibition on publishing the identity of a child in criminal proceedings

9.9 Section 15A of the *Children (Criminal Proceedings) Act 1987* (NSW) (*Children (Criminal Proceedings) Act*) prohibits the name of certain people from being published or broadcast in a way that connects the person with criminal proceedings. We classify s 15A as a statutory prohibition on publication (chapter 3).

9.10 A prohibition on publishing or broadcasting the name of a child mentioned or involved in criminal proceedings was introduced when the *Children (Criminal Proceedings) Act* was enacted in 1987,[3] as part of a broader suite of reforms to protect children in the criminal justice and welfare systems.[4] The original provision was repealed and replaced in 2009.[5]

9.11 The prohibition applies in relation to criminal proceedings in any court that exercises criminal jurisdiction.[6] This includes the Children's Court, where most criminal proceedings involving child defendants are heard, as well as the Local, District and Supreme Courts, where some of the more serious proceedings involving child defendants are heard.[7]

9.12 Section 15A applies to publishing or broadcasting a 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.[8]

9.13 "Publication" includes:

> The publication of information to an Internet website that provides the opportunity for, or facilitates or enables, dissemination of information to the public or a section of the public (whether or not the particular publication results in the dissemination of information to the public or a section of the public).[9]

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3. *Children (Criminal Proceedings) Act 1987* (NSW) s 11(1) as enacted.
4. NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 8 April 1987, 10357.
5. *Children (Criminal Proceedings) Act 1987* (NSW) s 15A, inserted by *Children (Criminal Proceedings) Amendment (Naming of Children) Act 2009* (NSW) sch 1[3].
6. *Children (Criminal Proceedings) Act 1987* (NSW) s 4.
7. *Children (Criminal Proceedings) Act 1987* (NSW) s 28.
8. *Children (Criminal Proceedings) Act 1987* (NSW) s 15A(2).
9. *Children (Criminal Proceedings) Act 1987* (NSW) s 15A(3).

9.14 The prohibition applies "whether the publication or broadcast occurs before or after the proceedings concerned are disposed of".[10]

9.15 The prohibition applies to a person where:

(a) the proceedings relate to the person and the person was a child when the offence to which the proceedings relate was committed, or

(b) the person appears as a witness in the proceedings and was a child when the offence to which the proceedings relate was committed (whether or not the person was a child when appearing as a witness), or

(c) the person is mentioned in the proceedings in relation to something that occurred when the person was a child, or

(d) the person is otherwise involved in the proceedings and was a child when so involved, or

(e) the person is a brother or sister of a victim of the offence to which the proceedings relate, and that person and the victim were both children when the offence was committed.[11]

9.16 A child is defined as a person who is under 18.[12]

9.17 The categories of person referred to in s 15A(1)(b)–(d) are broad and operate to protect, amongst others, the identity of any child victim connected with the criminal proceedings.

9.18 In 2004, the statutory prohibition was amended to clarify that it applies even if the person is deceased and to extend the protection to child siblings of child victims.[13] One of the policy objectives was "to protect siblings of deceased victims from the stigma associated with their brother's or sister's murder".[14]

9.19 There are a number of exceptions to the prohibition in s 15A, including where:

- the publication or broadcast of the person's name is in an official report of the proceedings

10. *Children (Criminal Proceedings) Act 1987* (NSW) s 15A(4)(a).
11. *Children (Criminal Proceedings) Act 1987* (NSW) s 15A(1).
12. *Children (Criminal Proceedings) Act 1987* (NSW) s 3(1) definition of "child".
13. *Crimes Legislation Amendment Act 2004* (NSW); NSW, *Parliamentary Debates*, Legislative Assembly, 27 February 2004, 6754.
14. 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) [5.41].

- the person has been convicted of a serious children's indictable offence and a court has authorised the publication or broadcast
- the court consents to the publication or broadcast, if the person is under 16, or the person consents, if they are 16 or older
- the child is deceased and the senior available next of kin gives consent to publication or broadcast of their name
- the proceedings are for a traffic offence and are held in a court other than the Children's Court, and
- a staff member of the court carries out the publication or broadcast in the proper exercise of official functions.[15]

9.20 The statutory prohibition in s 15A was well supported in submissions.[16] The Legislative Council Standing Committee on Law and Justice (Standing Committee) noted in a 2008 report that a prohibition on publishing the identity of children involved in criminal proceedings has a clear and justifiable policy rationale to:

- reduce stigma for juvenile offenders, facilitate their rehabilitation and reintegration into the community, and
- protect victims and family members of juvenile offenders from stigma associated with crime.[17]

In addition, the Standing Committee recognised that children are particularly vulnerable to the "negative impacts that may flow from their names being published".[18]

9.21 Submissions to this review emphasised that the prohibition aims to reduce stigma and facilitate the offender's rehabilitation, by preventing them from becoming marginalised and entrenched in a cycle of reoffending.[19] In our survey, respondents supported exceptions to open justice to protect the identity of children involved in criminal

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15. *Children (Criminal Proceedings) Act 1987* (NSW) s 15B–15G.
16. See, eg, Office of the Advocate for Children and Young People, *Submission CI05*, 1–2; Youth Justice NSW, NSW Department of Communities and Justice, *Submission CI07*, 1–2; Legal Aid NSW, *Submission CI24*, 14–15.
17. 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], [3.108]–[3.109], [4.27].
18. 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].
19. NSW Bar Association, *Preliminary Submission PCI41* [4]; Legal Aid NSW, *Preliminary Submission PCI39*, 10; NSW Young Lawyers Criminal Law Committee, *Preliminary Submission PCI37*, 6; NSW Council for Civil Liberties, *Preliminary Submission PCI29*, 5–6.

proceedings. Of the 125 respondents who answered the question of when information should be kept from the public:

- 116 (92.8%) said "to protect the identity of a child victim", and
- 85 (68%) said "to protect the identity of a child offender".[20]

9.22 All other Australian states and territories restrict the publication of identifying information in criminal cases involving children, although not in exactly the same way as in NSW. For example:

- the Australian Capital Territory (ACT) protects information that identifies someone as a person who is or was a child or young person the subject of a "childrens proceeding"[21]
- Victoria protects particulars likely to lead to the identification of a child, other party or witness in any proceedings heard in the Children's Court of Victoria[22]
- South Australia (SA) protects the identity of a child or youth who is alleged to have committed an offence, or who is concerned in those proceedings, either as a party or witness[23]
- Tasmania protects the identity of a youth who is the subject of, or a witness in, proceedings against a youth[24]
- Western Australia (WA) protects the identity of a child who is concerned in proceedings in the Children's Court of Western Australia as the person against whom or in respect of whom the proceedings are taken, a witness or the alleged victim[25]
- the Northern Territory (NT) prohibits the publication of particulars likely to lead to the identification of a youth or other party to a proceeding or a witness in a proceeding in the Youth Justice Court of the Northern Territory,[26] and
- Queensland protects identifying information about a child in a criminal proceeding against a child.[27]

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20. *Open Justice: Survey Results*, Research Report 16 (NSW Law Reform Commission, 2022) table 2.2.
21. *Criminal Code 2002* (ACT) s 712A(1).
22. *Children, Youth and Families Act 2005* (Vic) s 534(1)(a)(ii)–(iii).
23. *Young Offenders Act 1993* (SA) s 63C(1)(b).
24. *Youth Justice Act 1997* (Tas) s 31(1), s 108.
25. *Children's Court of Western Australia Act 1988* (WA) s 35(1).
26. *Youth Justice Act 2005* (NT) s 50(1).
27. *Youth Justice Act 1992* (Qld) s 301(1).

Broad scope of the prohibition

9.23 We considered whether the scope of s 15A(1) of the *Children (Criminal Proceedings) Act* should be amended to apply to a narrower category of people; that is, defendants, witnesses and victims who were children when the offence was committed. This approach would exclude a person who is:

- mentioned in the proceedings in relation to something that occurred when they were a child
- otherwise involved in the proceedings when they were a child, or
- a sibling of a victim of the offence, and that person and the victim were both children when the offence was committed.[28]

9.24 Australia's Right to Know (ARTK) and Banki Haddock Fiora argued that these people may only be mentioned incidentally in proceedings, and it is only necessary for the prohibition to protect the identities of children directly involved in criminal proceedings.[29]

9.25 In our view, the scope and categories of people who receive the benefit of the statutory prohibition is appropriate. Consultations indicated that even a peripheral involvement in proceedings can lead to a child being stigmatised.[30] It would be inappropriate for people involved in criminal proceedings when they were a child, even in an indirect way, to bear the burden of applying for an order.

Uniform terminology

Recommendation 9.1: Uniform terminology in the prohibition on publishing the identity of a child involved in criminal proceedings

(1) Part 2 Division 3A of the *Children (Criminal Proceedings) Act 1987* (NSW) should:

(a) define "publish" in the same way as in recommendation 3.2, and

(b) adopt the term "information tending to identify" a person and define it in the same way as in recommendation 3.3.

(2) Section 15B of the *Children (Criminal Proceedings) Act 1987* (NSW) should define "official report of proceedings" in the same way as in recommendation 3.6.

9.26 Recommendation 9.1 is for Part 2 Division 3A of the *Children (Criminal Proceedings) Act* to adopt uniform definitions of key terms. It could be given effect by:

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28. *Children (Criminal Proceedings) Act 1987* (NSW) s 15A(1)(c)–(e).
29. Australia's Right to Know, *Submission CI27*, 66-67, 70; Banki Haddock Fiora, *Preliminary Submission PCI27*, 3–4.
30. Roundtable 3, *Consultation CIC05*.

- replacing the current scope of the term "publish" in s 15A(2)–(3) with the uniform definition of this term, recommended in chapter 3
- removing unnecessary references to "broadcast" of information, as our recommended definition of "publish" includes broadcasting information via radio and television and publishing information by means of the internet
- replacing "name of a person" with "information tending to identify" a person, and adopting the uniform definition of this term, recommended in chapter 3, and
- adopting the uniform definition of "official report of proceedings", recommended in chapter 3, in s 15B, for consistency with other statutory prohibitions on publication.

9.27 In chapter 3, we discuss the concept of "jigsaw identification", where people are identified by piecing together the information that has been published in different sources. The Children's Court indicated that this issue often arises in relation to children and young people.[31] The recommended definition of "information tending to identify" a person is intended to provide greater clarity about the types of information that may result in the identification of a person.

Application and duration of the prohibition

Recommendation 9.2: The application and duration of the prohibition on publishing the identity of a child involved in criminal proceedings

Section 15A of the *Children (Criminal Proceedings) Act 1987* (NSW) should:

(a) apply to the publication of a person's identity before the proceedings are commenced, during the proceedings and after the proceedings are disposed of

(b) apply to the publication of a person's identity in a way that connects them with a criminal investigation

(c) apply to a person who is reasonably likely to appear, be mentioned, or be otherwise involved in the proceedings

(d) provide that the publication of the identity of a person is permitted where it is necessary:

  (i) for the safety and welfare of the person, or

  (ii) for the purposes of a criminal investigation or a missing person investigation, and

(e) define "criminal investigation" as an investigation conducted by police officers, or other persons charged with the duty of investigating, into whether a person should be charged with an offence.

9.28 Section 15A(4)(a) of the *Children (Criminal Proceedings) Act* provides that the statutory prohibition applies "before or after the proceedings concerned are disposed of". Recommendation 9.2(a) is to bring the commencement of the prohibition forward so that it also applies before the proceedings have commenced.

31. Children's Court of NSW, *Preliminary Consultation PCIC08*; Children's Court of NSW, *Submission CI28*, 11.

9.29 Recommendations 9.2(b) and 9.2(e) complement recommendation 9.2(a) by making clear that the prohibition applies to the stage of criminal investigation. This means the prohibition would apply where police are investigating but before charges are laid against a person. This recommendation ensures that the person's identity is protected from the earliest point of their involvement with the criminal justice system.

9.30 These recommendations are similar to our draft proposal,[32] which received support in submissions.[33] As some stakeholders highlighted, children are likely to be subject to media attention at the investigation stage,[34] which may place the child's safety at risk.[35]

9.31 ARTK argued that it would be difficult to ascertain when a child was under investigation and therefore when the prohibition on publication applies.[36] In our view, the definition of criminal investigation in recommendation 9.2(e) provides sufficient certainty to address this concern.

9.32 Recommendation 9.2(b) is similar to legislation in:

- Queensland, which prohibits the publication of identifying information related to children who are the subject of police investigations,[37] and
- the United Kingdom, which prohibits the publication of matters likely to lead to the identification of children under investigation.[38]

9.33 Recommendation 9.2(b) is also similar to a recommendation made by the Standing Committee in 2008.[39] The Standing Committee noted that the policy rationale for the statutory prohibition – that is, to reduce stigma and facilitate rehabilitation – applies equally to the period when a child is under investigation for an alleged offence.[40]

9.34 We note that the Government did not support the recommendation made by the Standing Committee, and stated:

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32. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 5.1.
33. NSW Police Force, *Submission CI38*, 2; knowmore, *Submission CI43*, 14; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission CI49,* 2–3; NSW Bar Association, *Submission CI56* [7]; Legal Aid NSW, *Submission CI57*, 13.
34. NSW Council for Civil Liberties, *Submission CI02*, 6; Legal Aid NSW, *Submission CI24*, 15.
35. Legal Aid NSW, *Submission CI57*, 13.
36. Australia's Right to Know, *Submission CI27*, 70.
37. *Youth Justice Act 1992* (Qld) s 283(2)(b), s 301(1).
38. *Youth Justice and Criminal Evidence Act 1999* (UK) s 44(1)–(2).
39. 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 4.
40. 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) [7.27].

> Such an extended prohibition does not presently exist in any other Australian jurisdiction. The NSW Government is committed to seeking a nationally consistent prohibition … In light of this priority, it is not feasible to extend the prohibition …[41]

9.35 We have concluded that there is a solid policy rationale for applying the statutory prohibition to the period of investigation.

9.36 We note that since 2008, nationally consistent legislation has not been enacted. While we acknowledge the desirability of uniformity, there is very little consistency between jurisdictions in this area, and this desirable reform should not be postponed in favour of the aspiration for uniformity.

9.37 Recommendation 9.2(c) is intended to ensure that the categories of people included in s 15A(1)(b)–(d) are protected by the prohibition before proceedings have commenced. It could be achieved by amending s 15A(1)(b)–(d) to capture:

- a person who appears, or is reasonably likely to appear, as a witness in the proceedings and was a child when the offence to which the proceedings relate was committed (whether or not the person was a child when appearing as a witness or reasonably likely to appear as a witness)
- a person who is, or is reasonably likely to be, mentioned in the proceedings in relation to something that occurred when the person was a child, and
- a person who is, or is reasonably likely to be, otherwise involved in the proceedings and was a child when so involved or reasonably likely to be involved.

9.38 The Aboriginal Legal Service and the Children's Court supported extending the prohibition to apply to children "reasonably likely to become involved" in criminal proceedings.[42] The language is consistent with two other statutory prohibitions that protect the identity of a child or young person.[43]

9.39 The Standing Committee noted that arguments in favour of bringing forward the application of the prohibition to the period before charging also support extending the prohibition to cover those "reasonably likely" to be involved in proceedings.[44]

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41. 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.
42. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission CI22*, 1; Children's Court of NSW, *Submission CI28*, 11.
43. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 45(1); *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 105(1).
44. 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) [7.31].

9.40 The effect of recommendations 9.2(a)–(c) would be that where, for example, a child is an alleged victim or a witness involved in a criminal investigation, but the criminal proceedings have not yet commenced, the child's identity could not be published as they are:

- connected with a criminal investigation, and
- "reasonably likely" to be "mentioned" or "otherwise involved" in proceedings.

9.41 Recommendation 9.2(d) is to include exceptions to allow for the publication of the identity of a person where this is necessary:

- for a person's safety and welfare, or
- for the purposes of a criminal investigation or a missing person investigation.

This is intended to ensure the statutory prohibition does not hamper police investigations.

9.42 For example, ARTK highlighted that Police may provide the media with closed-circuit television stills or footage of young people committing crimes, such as robberies, for the purpose of identifying and locating the subjects of the footage.[45] Recommendation 9.2(d) is intended to facilitate this practice by allowing the identity of a child to be published where there is an associated criminal investigation or missing person investigation, and publication is necessary for the purposes of the investigation.

9.43 The exception in recommendation 9.2(d)(ii) is similar to a recommendation made by the Standing Committee.[46] The Police submissions to the Standing Committee indicated that they were not opposed to similar proposals, although it was suggested that it would require careful drafting in legislation to avoid operational concerns.[47]

9.44 The Police submissions to this review did not directly address the operational impact of our draft proposal. Recommendation 9.1(1) clarifies that only the publication of information tending to identify a person would be prohibited. Disclosure of such information would not be prohibited. This means that police would still be able to disclose the child's name in the course of the investigation, for example, in internal police discussions and while interviewing another witness.

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45. Australia's Right to Know, *Submission CI59*, 19.
46. 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 5.
47. 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) [7.18]–[7.19], [7.32].

9.45 The Office of the Director of Public Prosecutions recognised an exception may be needed in the case of a missing child.[48] However, recommendation 9.2(d)(ii) is not intended to alter the scope of the statutory prohibition, such that it applies to missing children generally. It should be clearly understood that the statutory prohibition does not apply at all in a case of a missing person who is later found, and no criminal investigation or criminal proceedings were ever commenced.

Application of the prohibition when a person is deceased

9.46 Section 15A(4)(b) of the *Children (Criminal Proceedings) Act* provides that the prohibition applies even if the person protected by the prohibition is deceased at the time of the publication.

9.47 Our draft proposal was that the prohibition in s 15A should not apply to publishing the identity of a person once they are deceased, so long as this publication does not identify another living person whose identity is protected.[49] At the time, we considered that some of the rationales for the prohibition, such as preventing stigma and protecting privacy, are no longer relevant following the person's death.

9.48 Some stakeholders supported the idea that the prohibition should not apply when the person protected by the prohibition is deceased, arguing that:

- there are fewer privacy issues at stake[50]
- the rationale around protecting children from public scrutiny no longer applies,[51] and
- the prohibition could operate to protect the privacy of the offender in cases where a child was killed by a parent or relative.[52]

9.49 However, many other submissions opposed the draft proposal.[53] Some arguments included that:

- lifting the prohibition could lead to the stigmatisation of the family and community of the child or young person and cause undue hardship to them[54]

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48. NSW Office of the Director of Public Prosecutions, *Preliminary Submission PCI12*, 10.
49. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 5.5(b).
50. NSW Council for Civil Liberties, *Submission CI02*, 6.
51. Banki Haddock Fiora, *Submission CI29*, 3.
52. NSW Council for Civil Liberties, *Submission CI02*, 6.
53. See, eg, Youth Justice NSW, NSW Department of Communities and Justice, *Submission CI39*; knowmore, *Submission CI43*, 14–16; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission CI49*, 3; Law Society of NSW, *Submission CI54*, 2; Legal Aid NSW, *Submission CI57*, 17.
54. Children's Court of NSW, *Submission CI28*, 11; NSW Office of the Director of Public Prosecutions, *Submission CI48*, 4; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission CI49*, 3.

- stigmatisation is particularly significant in Aboriginal communities and for sexual abuse survivors[55]
- the current prohibition protects a child's family's privacy and reflects important cultural considerations, none of which is rendered irrelevant on account of the child's death (irrespective of their role in the proceedings)[56]
- the justification for the prohibition may actually increase after the person dies because they are unable to defend themselves,[57] and
- there is no public interest in publishing the name of a person after they are deceased.[58]

9.50 We recognise that there may be a public interest in the identity of a person being published after the person is deceased, for the purpose of accurate historical reporting. Nonetheless, we have concluded that the prohibition on publishing the identity of a person who was involved in criminal proceedings when they were a child should not be automatically lifted once the person is deceased. Mechanisms for lifting the prohibition when the person is deceased are discussed below.

Exception where a child is the victim of an alleged homicide

Recommendation 9.3: Exception to allow for the publication of the identity of a child victim of an alleged homicide

Section 15A of the *Children (Criminal Proceedings) Act 1987* (NSW) should provide that the prohibition does not apply to the publication of a child's identity where:

(a) there has been prior lawful publication of the child's identity pursuant to the exception in recommendation 9.2(d), and

(b) the child is a victim of an alleged homicide.

9.51 We agree with the Standing Committee that in the vast majority of cases, there will be no real need for the media to identify a child involved in criminal proceedings.[59] The media would still be able to report on the circumstances of the case and the proceedings generally without using the child's name or other identifying material.

9.52 However, as this report was being finalised, a number of high-profile cases involving child victims were being discussed in the community. There were concerns that in cases where there has been widespread publication of a child's identity during the investigation stage, it may be artificial to apply the statutory prohibition on publishing the

55. knowmore, *Submission CI43*, 15–16.
56. Legal Aid NSW, *Submission CI57*,17; Law Society of NSW, *Submission CI54*, 2.
57. Legal Aid NSW, *Submission CI57*,17.
58. knowmore, *Submission CI43*,14–15; Law Society of NSW, *Submission CI54*, 2.
59. 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) [5.54].

identity of the child once criminal proceedings have commenced.[60] It may also prevent the public from learning the outcome of a case.

9.53 To address this, recommendation 9.3 includes a new exception to s 15A of the *Children (Criminal Proceedings) Act* to enable publication of a child's identity where that child is the victim of an alleged homicide and there has been prior lawful publication under recommendation 9.2(d). This is similar to the exception to the prohibition on publishing the identity of a sexual offence complainant where there is an associated homicide, which we recommend in chapter 10.

9.54 The exception in recommendation 9.3 would apply only to the identity of a child victim, and not to other categories of people protected by the prohibition, such as a child defendant or a person who is an adult at the time of the publication of their identity. This is because there is a particular public interest in reporting on homicide cases involving a child victim, given the gravity of these circumstances. We discuss other mechanisms to lift the prohibition below.

Lifting mechanism with leave of the court when the person is alive

Recommendation 9.4: Mechanism for the court to grant leave to lift the prohibition on publication when the person is alive

Section 15D of the *Children (Criminal Proceedings) Act 1987* (NSW) should provide, in relation to the statutory prohibition in s 15A of the Act:

(1) A court may grant leave to publish a person's identity before, during and after the proceedings.

(2) Before granting leave, a court must take into account:

(a) the views of the person and of any other person who is protected by the prohibition and who may be identified by the publication (if these views are known or ascertainable), and

(b) the public interest.

(3) However, a court cannot grant leave to publish the identity of a person who is aged under 16 years at the time of the publication.

9.55 Currently, under s 15D(1)(a) of the *Children (Criminal Proceedings) Act*, the prohibition in s 15A can be lifted in relation to a person who is under 16 at the time of publication, if the court grants leave. This cannot be done unless the child agrees or, if the child is incapable of doing so, the court is of the opinion that it is in the public interest.[61]

9.56 Recommendation 9.4 is to align the existing mechanism with the standard mechanism for lifting a prohibition with leave we outline in chapter 8.

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60. K McDonough, "Balancing Act: The Tension between Open Justice and Child Protection", (2022) 86 *Law Society Journal* 32; J Blundell, "Time Absurd NSW Law was brought into Line with Other States", *The Sydney Morning Herald* (20 January 2022) 7.

61. *Children (Criminal Proceedings) Act 1987* (NSW) s 15D(2).

9.57 Under recommendation 9.4, any person could apply to the court for leave to publish a person's identity before, during or after the proceedings. This approach is more flexible than some other Australian states and territories. For example:

- in the NT and Victoria, a court can only lift the prohibition in an emergency or when reasonably necessary for the safety of a person (including the youth or a witness),[62] and
- in WA, only the Commissioner of Police or the Attorney General may make an application to the court to lift the prohibition.[63]

9.58 Under recommendation 9.4(2), a court would need to take into account the views of any other person who is protected by the prohibition and who may be identified by the publication, as well as the public interest, before it can grant leave. This recognises:

- different views about publication that people protected by the prohibition may have, and
- the public interest element in publication and non-publication of the person's identity (chapter 8).

9.59 Consistent with our standard approach outlined in chapter 8, recommendation 9.4(3) would amend s 15D(1)(a) and s 15D(2) of the *Children (Criminal Proceedings) Act* so that a court cannot permit publication of the identity of a child who is under 16. Involvement in criminal proceedings may be particularly stigmatising for children under 16. They are also less likely to understand the enduring consequences of their actions.

Lifting mechanism with leave of the court when the person is deceased

Recommendation 9.5: Mechanism for the court to grant leave to lift the prohibition on publication when the person is deceased

(1) Section 15E of the *Children (Criminal Proceedings) Act 1987* (NSW) should be repealed.

(2) Section 15D of the *Children (Criminal Proceedings) Act 1987* (NSW) should provide, in relation to the statutory prohibition in s 15A of the Act:

  (a) A court may grant leave to publish a deceased person's identity before, during and after the proceedings.

  (b) Before granting leave, a court must take into account:

    (i) what the deceased person would have wanted if they had been alive

    (ii) the views of family members of the deceased person, unless the family member is also the alleged or convicted offender

62. *Youth Justice Act 2005* (NT) s 50(4); *Children, Youth and Families Act 2005* (Vic) s 534(1A).

63. *Children's Court of Western Australia Act 1988* (WA) s 36A(3).

(iii) the views of any other person who is protected by the prohibition and who may be identified by the publication (if these views are known or ascertainable), and

(iv) the public interest.

9.60 Section 15E of the *Children (Criminal Proceedings) Act* provides that the senior available next of kin can consent to publication of a deceased child's identity. It is not explicit that s 15E would be available if the person whose identity is protected by s 15A was an adult when they died, as it refers only to a deceased "child".

9.61 Section 15E(2) provides that the senior available next of kin can only give consent if it appears, after making reasonable inquiries, that no other senior available next of kin objects.

9.62 Section 15E(3) provides that where the deceased child has a sibling whose identity is protected by the prohibition, the senior next of kin must make reasonable inquiries to obtain the sibling's views and take into account the impact of publishing the deceased child's identity on that sibling.

9.63 Section 15E(4) prevents consent being given by a senior next of kin who is the defendant in related proceedings.

9.64 Recommendation 9.5 would result in the repeal of s 15E of the *Children (Criminal Proceedings) Act* and its replacement with a new mechanism for lifting the prohibition with the court's leave.

9.65 The lifting mechanism in recommendation 9.5(2) is consistent with the standard approach to lifting a statutory prohibition where the person is deceased outlined in chapter 8. It is also consistent with our recommendations for other statutory prohibitions involving children and young people where we recommend the duration be extended (recommendations 9.9 and 9.11).

9.66 The mechanism in recommendation 9.5(2) is broader than the existing mechanism in s 15E, in that it would apply to any deceased person who is protected by the prohibition (whether or not the person was an adult or a child at the time of their death).

9.67 Recommendation 9.5(2) would allow a person to apply for leave of the court to publish the identity of a person protected by the prohibition, and the court would be required to consider certain matters in deciding whether to grant leave, including:

- what the deceased person would have wanted if they had been alive
- the views of family members (unless the family member is also the alleged or convicted offender), and
- the views of another living person whose identity is protected and who may be identified by the publication

This is to ensure the court considers all relevant views, which the court can balance in making its decision.

9.68 Legal Aid, the Law Society and knowmore supported the consideration of such factors.[64]

9.69 Recommendation 9.5 avoids the difficulties that may arise with the current s 15E, including that:

- it may be burdensome for the publisher and the family to determine who is the senior available next of kin, as multiple people may qualify as a senior available next of kin
- it is not clear who is responsible for deciding who qualifies as the senior next of kin, and
- where there are multiple family members with views about publication of the deceased child's identity, those family members may not agree, or insufficient weight may be given to the views of some family members.

9.70 Recommendation 9.5 also ensures that grieving family members are not placed in a position where they must assume responsibility for making a decision about publication, which could exacerbate their trauma at a difficult time. In 2008, the Standing Committee acknowledged that the current provision has the potential to create unwanted stress to the deceased's family who are dealing with requests from the media.[65] It may also be difficult for families to make decisions about the publication of a deceased child's identity where this may result in long-term stigma for another family member who is a defendant, victim or sibling of the deceased child or is otherwise involved in the criminal proceedings.

9.71 The court is best placed to weigh the views of the family and whether the publication of the deceased person's identity is in the public interest, which should relieve the pressure on families, while maintaining their voice in the process.

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64. Legal Aid NSW, *Submission CI57*,17; Law Society of NSW, *Submission CI54*, 2*;* knowmore, *Submission CI43*, 15.

65. 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].

Where an application to lift a prohibition can be heard before proceedings have commenced

Recommendation 9.6: Where an application to lift the prohibition on publication can be heard before proceedings have commenced

Section 15D of the *Children (Criminal Proceedings) Act 1987* (NSW) should provide, in relation to the statutory prohibition in s 15A of the Act, that, before proceedings have commenced, applications to publish the identity of a person protected by the prohibition can be heard by any court in which the proceedings could be commenced.

9.72 Where there is an application under s 15D to lift the prohibition in s 15A of the *Children (Criminal Proceedings) Act* before criminal proceedings have commenced, there is no obvious court to deal with the application.

9.73 To address this, recommendation 9.6 would enable applications to be heard by any court in which the criminal proceedings concerned could be commenced.

Lifting mechanism by consent

Recommendation 9.7: Mechanism for a person to consent to lifting the prohibition on publication

Section 15D of the *Children (Criminal Proceedings) Act 1987* (NSW) should provide, in relation to the statutory prohibition in s 15A of the Act:

(1) A child aged under 16 years at the time of publication cannot consent to the publication of their identity.

(2) A person aged 16 years or over but under 18 years at the time of publication can consent to the publication of their identity after receiving advice from an Australian legal practitioner about the implications of consenting.

(3) A person aged 18 years or over at the time of publication can consent to the publication of their identity.

(4) However, a person cannot consent to the publication of their identity under recommendation 9.7(2)–(3) if:

  (a) the publication may identify:

    (i) a child who is protected by the prohibition and who is aged under 16 years, or

    (ii) any other person who is protected by the prohibition and who has not consented to the publication of their identity, or

  (b) the proceedings are ongoing.

9.74 Section 15D(1)(b) of the *Children (Criminal Proceedings) Act* provides that the prohibition in s 15A can be lifted if the person consents (if they are 16 or older). If the person is aged 16 or 17, consent must be given in the presence of an Australian legal practitioner of the child's own choosing.[66]

66. *Children (Criminal Proceedings) Act 1987* (NSW) s 15D(3).

9.75 Recommendation 9.7 is to introduce a new mechanism for lifting the prohibition by consent that reflects the standard approach to lifting the prohibition by consent outlined in chapter 8.

9.76 Under recommendation 9.7(1), a child under 16 would not be able give consent. This is due to their particular vulnerability (chapter 8).

9.77 Under recommendation 9.7(2), a person aged 16 or 17 would only be able to consent to publication of their identity "after receiving advice from" an Australian legal practitioner, rather than "in the presence of" a practitioner. This is intended to highlight the importance of young people receiving legal advice about the implications of consenting to publication, and to allow greater flexibility as to how consent can be given (once the advice is obtained). The Bar Association supported young people obtaining legal advice on the implications of consent.[67]

9.78 Unlike s 15D(3), recommendation 9.7(2) would not require the legal practitioner to be chosen by the young person. We recognise that the lawyer could be appointed to the person's case.

9.79 Under recommendation 9.7(3), a person aged 18 or over would be able to consent to publication of their identity, without the need for legal advice.

9.80 In all cases, a person would not be able to consent to lifting the prohibition:

- Where this may identify another person protected by the prohibition in s 15A who is under 16 years or who does not consent (recommendation 9.7(4)(a)). This is to ensure that a person's desire to tell their story does not intrude on the protection afforded to another person by the prohibition.
- During the proceedings (recommendation 9.7(4)(b)). This is to protect the integrity of the proceedings and limit publication about the case while proceedings are ongoing, which may be traumatising to others involved in the case. However, a court could grant leave for publication while proceedings are ongoing under recommendation 9.4.

No change to the mechanism for lifting the prohibition in serious crimes

9.81 Section 15C of the of the *Children (Criminal Proceedings) Act* provides a mechanism for the court to authorise the publication of the name of a person convicted of a serious children's indictable offence (whether or not the person consents or concurs).

9.82 A "serious children's indictable offence" includes:

- homicide
- any offence punishable by imprisonment for 25 years or life

67. NSW Bar Association, *Submission CI56* [32].

- 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.[68]

9.83 The order must be made by the sentencing court at the time of sentencing.[69] In deciding whether to make such an order, the sentencing court must consider:

- the level of seriousness of the offence
- the effect of the offence on any victim 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 the court considers relevant having regard to the interests of justice.[70]

9.84 Prior to amendments made in 2009, a court could only make an order authorising the person's name to be published if it was satisfied that:

- making such an order was in the interests of justice, and
- the prejudice to the person arising from publishing or broadcasting their name in accordance with such an order did not outweigh those interests.[71]

9.85 The 2008 Standing Committee Report, which informed the 2009 amendments, noted that the public can often be provided with sufficient information about a case without it being necessary to name the child.[72]

9.86 There have been a small number of cases in which a court has authorised publication and disclosure of an offender's name under s 15C.[73] In one case, the court noted that

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68. *Children (Criminal Proceedings) Act 1987* (NSW) s 3(1) definition of "serious children's indictable offence"; *Children (Criminal Proceedings) Regulation 2021* (NSW) cl 4.
69. *Children (Criminal Proceedings) Act 1987* (NSW) s 15C(2).
70. *Children (Criminal Proceedings) Act 1987* (NSW) s 15C(3).
71. *Children (Criminal Proceedings) Act 1987* (NSW) s 11(4C), as repealed by *Children (Criminal Proceedings) Amendment (Naming of Children) Act 2009* (NSW) sch 1 cl 1.
72. 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].
73. *R v Dib* [2012] NSWSC 1431 [55]–[58]; *R v Milat* [2012] NSWSC 634 [2].

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.[74] 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.[75]

9.87 Queensland legislation contains a similar mechanism for the prohibition to be lifted by a court order in cases involving serious crimes, if a child has been sentenced. The court must consider the following factors:

(a) the need to protect the community; and

(b) the safety or wellbeing of a person other than the child; and

(c) the impact of publication on the child's rehabilitation; and

(d) any other relevant matter.[76]

9.88 We received several submissions referring to a case known as "*DL*",[77] where s 15C may have been relevant. These submissions broadly argued that the community should be able to identify people who commit serious offences for a range of reasons, including:

- the protection of the community
- so that the public can follow the outcome of serious cases, and
- because the current protection benefits the offender, at the expense of the victim and their family.[78]

9.89 The family of the victim in *DL* submitted that the prohibition in s 15A should not apply where the person is sentenced to more than 10 years, subject to some exceptions such

74. *R v Dib* [2012] NSWSC 1431 [35], [57]–[58].
75. *R v Milat* [2012] NSWSC 634 [2].
76. *Youth Justice Act 1992* (Qld) s 234(2).
77. *R v DL* [2008] NSWSC 1199; *DL v R* [2017] NSWCCA 57; *DL v R (No 2)* [2017] NSWCCA 58; *DL v R* [2018] HCA 32, 265 CLR 215; *DL v R* [2018] NSWCCA 302.
78. B Fordham, *Preliminary Submission PCI02*, 1; D Gibson, *Preliminary Submission PCI03*; D Carr, *Preliminary Submission PCI04*; C Lee, *Preliminary Submission PCI05*; C O'Loughlin, *Preliminary Submission PCI07*; C and M Burgess, *Preliminary Submission PCI21*; C and M Burgess, *Submission CI03*, 1–2.

as mental health and cognitive impairment.[79] These proposals have been recently highlighted by the media.[80]

9.90 Others submitted that publication of the name of a child offender who commits a serious offence should be automatically allowed after they turn 18.[81] Another submitted that offenders should be reassessed once they turn 21, and that there should be a rebuttable presumption in favour of publication, unless special circumstances exist.[82]

9.91 The Public Defenders submitted that, in respect of *DL*, it appears no application was made when the offender was sentenced or resentenced. The submission noted that s 15C may have provided a mechanism for the court to consider, during sentencing, the publication of the offender's name, if an application had been made.[83] The Public Defenders also submitted that the problem may arise from the practical implementation of the law and support for the families of deceased victims, rather than from the law itself.[84]

9.92 We considered whether s 15C should be amended to require the sentencing court to also consider the offender's age at the time of the offence when deciding whether to make an order authorising publication of the offender's name.

9.93 The Public Defenders submitted that the current list of factors in s 15C achieves a balance between maintaining a broad judicial discretion and providing legislative guidance about the relevant factors.[85] Another submission was opposed to any reform.[86]

9.94 We have concluded that s 15C should be retained without amendment. The prohibition in s 15A supports protecting the identities of child defendants in criminal proceedings to ensure that their rehabilitation will not be compromised by stigma. It may be that the weight of these considerations is reduced in some cases involving serious offences. However, that is not invariably so. Section 15C strikes a reasonable compromise between the interests of rehabilitation of child offenders and open justice by allowing a court to determine where the balance lies in each individual case at the time of sentencing.

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79. C and M Burgess, *Submission CI03*, 2.
80. A Saw, "'I won't be able to Breathe': Schoolgirl Killer's next Move", *The Daily Telegraph* (online, 8 March 2022).
81. B Fordham, *Preliminary Submission PCI02*, 1; D Gibson, *Preliminary Submission PCI03*; C and M Burgess, *Preliminary Submission PCI21*.
82. H Brown, *Preliminary Submission PCI10*, 2–3.
83. NSW, Public Defenders, *Preliminary Submission PCI33*, 7–8.
84. NSW, Public Defenders, *Preliminary Submission PCI33*, 9.
85. NSW, Public Defenders, *Preliminary Submission PCI133*, 8–10.
86. G Wade, *Preliminary Submission PCI06*.

9.95 The exception in s 15C is limited to the time of sentence and is not a general power to authorise publication.[87] Recommendations 9.4 and 9.5 would provide new mechanisms for the court to grant leave for the publication of the identity of a person protected by the prohibition after the proceedings have concluded.

9.96 If recommendations 9.4 and 9.5 are implemented, legislative drafting should make it clear that there is no conflict between these lifting mechanisms and s 15C. This would ensure that there is always a mechanism to seek leave to publish the identity of an offender after the mechanism in s 15C has expired.

9.97 In addition, any education or training addressing reforms arising from this review should include the statutory prohibition in the *Children (Criminal Proceedings) Act* and the operation of all lifting mechanisms (including s 15C) (chapter 16).

Indirect effect in supressing name of offenders

9.98 The prohibition in s 15A of the *Children (Criminal Proceedings) Act* may have the indirect effect of preventing publication of information identifying the perpetrator, where the perpetrator is related to the child. This is notably so in cases of child sexual abuse.

9.99 In a recent case, the Court of Criminal Appeal drew attention to this problem:

> In order to comply with s 15A of the *Children (Criminal Proceedings) Act* the respondent is referred to in this judgment only as "PC", the victim's name has not been mentioned, the locality in which the offences occurred has not been specified and the names of persons connected with the respondent's background have not been given. The victim was a vulnerable young person when these offences were committed. The suppression of all of this information in compliance with the statute serves Parliament's purpose of protecting her against the embarrassment she might feel if she should be identifiable from the terms of the Court's judgment.
>
> However, it is pertinent to observe that this regime of protection for the victim also shields the respondent from being exposed in his community as a person who has committed these wrongs. The natural caution of media organisations with respect to reporting on trials and appeals that are subject to s 15A of the *Children (Criminal Proceedings) Act* means that the prosecution and sentencing of offenders in this class barely receives any publicity at all. The anonymization of the offender that is required, indirectly, by the Act operates in a way that is likely to detract greatly, if not completely, from the general deterrent effect of the sentences passed in such cases.
>
> Sentences that are imposed upon stepfathers who sexually abuse their stepdaughters could be expected to have a significant deterrent effect if

87. *Children (Criminal Proceedings) Act 1987* (NSW) s 15C(2).

> publicised within the communities within which the offences have been committed. Members of local communities would likely take notice of sentencing outcomes in relation to offenders whom they either know or know of. Sexual offending within this category of family relationship recurs with high frequency and has done for decades, as may be seen in the judgments of criminal courts across the country. The pattern constitutes a very concerning, persistent and widespread criminal phenomenon. The regime of anonymization of these judgments, necessitated by s 15A, and the associated dearth of media publicity, makes it difficult to avoid the conclusion that the judges are, for all practical purposes, merely talking to each other and to the legal profession when pronouncing sentences in these cases. The object of deterrence, dependent as it is upon public knowledge and attention, is likely being defeated. In my view this subject would warrant the attention of the Law Reform Commission, to consider whether there is a means by which adequate and meaningful publicity could be given to deterrent sentences in these cases without compromising the privacy and protection of young victims.[88]

9.100 Where there is a familial relationship, and in particular a common family name, identification of the perpetrator will almost inevitably tend to identify the child. In these circumstances, there is a need to balance the interests of protecting the child with denouncing the perpetrator. In our view, the interests of the child should prevail.

9.101 In addition, we note the following:

- A sentence usually derives its deterrent effect more from the sentence itself and the circumstances of the offence, than from identification of the particular offender. Deterrence can be supported by reporting that a stepfather has been sentenced to imprisonment for two years for abuse of his stepchild, without it being necessary to identify the offender and thus the child. This could be included in a judgment summary.
- The deterrent effect of a sentence usually does not depend on a local community knowing the identity of the offender, but on the sentence and circumstances being more widely known. Moreover, identification of the offender in his or her local community would exacerbate the risk of identification of the child victim.
- The lifting mechanism in recommendation 9.7 provides a means by which a victim of 16 or more can consent to publication of their identity.

88. *R v PC* [2022] NSWCCA 59 [56]–[58].

Other statutory prohibitions on publishing the identity of children and young people

9.102 In addition to the statutory prohibition on publication contained in the *Children (Criminal Proceedings) Act*, above, there are five other provisions relating to children and young people that we classify as statutory prohibitions on publication (chapter 3):

- *Young Offenders Act 1997* (NSW) (*Young Offenders Act*) s 65
- *Children and Young Persons (Care and Protection) Act 1998* (NSW) (*Care and Protection Act)* s 105
- *Adoption Act 2000* (NSW) (*Adoption Act*) s 180
- *Surrogacy Act 2010* (NSW) (*Surrogacy Act*) s 52, and
- *Status of Children Act 1996* (NSW) (*Status of Children Act*) s 25.

We consider that these statutory prohibitions should be retained.

9.103 It should also be noted that, in certain circumstances, the statutory prohibition contained in s 578A of the *Crimes Act 1900* (NSW) may apply to a child who is a complainant in relation to a prescribed sexual offence (chapter 10).

9.104 Further, there is a provision relating to children and young people that we classify as a statutory prohibition on publication, contained in s 45(1) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) (chapter 11).

Prohibition in the *Young Offenders Act*

9.105 The *Young Offenders Act* establishes alternatives to court proceedings that divert young people from criminal proceedings through processes such as warnings, cautions and youth justice conferences.[89]

9.106 Section 65 provides that the name or identifying information of any child dealt with under the *Young Offenders Act* must not be published or broadcast.[90] For the purposes of the Act, a child is a person who is aged 10 or over, but who is under 18.[91] Most other states and territories have a similar prohibition.[92]

9.107 There are two exceptions to the prohibition in s 65, which apply where:

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89. *Young Offenders Act 1997* (NSW) s 3(a).
90. *Young Offenders Act 1997* (NSW) s 65(1).
91. *Young Offenders Act 1997* (NSW) s 4 definition of "child".
92. *Youth Justice Act 2005* (NT) s 43; *Youth Justice Act 1992* (Qld) s 283(2)(c)–(d), s 301; *Young Offenders Act 1993* (SA) s 13; *Youth Justice Act 1997* (Tas) s 22; *Young Offenders Act 1994* (WA) s 40.

- the name or identifying information of the child is published or broadcast in an official report of the proceedings, and
- a child is over 16 at the time of the publication and consents.[93]

9.108 This statutory prohibition on publication was well supported by submissions.[94]

Prohibition in the *Care and Protection Act*

9.109 The *Care and Protection Act* includes powers to investigate reports of harm, to remove children from the care of their families and for related court proceedings under the Act.

9.110 Section 105 of 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 proceedings under the Act. Non-court proceedings means any aspect of care proceedings not conducted before the Children's Court, including counselling, dispute resolution conferences and alternative dispute resolution processes.[95]

9.111 For the purpose of this Act, a child is defined as a person who is under 16 and a young person is a person who is 16 or 17.[96]

9.112 The statutory prohibition covers children and young people who:

- appear, or are reasonably likely to appear, as witnesses before the Children's Court in any care 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 homelessness, or
- are, or have been, under the parental responsibility of the Minister or in out-of-home care.[97]

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93. *Young Offenders Act 1997* (NSW) s 65(3).
94. Youth Justice NSW, NSW Department of Communities and Justice, *Submission CI07*, 4; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission CI22*, 1–2; Children's Court of NSW, *Submission CI28*, 13.
95. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 3(1) definition of "non-court proceedings".
96. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 3(1) definition of "child", definition of "young person".
97. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 105(1)–(1AA).

9.113 The reference to those who are or have been under the parental responsibility of the Minister or in out-of-home care was added in 2018.[98] It reversed a Court of Appeal decision in 2017 that the prohibition in s 105 did not prevent publication of the name of any child about whom care proceedings had been taken, without any reference to those proceedings.[99]

9.114 A note in s 105 of the *Care and Protection Act* provides examples of identifying someone in out-of-home care, which are identifying the child or young person as being or having been:

- a foster child or ward of the state
- in foster care or under the parental responsibility of the Minister, and
- in the care of an authorised carer.[100]

9.115 The prohibition does not apply to criminal proceedings.[101]

9.116 There is a range of exceptions to the statutory prohibition, which apply where the publication or broadcast of the identity of the child or young person:

- is an official report of the proceedings
- relates to findings of the Coroners Court in an inquest concerning the suspected death of the child or young person
- 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), or
- where the child or young person has died, or after they have turned 25, whichever occurs first.[102]

9.117 We have limited our recommendations for this statutory prohibition to its operation in relation to court proceedings, excluding both the provisions relating to matters in the Coroners Court and administrative processes and decisions. Care should be taken to ensure that implementation of any of our recommendations does not have unintended consequences for these other contexts.

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98. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 105(1AA), inserted by *Children and Young Persons (Care and Protection) Amendment Act 2018* (NSW) sch 1 cl 35.
99. *Secretary, Department of Family and Community Services v Smith* [2017] NSWCA 206 [48]–[49].
100. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 105(1AA) note.
101. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 105(6).
102. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 105(1A), s 105(3).

Prohibitions in the Adoption, Surrogacy and Status of Children Acts

9.118 Section 180 of 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. This includes a child in relation to whom an adoption application is made.[103]

9.119 All other Australian states and territories have similar provisions that prohibit publishing information that identifies people involved in adoption proceedings.[104]

9.120 The exceptions to the prohibition in s 180 of the *Adoption Act* include where:

- the information is part of an official report of proceedings
- the court authorises the publication consistent with the process outlined in s 180A, and
- the person consents to the publication of their identity after the proceedings have been disposed of, provided the material does not identify any person who does not consent to being identified.[105]

9.121 Section 52 of the *Surrogacy Act* prohibits the publication of material that identifies, or is reasonably likely to identify, a person as affected by a surrogacy arrangement. This includes the child of a surrogacy arrangement.[106] There are similar provisions in Queensland, Tasmania and Victoria.[107]

9.122 Section 25 of the *Status of Children Act* prohibits the publication of the name or identifying information of a person by, or in relation to whom, an application for a declaration of parentage, or annulment of an order, is brought. There are similar provisions in the NT, SA and WA.[108]

Uniform terminology

Recommendation 9.8: Uniform terminology in certain prohibitions on publication concerning children and young people

(1) Section 65 of the *Young Offenders Act 1997* (NSW), s 105 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW), s 180 of the *Adoption Act 2000*

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103. *Adoption Act 2000* (NSW) s 180(2)(a).
104. *Adoption Act 1993* (ACT) s 97; *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.
105. *Adoption Act 2000* (NSW) s 180(3)–(4), s 180A.
106. *Surrogacy Act 2010* (NSW) s 52(2)(a).
107. *Surrogacy Act 2010* (Qld) s 53; *Surrogacy Act 2012* (Tas) s 42.
108. *Status of Children Act 1978* (NT) s 17(2); *Family Relationships Act 1975* (SA) s 13; *Family Court Act 1997* (WA) s 243.

(NSW), s 52 of the *Surrogacy Act 2010* (NSW) and s 25 of the *Status of Children Act 1996* (NSW) should:

(a) adopt the term "publish" and define it in the same way as in recommendation 3.2, and

(b) adopt the term "information tending to identify" a person and define it in the same way as in recommendation 3.3.

(2) Section 65 of the *Young Offenders Act 1997* (NSW), s 105 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) and s 180 of the *Adoption Act 2000* (NSW) should define "official report of proceedings" in the same way as in recommendation 3.6.

(3) Section 52 of the *Surrogacy Act 2010* (NSW) and s 25 of the *Status of Children Act 1996* (NSW) should:

(a) include an exception for an official report of proceedings, and

(b) define "official report of proceedings" in the same way as in recommendation 3.6.

9.123 Recommendation 9.8 is for the prohibitions in the *Young Offenders Act, Care and Protection Act, Adoption Act, Surrogacy Act* and *Status of Children Act* to adopt uniform definitions of key terms. Recommendation 9.8(1)(a) could be given effect by:

- introducing the uniform definition of "publish", recommended in chapter 3, into s 65 of the *Young Offenders Act*, s 105 of the *Care and Protection Act*, s 180 of the *Adoption* Act, and s 25 of the *Status of Children Act,* as these provisions do not currently define this term
- replacing the current definition of "publish" in s 52(5) of the *Surrogacy Act* (as "disseminate or provide access, by any means, to the public or a section of the public") with the uniform definition of this term, and
- removing unnecessary references to "broadcast" or "broadcasting" information in s 65 of the *Young Offenders Act* and s 105 of the *Care and Protection Act*, as the uniform definition of "publish" includes broadcasting information via television and radio and publishing information on the internet.

9.124 Recommendation 9.8(1)(b) could be given effect by adopting the term "information tending to identify" a person instead of:

- "name" in s 105 of the *Care and Protection Act* and s 65 of the *Young Offenders Act*
- "name, or the particulars relating to the identity, of" in s 25 of the *Status of Children Act,* and
- "material that identifies, or is reasonably likely to identify" in s 180 of the *Adoption Act* and s 52 of the *Surrogacy Act.*

9.125 To provide further guidance about what information is protected by the prohibition, the uniform definition of "information tending to identify" a person, recommended in chapter 3, should also be adopted. For example, this definition should replace s 65(4) of the *Young Offenders Act*, which provides that:

a reference to the name of a child includes a reference to any information, picture or other material that identifies the child or is likely to lead to the identification of the child.

9.126 For consistency with other legislation containing exceptions to open justice, recommendation 9.8(2)–(3) would:

- introduce the exception for an "official report of proceedings" where it does not already exist, and
- adopt the uniform definition of "official report of proceedings", recommended in chapter 3.

Application of the prohibitions when a person is deceased

Recommendation 9.9: Application of certain prohibitions on publication concerning children and young people to a deceased person

Section 65 of the *Young Offenders Act 1997* (NSW), s 105 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW), s 180 of the *Adoption Act 2000* (NSW), s 52 of the *Surrogacy Act 2010* (NSW) and s 25 of the *Status of Children Act 1996* (NSW) should apply even if the person protected by the prohibition is deceased at the time of publication.

9.127 Section 65(1) of the *Young Offenders Act* states that the prohibition applies before or after the child is finally dealt with under the Act.

9.128 The prohibition in s 105 of the *Care and Protection Act* applies until the child or young person turns 25 or dies, whichever occurs first (except in the case of a child or young person whose suspected death is subject to investigation by a coroner).[109]

9.129 The statutory prohibitions in s 180 of the *Adoption Act,* s 52 of the *Surrogacy Act* and s 25 of the *Status of Children Act* have an implied indefinite duration.

9.130 Recommendation 9.9 is for all of these prohibitions to state explicitly that they apply beyond the death of the person protected by the prohibition (who could be a child, young person or adult). This is to ensure clarity and consistency across the statutory prohibitions concerning children and young people.

9.131 Our draft proposal was that some of these prohibitions should be lifted once the person protected by the prohibition is deceased, so long as this publication does not identify another living person whose identity is protected (for example, a sibling of the deceased).[110]

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109. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 105(1A), s 105(3)(b)(iv).

110. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 5.5.

9.132 However, we do not make this recommendation in relation to the *Young Offenders Act* because:

- children and young people dealt with under the *Children (Criminal Proceedings) Act*, have often been previously dealt with under the *Young Offenders Act*, and
- proceedings under the *Young Offenders Act* can cause stigma to the person's family and community, similar to proceedings under the *Children (Criminal Proceedings) Act.*[111]

Therefore, the prohibitions under both Acts should have the same duration.

9.133 An indefinite duration is appropriate for these other prohibitions concerning children and young people, given the sensitive and private subject matter and the potentially stigmatising effect of the proceedings.

Lifting mechanism with leave of court when the person is alive

Recommendation 9.10: Mechanism for the court to grant leave to lift certain prohibitions on publication concerning children and young people when the person is alive

(1) Section 65 of the *Young Offenders Act 1997* (NSW) and s 105 of the C*hildren and Young Persons (Care and Protection) Act 1998* (NSW) should provide:

(a) A court may grant leave to publish a person's identity before, during and after the proceedings.

(b) Before granting leave, a court must take into account:

(i) the views of the person and of any other person who is protected by the prohibition and who may be identified by the publication (if these views are known or ascertainable), and

(ii) the public interest.

(c) However, a court cannot grant leave to publish the identity of a child who is aged under 16 years at the time of publication.

(2) Section 180 and s 180A of the *Adoption Act 2000* (NSW), s 52 of the *Surrogacy Act 2010* (NSW) and s 25 of the *Status of Children Act 1996* (NSW) should provide:

(a) A court may grant leave to publish a person's identity during and after the proceedings.

(b) Before granting leave, a court must take into account:

(i) the views of the person and of any other person who is protected by the prohibition and who may be identified by the publication (if these views are known or ascertainable), and

(ii) the public interest.

(c) However, a court cannot grant leave to publish the identity of a child who is aged under 16 years at the time of publication.

111. Children's Court of NSW, *Consultation CIC25*.

9.134 Section 105(3)(b)(i) of the *Care and Protection Act* provides that the Children's Court may "consent" to the publication of the name of a child under 16 and s 105(3)(b)(iiia) provides that the Coroners Court may "consent" in the case of a child or young person whose suspected death is the subject of an inquest. It does not specify any criteria or considerations for doing so.

9.135 Section 180A of the *Adoption Act* provides a mechanism for the court to "authorise" the publication of any material during proceedings if each person affected by the adoption application consents to the publication and it is appropriate in the circumstances of the case to do so.

9.136 The *Young Offenders Act*, the *Surrogacy Act* and the *Status of Children Act* do not contain a mechanism for the prohibitions to be lifted by leave of a court.

9.137 Recommendation 9.10(1) is for s 65 of the *Young Offenders Act* and s 105 of the *Care and Protection Act* to adopt the standard mechanism for lifting a prohibition with leave of the court, outlined in chapter 8.

9.138 Consistent with our approach to the coronial jurisdiction outlined in chapter 15, recommendation 9.10(1) is not intended to change the current mechanism in the *Care and Protection Act* for the Coroners Court to consent to a publication in the case of a child or young person whose suspected death is the subject of an inquest.

9.139 Recommendation 9.10(2) is for s 180 and s 180A of the *Adoption Act,* s 52 of the *Surrogacy Act* and s 25 of the *Status of Children Act*, to adopt a slightly modified version of this lifting mechanism, which does not enable the court to grant leave before the proceedings commence. This is because the statutory prohibitions in these Acts do not themselves commence until proceedings have commenced.

9.140 The lifting mechanisms in recommendation 9.10 are more flexible than those for lifting prohibitions relating to children and young people in some other Australian states and territories. For example:

- in SA, the court can only lift the prohibition on publishing the identity of a youth subject to action by a police officer or a family conference for an educational documentary,[112] and
- the NT, Tasmania and WA do not make provision for the court to lift the prohibition on publishing the identity of a young person involved in diversionary proceedings.[113]

112. *Young Offenders Act 1993* (SA) s 13(1a)–(1j).

113. *Youth Justice Act 2005* (NT) s 43; *Youth Justice Act 1997* (Tas) s 22; *Young Offenders Act 1994* (WA) s 40.

Lifting mechanism with leave of the court when the person is deceased

Recommendation 9.11: Mechanism for the court to grant leave to lift certain prohibitions on publication concerning children and young people when the person is deceased

(1) Section 65 of the *Young Offenders Act 1997* (NSW) and s 105 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) should provide:

- (a) A court may grant leave to publish a deceased person's identity before, during and after the proceedings.
- (b) Before granting leave, a court must take into account:
  - (i) what the deceased person would have wanted if they had been alive
  - (ii) the views of family members of the deceased person
  - (iii) the views of any other person who is protected by the prohibition and who may be identified by the publication (if these views are known or ascertainable), and
  - (iv) the public interest.

(2) Section 180 and s 180A of the *Adoption Act 2000* (NSW), s 52 of the *Surrogacy Act 2010* (NSW) and s 25 of the *Status of Children Act 1996* (NSW) should provide:

- (a) A court may grant leave to publish a deceased person's identity during and after the proceedings.
- (b) Before granting leave, a court must take into account:
  - (i) what the deceased person would have wanted if they had been alive
  - (ii) the views of family members of the deceased person
  - (iii) the views of any other person who is protected by the prohibition and who may be identified by the publication (if these views are known or ascertainable), and
  - (iv) the public interest.

9.141 As outlined above, recommendation 9.9 is for s 65 of the *Young Offenders Act*, s 105 of the *Care and Protection Act*, s 180 of the *Adoption Act,* s 52 of the *Surrogacy Act* and s 25 of the *Status of Children Act* to apply even if the person protected by the prohibition is deceased at the time of the publication. However, there may be situations where a family member or friend of the person, or the media, may wish to publish the identity of a deceased person who is protected by the prohibition.

9.142 Recommendation 9.11 ensures that there is a mechanism for the court to grant leave for publication where the person is deceased that is consistent with our standard approach to lifting statutory prohibitions outlined in chapter 8.

9.143 The mechanism in recommendation 9.11(2) is slightly different, in that it does not enable the court to grant leave before proceedings commence, as the prohibitions themselves do not commence until proceedings have commenced.

Where an application to lift a prohibition can be heard before proceedings have commenced

Recommendation 9.12: Where an application to lift certain prohibitions on publication concerning children and young people can be heard before proceedings have commenced

Section 65 of the *Young Offenders Act 1997* (NSW) and s 105 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) should provide that before proceedings have commenced, applications to publish the identity of a person protected by the prohibition can be heard by any court in which the proceedings could be commenced.

9.144 Recommendation 9.12 ensures that the *Young Offenders Act* and the *Care and Protection Act* specify where applications to lift the statutory prohibitions can be heard before proceedings have commenced. It is consistent with recommendation 9.6 for the *Children (Criminal Proceedings) Act*.

9.145 Section 105(1) of the *Care and Protection Act* states that it applies "before any proceedings have commenced" and clearly identifies the categories of children and young people protected by the prohibition as including those who are "likely" to become involved in proceedings.

9.146 This is appropriate as being involved in proceedings under the *Care and Protection Act* can lead to stigmatisation. In 2017, the Supreme Court observed:

> (1) that there is a stigma attached to in-care status, and (2) that for that reason, children in care manage closely those who are informed of their status.[114]

9.147 Similarly, s 65(1) of the *Young Offenders Act* states that it applies "whether before or after the matter involving the child is finally dealt with" under the Act.

9.148 In general, we consider that prohibitions relating to children and young people should have consistent durations. However, we do not recommend that the statutory prohibitions in the *Adoption Act, Surrogacy Act* and *Status of Children Act* should be amended to commence earlier, given the specialised nature of these proceedings.

Lifting mechanism by consent

Recommendation 9.13: Mechanism for a person to consent to lifting certain prohibitions on publication concerning children and young people with consent

Section 65 of the *Young Offenders Act 1997* (NSW), s 105 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW), s 180 of the *Adoption Act 2000* (NSW), s 52 of the *Surrogacy Act 2010* (NSW) and s 25 of the *Status of Children Act 1996* (NSW) should provide:

114. *Secretary, Department of Family and Community Services v Smith* [2017] NSWSC 6 [49].

(1) A child aged under 16 years at the time of publication cannot consent to the publication of their identity.

(2) A person aged 16 years or over but under 18 years at the time of publication can consent to the publication of their identity after receiving advice from an Australian legal practitioner about the implications of consenting.

(3) A person aged 18 years or over at the time of publication can consent to the publication of their identity.

(4) However, a person cannot consent to the publication of their identity under recommendation 9.13(2)–(3) if:

(a) the publication may identify:

(i) a child who is protected by the prohibition and who is aged under 16 years, or

(ii) any other person who is protected by the prohibition and who has not consented to the publication of their identity, or

(b) the proceedings are ongoing.

9.149 Section 65(3)(b) of the *Young Offenders Act* provides that the prohibition can be lifted with the consent of a child who is over 16.

9.150 The prohibition in s 105 of the *Care and Protection Act* can be lifted with the consent of the "young person",[115] which means a person aged 16 or 17.[116]

9.151 Section 180(4) of the *Adoption Act* provides that after the proceedings have concluded, the parties can consent to the information being published, if the publication does not identify another person affected who does not consent. If a person affected by the adoption application is under 18, the person with parental responsibility can give consent on their behalf.[117]

9.152 These provisions were introduced to the *Adoption Act* in 2008 and were intended to encourage open adoption practices, relax publication restrictions imposed on the parties, and give adoptive parents and children greater capacity to speak and write publicly about their experiences.[118]

9.153 The prohibition on publishing identifying information in relation to adoption proceedings can also be lifted by consent in SA, Victoria and WA.[119]

9.154 The prohibition in s 52 of the *Surrogacy Act* can be lifted if the person identified, or reasonably likely to be identified, consents and the material does not identify, or is not

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115. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 105(3)(b)(ii).

116. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 3(1) definition of "young person".

117. *Adoption Act 2000* (NSW) s 180(5).

118. NSW, *Parliamentary Debates*, Legislative Assembly, Agreement in Principle Speech, 25 September 2008, 10111.

119. *Adoption Act 1988* (SA) s 31(2)(a)(i); *Adoption Act 1984* (Vic) s 121(2)–(3); *Adoption Act 1994* (WA) s 124(3).

reasonably likely to identify, any person affected by the surrogacy arrangement who does not consent to being identified.[120] If a person affected by the surrogacy arrangement is under 18, the person with parental responsibility can give consent on their behalf.[121]

9.155 Queensland surrogacy legislation similarly prohibits the identification of the same types of people connected with surrogacy arrangements, unless written consent is provided by each person who would be identified.[122]

9.156 The *Status of Children Act* does not currently contain any mechanisms for lifting the prohibition in s 25.

9.157 Recommendation 9.13 is for these prohibitions to include the standard lifting mechanism outlined in chapter 8, which would have the effect of replacing the following provisions:

- s 65(3)(b) of the *Young Offenders Act* and s 105(3)(b)(ii) of the *Care and Protection Act*, which enable young people to consent to publication of their identity without any limitations, and
- s 180(5) of the *Adoption Act* and s 52(4) of the *Surrogacy Act,* which enable consent to be provided by a young person's parent or guardian.

9.158 Where a child or young person is under the parental responsibility of the Minister, the *Care and Protection Act* provides that the Secretary of the Department of Communities and Justice can consent to lifting the prohibition if they are of the opinion that the publication may be seen to be of benefit to the child or young person.[123] We do not recommend any changes to this lifting mechanism, which involves administrative considerations relating to children in out-of-home care. In implementing recommendation 9.13, the Government may wish to consider consistent reforms with respect to children in out-of-home care.

No general statutory prohibition on publication relating to children involved in civil proceedings

9.159 Several submissions supported introducing new protections for the identities of children in civil proceedings generally, including where they are a respondent, plaintiff or witness.[124] Legal Aid argued that naming children in civil proceedings can have

120. *Surrogacy Act 2010* (NSW) s 52(3).
121. *Surrogacy Act 2010* (NSW) s 52(4).
122. *Surrogacy Act 2010* (Qld) s 53(2).
123. *Children and Young Persons (Care and Protection) 1998* (NSW) s 105(3)(b)(iii).
124. Youth Justice NSW, NSW Department of Communities and Justice, *Submission CI07*, 6; Legal Aid NSW, *Submission CI24*, 19–21; Domestic Violence NSW, *Preliminary Submission PCI42*, 5–6

"irreversible, detrimental effects", since such proceedings may involve sensitive and traumatic material.[125]

9.160 The Standing Committee considered the question of extending protections to civil proceedings, ultimately recommending that the Government consider the feasibility of this proposal.[126] The Government has not acted on this recommendation.[127]

9.161 We do not recommend that a prohibition on publishing the identities of children involved in civil proceedings be introduced. Instead, we recommend that the new Act contain a specific ground to enable a non-publication or non-disclosure order to be made where necessary to avoid causing undue distress or embarrassment to a child who is a party to or witness in any legal proceeding, including a civil proceeding.[128] This would allow orders to be made in appropriate cases.

Discretions to make non-publication orders

9.162 There are two provisions relating to children and young people that we classify as discretions to make non-publication orders (chapter 3):

- *Adoption Act* s 186(2), and
- *Minors (Property and Contracts) Act 1970* (NSW) (*Minors (Property and Contracts) Act)* s 43(5).

9.163 Under s 186(2) of the *Adoption Act*, 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, mentioned in proceedings for adoption information. "Adoption information" is defined as a birth certificate, adopted person's birth record and certain other prescribed information.[129]

9.164 The *Minors (Property and Contracts) Act* replaced the common law about contractual capacity of minors (that is, the legal ability for a person to enter into a contract), lowering the age of contractual capacity from 21 to 18.

9.165 Part 3 of the *Minors (Property and Contracts) Act* establishes the principle that children who are too young to understand the nature and effect of a contract are not bound by it, and then outlines situations where minors are presumed to be bound. The Act uses the

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125. Legal Aid NSW, *Preliminary Submission PCI39*, 10; See also, Legal Aid NSW, *Submission CI24*, 19–21.
126. 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.
127. 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) 4.
128. Recommendation 6.4(f).
129. *Adoption Act 2000* (NSW) s 3, dictionary definition of "adoption information".

term “civil act” to refer to contracts, dispositions, disclaimers and other private agreements between parties.[130]

9.166 Section 43(1) of the *Minors (Property and Contracts) Act* provides that, in proceedings where there is a question as to whether a civil act is for the protection of a minor, the court may “refer” investigation of this question to that minor’s parent or guardian. Section 43(5) provides that, if a referee files a report of their investigations, a court may make such orders as it thinks fit for the purpose of preventing or limiting publication of the report.

Uniform terminology

Recommendation 9.14: Uniform terminology in discretions to make non-publication orders in the *Adoption Act* and *Minors (Property and Contracts) Act*

Section 186(2) of the *Adoption Act 2000* (NSW) and s 43(5) of the *Minors (Property and Contracts) Act 1970* (NSW) should:

(a) adopt language consistent with a discretion to make a non-publication order

(b) define “non-publication order” in the same way as in recommendation 3.1, and

(c) define “publish” in the same way as in recommendation 3.2.

9.167 Recommendation 9.14 is to amend the language used in the relevant discretions, so it is consistent with their classification, and to adopt uniform definitions of key terms. This can be achieved by:

- adopting the term “non-publication order” instead of “an order forbidding publication” in s 186(2) of the *Adoption Act*, and “such orders as it thinks fit for the purpose of preventing or limiting publication” in s 43(5) of the *Minors (Property and Contracts) Act*, and
- introducing the uniform definitions of “non-publication order” and “publish” recommended in chapter 3, as the provisions do not currently define these terms.

Non-disclosure provisions

Statutory prohibition on disclosure

9.168 Section 29(1)(f) of the *Care and Protection Act* restricts disclosure to any person or body, including in legal proceedings, of the identity of a person who reported that a child or young person is at risk of harm (a “reporter”).[131] Section 29(1) also contains a range of other protections for reporters. This provision was introduced because, for many

130. *Minors (Property and Contracts) Act 1970* (NSW) s 6(1) definition of “civil act”.

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

people, "concern that they may be identified as the reporter is a strong impediment to their reporting".[132]

9.169 There are exceptions to the prohibition if the disclosure is necessary:

- for proper investigation of the report, or
- in connection with the investigation of a serious offence, in order to safeguard or promote the safety and welfare and well-being of a child or young person (in certain circumstances).[133]

9.170 We classify s 29(1)(f) as a statutory prohibition on disclosure (chapter 3). Similar provisions exist in all other Australian jurisdictions.[134]

9.171 Except for s 29(1)(f), our recommendations do not apply to the rest of the protections outlined in s 29(1) of the *Care and Protection Act* because they do not relate to court proceedings.

Uniform terminology

Recommendation 9.15: Uniform terminology in the prohibition on disclosing the identity of a person who reports a child or young person at risk of harm

Section 29(1)(f) of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) should:

(a) define "disclose" in the same way as in recommendation 3.2, and

(b) adopt the term "information tending to identify" a person and define it in the same way as in recommendation 3.3.

9.172 Recommendation 9.15 is for s 29(1)(f) of the *Care and Protection Act* to adopt uniform definitions of key terms. It can be achieved by:

- adopting the uniform definition of "disclose", recommended in chapter 3, as the provision does not currently define this term
- using the term "information tending to identify" a person who made the report instead of "identity of the person" and "information from which their identity can be deduced", and

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

133. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 29(4)–(4A).

134. *Children and Young People Act 2008* (ACT) s 775(5), s 777(3), s 863C, s 866, s 867; *Care and Protection of Children Act 2007* (NT) s 27(2)–(3); *Child Protection Act 1999* (Qld) s 186; *Children and Young People (Safety) Act 2017* (SA) s 163; *Children ,Young Persons and Their Families Act 1997* (Tas) s 16; *Children, Youth and Families Act 2005* (Vic) s 41, s 191, s 209, s 213; *Children and Community Services Act 2004* (WA) s 124F, s 240.

- adopting the uniform definition of "information tending to identify" a person, recommended in chapter 3.

9.173 Unlike for other statutory prohibitions, we do not recommend including an exception that would allow disclosure of the protected information in an official report of proceedings. Given the purpose of the prohibition, which is to encourage people to report children at risk of harm, an additional exception, which might allow even limited disclosure of the identity of people who make such reports, is not appropriate.

Application of the prohibition when a person is deceased

Recommendation 9.16: Application of the prohibition on disclosing the identity of a person who reports a child or young person at risk of harm to a deceased person

Section 29(1)(f) of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) should apply even if the person protected by the prohibition is deceased at the time of publication.

9.174 Currently, the prohibition in s 29(1)(f) of the *Care and Protection Act* has an implied indefinite duration, as it does not specify when it no longer applies.

9.175 Recommendation 9.16 is intended to clarify that the prohibition applies beyond the death of the person protected by the prohibition. This aligns with what we recommend for the other statutory prohibition on publication contained in the *Care and Protection Act* (recommendation 9.9).

Lifting mechanism with leave of the court

Recommendation 9.17: Mechanism for the court to grant leave to lift the prohibition on disclosure when the person is deceased

Section 29(1)(f) of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) should provide:

(1) A court may grant leave to disclose a deceased person's identity during and after the proceedings.

(2) Before granting leave, a court must take into account:

  (a) what the deceased person would have wanted if they had been alive

  (b) the views of family members of the deceased person

  (c) the views of any other person who is protected by the prohibition and who may be identified by the disclosure (if these views are known or ascertainable), and

  (d) the public interest.

9.176 Disclosure of the identity of a reporter is permitted with the leave of a court or other body before which proceedings relating to the report are conducted.[135] Leave may only be granted where the court is "satisfied that the evidence is of critical importance in the

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

proceedings and that failure to admit it would prejudice the proper administration of justice".[136] A court or other body granting leave must state the reasons why leave is granted and ensure the holder of the report is informed that identifying information about the reporter has been disclosed.[137] We do not recommend any changes to these provisions (for example, to align with the standard mechanism for lifting a prohibition with leave of the court, outlined in chapter 8) as they are appropriately tailored for the specific circumstances.

9.177 However, recommendation 9.16 clarifies that the statutory prohibition in s 29(1)(f) applies even if the person is deceased. To allow flexibility, recommendation 9.17 provides a mechanism for the court to grant leave for a disclosure of the identity of a person protected by the prohibition who is deceased. It is consistent with the approach outlined in chapter 8.

Lifting mechanism by consent

Recommendation 9.18: Mechanism for a person to consent to lifting the prohibition on disclosure

Section 29(1)(f)(i) of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) should provide that the person cannot consent to disclosure of their identity if:

(a) the disclosure may identify another person who is protected by the prohibition and who has not consented to disclosure of their identity, or

(b) the proceedings are ongoing.

9.178 Section 29(1)(f)(i) of the *Care and Protection Act* permits the disclosure of the identity of a reporter, with their consent. However, it is not subject to any limitations.

9.179 As the prohibition in s 29(1)(f) would likely cover people aged over 18, we do not recommend introducing the same limitations with respect to the ability of children or young people to consent to disclosure that we have recommended for statutory prohibitions on publication (chapter 8).

9.180 However, it is appropriate that a person should not be able to consent if doing so would identify another person protected by the prohibition who does not consent or while proceedings are ongoing. The second qualification is important given the range of people who are entitled to have their identity protected by the prohibition. In some situations, the publication of the reporter's identity (for example, a principal of a school) may allow others to deduce the identity of a person involved in producing a report (for example, a teacher at the same school).

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

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

Exclusion provisions

Statutory exclusion provisions

9.181 This section deals with two provisions relating to children and young people that we classify as statutory exclusion provisions; meaning they apply automatically, without the court needing to make an order (chapter 3).

Statutory exclusion provision in children's criminal proceedings

9.182 Section 10(1) of the *Children (Criminal Proceedings) Act* provides that any person who is not directly interested in criminal proceedings against a child is to be excluded from the proceedings. Several submissions supported excluding the public from children's criminal proceedings.[138]

9.183 The Children's Court observed that this enables the full participation of children and young people in criminal proceedings "which in turn, protects and facilitates their right to be heard".[139] The Court also submitted that:

> conducting criminal proceedings involving children and young people in open court could be a very confronting and potentially traumatising or re-traumatising experience for them.[140]

9.184 Excluding the public from criminal proceedings against children was supported by the respondents to our survey. We asked when courts should be closed to the public, and of the 133 respondents who answered this question, 109 (81.95%) selected "when a child defendant is giving evidence".[141]

9.185 All other states and territories limit public access to criminal proceedings involving children:

- in the ACT, the public is excluded any time "a child or young person is the subject of a proceeding in a court"[142]
- in the NT, all proceedings in the Youth Justice Court are closed to the public[143]
- in Queensland, the public is excluded from any proceedings in the Childrens Court relating to a child[144]

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138. Youth Justice NSW, NSW Department of Communities and Justice, *Submission CI07*, 3; NSW Office of the Director of Public Prosecutions, *Submission CI17*, 21; Children's Court of NSW, *Submission CI28*, 11–12; Fighters Against Child Abuse Australia, *Submission CI32*, 24.
139. Children's Court of NSW, *Submission CI28*, 12.
140. Children's Court of NSW, *Submission CI28*, 12.
141. *Open Justice: Survey Results*, Research Report 16 (NSW Law Reform Commission, 2022) table 2.1.
142. *Court Procedures Act 2004* (ACT) s 72(1).
143. *Youth Justice Act 2005* (NT) s 49(1).

- in SA, the public is excluded from proceedings in the Youth Court,[145] and
- in Tasmania, the public is excluded from proceedings in the Youth Justice Court.[146]

9.186 In Victoria, proceedings in the Children's Court are generally conducted in open court, but the court may order that proceedings be heard in closed court, or that only certain people or classes of people may be present during the proceedings.[147] Similarly, in WA, proceedings in the Children's Court are generally in open court, but the court may order that any person is to be excluded from the court.[148]

9.187 There are three exceptions to s 10(1) of the *Children (Criminal Proceedings) Act:*

- the court may direct that a person is not to be excluded from the proceedings[149]
- any person who is "engaged in preparing a report on the proceedings for dissemination through a public news medium" is entitled to enter and remain in the proceedings, unless the court directs otherwise,[150] and
- any "family victim" is entitled to enter or remain in the proceedings.[151]

9.188 The Children's Court indicated that the first exception has been used to permit attendance by researchers, university students, and friends or support people of children involved. The decision to allow a person who is not directly interested in criminal proceedings to remain in court is made by the magistrate on a case by case basis and the child's view will usually be considered.[152]

9.189 In one case, the Supreme Court inferred that the objective of the second exception:

> is to ensure that the media, which are regarded as the "eyes and ears" of the public can be privy to the actual facts in order that they can report on them.[153]

9.190 The Court of Criminal Appeal has observed that, as a result of the exception for the media, the only way for the public to learn about the administration of justice in a particular case is through the media and not through attendance at court.[154]

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144. *Childrens Court Act 1992* (Qld) s 20(1).
145. *Youth Court Act 1993* (SA) s 24(1).
146. *Youth Justice Act 1997* (Tas) s 30(1).
147. *Children, Youth and Families Act 2005* (Vic) s 523(1)–(2).
148. *Children's Court of Western Australia Act 1988* (WA) s 31(1).
149. *Children (Criminal Proceedings) Act 1987* (NSW) s 10(1)(a).
150. *Children (Criminal Proceedings) Act 1987* (NSW) s 10(1)(b).
151. *Children (Criminal Proceedings) Act 1987* (NSW) s 10(1)(c), s 10(4) definition of "family victim".
152. Children's Court of NSW, *Preliminary Consultation PCI08.*
153. *Doe v Fairfax Media Publications Pty Limited* [2017] NSWSC 1153 [52].

9.191 The Children's Court and ARTK supported the exception enabling the media to be present in children's criminal proceedings.[155] The Children's Court submitted that this is an "important safeguard to help instil public confidence in the Court".[156]

9.192 Section 10(1) of the *Children (Criminal Proceedings) Act* is chiefly concerned with facilitating a child's participation in proceedings and safeguarding their future prospects and rehabilitation. That object is not undermined by permitting media to remain and report, subject to the statutory prohibition on publishing identifying information in s 15A of the Act.

9.193 Some other states and territories also have exceptions for the media. In the ACT, there is an exception for a "person who attends the proceeding to prepare a news report of the proceeding and is authorised to attend for that purpose by the person's employer".[157] In the NT and SA, there are exceptions for a "genuine representative of the news media".[158] In Queensland, the Childrens Court may permit "a representative of mass media" to be present.[159]

Statutory exclusion provision in care and protection proceedings

9.194 Section 104B of the *Care and Protection Act* provides that while the Children's Court is hearing proceedings with respect to a child or young person, any person who is not directly interested in proceedings must, unless the Children's Court otherwise directs, be excluded from the proceedings. However, s 104C of the Act provides that:

> any person who is engaged in preparing a report of the proceedings for dissemination through a public news medium is, unless the Children's Court otherwise directs, entitled to enter and remain in the place where the proceedings are being heard.

9.195 Several submissions supported s 104B of the *Care and Protection Act*.[160] ARTK and the Children's Court also supported the exception for the media in s 104C.[161]

9.196 Section 104B is chiefly concerned with safeguarding the child's welfare in care and protection proceedings. That object is not undermined by permitting media to remain and report (subject to the prohibition on publishing identifying information, discussed above). We have not heard views to the contrary.

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154. *AE v R* [2010] NSWCCA 203 [38].
155. Children's Court of NSW, *Submission CI28*, 17; Australia's Right to Know, *Submission CI27*, 70.
156. Children's Court of NSW, *Submission CI28*, 17.
157. *Court Procedures Act 2004* (ACT) s 72(1)(i).
158. *Youth Justice Act 2005* (NT) s 49(2)(h); *Youth Court Act 1993* (SA) s 24(1)(f)(ii).
159. *Childrens Court Act 1992* (Qld) s 20(3)(c)(i).
160. Public Interest Advocacy Centre, *Submission CI14*, 2; Legal Aid NSW, *Submission CI24*, 17–18; Children's Court of NSW, *Submission CI28,* 14.
161. Australia's Right to Know, *Submission CI27*, 73; Children's Court of NSW, *Submission CI28*, 17.

9.197 All other states and territories have provisions limiting public access to care and protection proceedings:

- in the ACT, the public is excluded at any time "a child or young person is the subject of a proceeding in a court"[162]
- in the NT, the public is excluded from proceedings in the family matters division of the Local Court[163]
- in Queensland, the public is excluded from any proceedings in the Childrens Court relating to a child[164]
- in SA, the public is excluded from proceedings in the Youth Court,[165] and
- in Tasmania, the public is excluded from proceedings in the Magistrates Court (Children's Division).[166]

9.198 In Victoria, proceedings in the Children's Court are generally conducted in open court, but the court may order that proceedings be heard in closed court, or that only people or classes of people may be present during the proceedings.[167] Similarly, in WA, proceedings in the Children's Court are generally in open court, but the court may order that any person is to be excluded from the court.[168]

Uniform terminology

Recommendation 9.19: Uniform terminology in statutory exclusion provisions applying in proceedings relating to children

Section 10(1) of the *Children (Criminal Proceedings) Act 1987* (NSW) and s 104C of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) should:

(a) adopt the term "journalist", and

(b) define "journalist", "news media organisation" and "news medium" in the same way as in recommendation 3.5.

9.199 For consistency with other legislation containing exceptions to open justice, recommendation 9.19 is for s 10(1) of the *Children* (*Criminal Proceedings) Act* and s 104C of the *Care and Protection Act* to adopt the term "journalist". That is, the term "journalist" should be used instead of:

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162. *Court Procedures Act 2004* (ACT) s 72(1).
163. *Care and Protection of Children Act 2007* (NT) s 89, s 99.
164. *Childrens Court Act 1992* (Qld) s 20(1).
165. *Youth Court Act 1993* (SA) s 7(a), s 24.
166. *Magistrates Court (Children's Division) Act 1998* (Tas) s 6(a), s 11.
167. *Children, Youth and Families Act 2005* (Vic) s 515, s 523(1)–(2).
168. *Children's Court of Western Australia Act 1988* (WA) s 20(1), s 31(1).

- "person who is engaged in preparing a report on the proceedings for dissemination through a public news medium" in s 10(1)(b) of the *Children (Criminal Proceedings) Act*, and
- "person who is engaged in preparing a report of the proceedings for dissemination through a public news medium" in s 104C of the *Care and Protection Act*.

9.200 The provisions should also adopt the uniform definition of "journalist", as well as the definitions of "news media organisation" and "news medium", as these terms are referred to in the definition of "journalist" (chapter 3).

Discretions to make an exclusion order

9.201 This section deals with four provisions relating to children and young people that we classify as discretions to make an exclusion order (chapter 3).

9.202 Section 10(2) of the *Children (Criminal Proceedings) Act* provides that the court may direct any person (other than the child, a person who is directly interested in the proceedings, or a family victim) to leave the proceedings during the examination of any witness if the court is of the opinion that it is in the interests of the child that such a direction should be given.

9.203 Section 104(1) of the *Care and Protection Act* provides that, in proceedings with respect to a child or young person, the Children's Court may direct the child or young person to leave. The court may only give such a direction if it is:

> of the opinion that the prejudicial effect of excluding the child or young person is outweighed by the psychological harm that is likely to be caused to the child or young person if the child or young person were to remain or be present.[169]

9.204 If the court gives a direction under s 104(1), it must also give a direction that people who are engaged in preparing reports of the proceedings for dissemination through a public news medium must leave the proceedings, if it is of the opinion that it is in the interests of the child or young person to do so.[170]

9.205 Section 104A(1) of the *Care and Protection Act* provides that the Children's Court may direct any person (other than the child or young person) to leave proceedings with respect to a child or young person. This includes a person who is directly interested in the proceedings.[171] The court may only give such a direction "if it is of the opinion that it is in the interests of the child or young person that such a direction should be given".[172]

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169. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 104(3).
170. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 104(4).
171. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 104A(4).
172. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 104A(3).

9.206 Several submissions supported s 104 and s 104A of the *Care and Protection Act*.[173] The Children's Court submitted that, while the discretion in s 104(1) is rarely used, it is appropriate to retain the discretion to exclude a child or young person from proceedings as evidence given in care and protection matters can be highly traumatising. For example, it may be appropriate to exclude a child or young person where the child would have heard directly that the parents did not want the child to be returned to their care due to the child's high needs and behavioural issues, or where graphic or confronting evidence is given, including evidence in relation to domestic violence or sexual assault.[174]

Uniform terminology

Recommendation 9.20: Uniform terminology in discretions to make exclusion orders in children's criminal proceedings and care and protection proceedings

(1) Section 10(2) of the *Children (Criminal Proceedings) Act 1987* (NSW) should adopt language consistent with a discretion to make an exclusion order excluding any person (other than the child or any other person who is directly interested in the proceedings or a family victim).

(2) Section 104(1) of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) should adopt language consistent with a discretion to make an exclusion order excluding the child or young person.

(3) Section 104(4) of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) should:

(a) adopt language consistent with a discretion to make an exclusion order excluding a journalist, and

(b) define "journalist", "news media organisation" and "news medium" in the same way as in recommendation 3.5.

(4) Section 104A(1) of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) should adopt language consistent with a discretion to make an exclusion order excluding any person (other than the child or young person).

(5) Section 10(2) of the *Children (Criminal Proceedings) Act 1987* (NSW) and s 104 and s 104A of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) should provide that "exclusion order" has the same meaning and effect as it has in recommendation 3.1.

9.207 Recommendations 9.20(1)–(4) is for these provisions to adopt language consistent with the classification of a discretion to make an exclusion order. However, we have not recommended that these provisions adopt the uniform definition of exclusion order in recommendation 3.1, which can have a broader application (for example, all people other than those whose presence is necessary). Instead, the scope of the discretion to make an exclusion order (that is, who the order can apply to) would be confined, to reflect the current scope of the provisions, which are limited to a specific person (such as the child or young person).

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173. Public Interest Advocacy Centre, *Submission CI14*, 2; Legal Aid NSW, *Submission CI24*, 17–18; Children's Court of NSW, *Submission CI28*, 14.

174. Children's Court of NSW, *Submission CI28*, 15.

9.208 Recommendations 9.20(1)–(4) could be given effect by replacing the discretion in:

- s 10(2) of the *Children (Criminal Proceedings) Act* to "direct any person (other than the child or any other person who is directly interested in the proceedings or a family victim) to leave the place where the proceedings are being heard" with a discretion to make an "exclusion order excluding any person (other than the child or any other person who is directly interested in the proceedings or a family victim)"
- s 104(1) of the *Care and Protection Act* to "direct the child or young person to leave the place where the proceedings are being heard" with a discretion to make an "exclusion order excluding the child or young person"
- s 104(4) of the *Care and Protection Act* to "give a direction with respect to all persons who are engaged in preparing reports of the proceedings for dissemination through a public news medium to leave the place where the proceedings are being heard" with a discretion to make an "exclusion order excluding a journalist", and
- s 104A(1) of the *Care and Protection Act* to "direct any person (other than the child or young person) to leave the place where the proceedings are being heard" with a discretion to make an "exclusion order excluding any person (other than the child or young person)".

9.209 Recommendation 9.20(5) is for s 10(2) of the *Children (Criminal Proceedings) Act* and s 104 and s 104A of the *Care and Protection Act* to provide that "exclusion order" has the same meaning and effect as it has in recommendation 3.1. This is to clarify that an exclusion order made under these provisions results in physical exclusion from the court but does not have any consequential impact on disclosure of information from the proceedings (chapter 3).

Considerations for making an exclusion order in children's criminal proceedings

Recommendation 9.21: Considerations for making an exclusion order in children's criminal proceedings

Section 10(2) of the *Children (Criminal Proceedings) Act 1987* (NSW) should provide that the court may make an exclusion order for the examination of any witness if the court is of the opinion that:

(a) it is in the interests of the child defendant, or

(b) if the witness is a child, it is in the interests of that child witness.

9.210 Section 10(2) of the *Children (Criminal Proceedings) Act* empowers a court to direct any person (with some exceptions) to leave the proceedings during the examination of any witness.

9.211 Currently, a court may only make such a direction "if the court is of the opinion that it is in the interests of the child [defendant] that such a direction should be given".[175] However, another factor likely to be relevant is the interests of a witness being examined, if that witness is also a child.

9.212 For example, if a child witness is distressed about being required to give evidence in the presence of certain people, a court may wish to exclude those people. The current provision does not expressly allow the court to have regard to this.

9.213 Section 10(2) should therefore provide that a court may make an exclusion order if it is of the opinion that it is in the interests of the child defendant, or if the witness is a child, the interests of that child witness.

9.214 This is similar to our draft proposal,[176] which received some support in submissions.[177] The Children's Court submitted that judicial officers would likely be open to any request made by a child to exclude other people from the court while they were giving evidence.[178]

9.215 We note that the discretion to make an exclusion order in s 10(2) of the *Children (Criminal Proceedings) Act* would be complemented by the general powers to make exclusion orders under the new Act (chapter 6). The new Act includes, as a ground on which a court may make an exclusion order, that the order is necessary to support a child to give evidence.[179]

Application of exclusion provisions in children's criminal proceedings

The provisions should apply where a person was a child at the time of the offence

Recommendation 9.22: Application of s 10 of the *Children (Criminal Proceedings) Act*

Section 10 of the *Children (Criminal Proceedings) Act 1987* (NSW) should clarify that it applies while a court is hearing criminal proceedings to which:

(a) a child is a party, or

(b) a person who was a child at the time the offence was committed is a party.

175. *Children (Criminal Proceedings) Act 1987* (NSW) s 10(2).

176. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 7.13.

177. Children's Court of NSW, *Submission CI28*, 16; NSW Bar Association, *Submission CI56* [7]; Legal Aid NSW, *Submission CI57*, 21.

178. Children's Court of NSW, *Submission CI28*, 16.

179. Recommendation 6.5(d).

9.216 Currently, s 10(1) and s 10(2) of the *Children (Criminal Proceedings) Act* apply to "criminal proceedings to which a child is a party". A "child" is defined as a person who is under 18.[180]

9.217 The Bar Association argued that it is unclear whether the provisions apply to proceedings involving a person who was a child when the offence was committed, but who has turned 18 by the time of trial or sentencing. It reported that "while some judges have closed the court in these circumstances, others have not".[181] The submission argued that the provisions should apply in these circumstances, given these offenders are still legally considered children and therefore concerns around protecting their privacy and avoiding stigmatisation are relevant.[182]

9.218 Recommendation 9.22 is for s 10(1) and s 10(2) to apply while a court is hearing criminal proceedings to which a child is a party or to which a person who was a child at the time the offence was committed is a party. This is consistent with the prohibition on publishing the identity of a child involved in criminal proceedings, which also applies to adults if they were a child when the offence to which the proceedings relate was committed or when involved in the proceedings.[183] It is also consistent with the rationale that a person who commits an offence when a child should not have to bear the stigma of that offence in adulthood.

The provisions should also apply to traffic proceedings

Recommendation 9.23: No exception for traffic proceedings

Section 10(3) of the *Children (Criminal Proceedings) Act 1987* (NSW) should be repealed.

9.219 Section 10(3) of the *Children (Criminal Proceedings) Act* provides that s 10(1) and s 10(2) of the Act do not apply to proceedings in respect of a traffic offence, if those proceedings are held before a court other than the Children's Court.

9.220 Proceedings for traffic offences are generally dealt with in the Local Court. However, the Children's Court can hear traffic offence proceedings against a child where:

- the traffic offence arose out of the same circumstances as another offence that is alleged to have been committed by the child, and in respect of which the child is charged before the Children's Court, or

180. *Children (Criminal Proceedings) Act 1987* (NSW) s 3(1) definition of "child".
181. NSW Bar Association, *Submission CI56* [18].
182. NSW Bar Association, *Submission CI56* [19]–[21].
183. *Children (Criminal Proceedings) Act 1987* (NSW) s 15A(1)(a).

- the child was not, when the offence was allegedly committed, old enough to obtain a licence or permit.[184]

9.221 There are no equivalent exceptions for traffic offences in other Australian states and territories where criminal proceedings against children are closed to the public, including the ACT, the NT, Queensland, SA and Tasmania.[185]

9.222 Recommendation 9.23 is to repeal the exception for proceedings for traffic offences. This is the same as our draft proposal,[186] which submissions generally supported.[187]

9.223 The justification for the current approach is that "any child old enough to drive should be dealt with in the same forum as adults". In other words, because the ability to obtain a licence is a privilege extended to adults, all traffic offenders should be dealt with the same, as adults.[188]

9.224 However, NSW law generally recognises that different considerations should apply to children in the criminal justice system. While the adult privilege of driving licences may extend to children, their vulnerability should still be recognised.

Closed court provisions

Requirements to make a closed court order

9.225 In this section, we deal with four provisions in legislation relating to children and young people that we classify as requirements to make a closed court order (chapter 3).

9.226 Under s 119(1) of the *Adoption Act*, all proceedings heard by the Supreme Court under the Act are to be heard in "closed court". Only the parties and their lawyers may be present.[189] However, the court may permit other people to attend if it considers it to be appropriate.[190]

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184. *Children (Criminal Proceedings) Act 1987* (NSW) s 28(2).
185. *Magistrates Court Act 1930* (ACT) s 288; *Court Procedures Act 2004* (ACT) s 72; *Youth Justice Act 2005* (NT) s 49, s 52; *Youth Justice Act 1992* (Qld) s 99–100; *Childrens Court Act 1992* (Qld) s 20; *Youth Court Act 1993* (SA) s 7, s 24; *Youth Justice Act 1997* (Tas) s 30, s 161.
186. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 7.2.
187. Supreme Court of NSW, *Submission CI55* [15]; NSW Bar Association, *Submission CI56* [7]; knowmore, *Submission CI43*, 21; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission CI49*, 3; Legal Aid NSW, *Submission CI57*, 21; Children's Court of NSW, *Submission CI28*, 12–13; Children's Court of NSW, *Submission CI62*, 6.
188. NSW, Department of Attorney General and Justice, *Review of the Young Offenders Act 1997 and the Children (Criminal Proceedings) Act 1987*, Consultation Paper (2011) 41.
189. *Adoption Act 2000* (NSW) s 119(1)–(2).
190. *Adoption Act 2000* (NSW) s 119(2).

9.227 Under s 47 of the *Surrogacy Act,* all proceedings under the Act, in respect of a parentage order (which is an order made by the Court for the transfer of the parentage of a child),[191] are to be heard in closed court, unless the court directs otherwise. Under the *Uniform Civil Procedure Rules 2005* (NSW)*,* an application for a parentage order is to be dealt with and determined by the court in the absence of the public and without any attendance by or on behalf of the plaintiff, unless the Supreme Court otherwise orders.[192] The provisions are intended to "protect the privacy of parties to surrogacy arrangements and to protect the child from possible stigmatisation".[193]

9.228 Under s 24(1) of the *Status of Children Act*, the following types of proceedings under the Act are to be heard in closed court:

- an application for a declaration of parentage (which is a declaration that a named or identified person is a child's parent)[194]
- an annulment of a paternity acknowledgment,[195] and
- an annulment of a declaration of parentage.[196]

9.229 Under s 21 of the *Guardianship of Infants Act 1916* (NSW) (*Guardianship of Infants Act*), applications under the Act for access to a minor by maternal or paternal grandparents are to be heard "in camera".[197]

9.230 All other states and territories have similar provisions that require adoption proceedings to be held in a closed court.[198] Most states and territories also have provisions for proceedings for parentage determinations or proceedings relating to surrogacy arrangements to be held in closed court.[199]

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191. *Surrogacy Act 2010* (NSW) s 4(1) definition of "parentage order".
192. *Uniform Civil Procedure Rules 2005* (NSW) r 56A.4.
193. NSW, *Parliamentary Debates*, Legislative Council, Second Reading Speech, 21 October 2010, 26546.
194. *Status of Children Act 1996* (NSW) s 21, s 24(1).
195. *Status of Children Act 1996* (NSW) s 20, s 24(1).
196. *Status of Children Act 1996* (NSW) s 22, s 24(1).
197. *Guardianship of Infants Act 1916* (NSW) s 21.
198. *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.
199. See, eg, *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.

Uniform terminology

Recommendation 9.24: Uniform terminology in requirements to make closed court orders in adoption, surrogacy, parentage and guardianship proceedings

Section 119(1) of the *Adoption Act 2000* (NSW), s 47 of the *Surrogacy Act 2010* (NSW), s 24(1) of the *Status of Children Act 1996* (NSW) and s 21 of the *Guardianship of Infants Act 1916* (NSW) should:

(a) adopt language consistent with a requirement to make a closed court order

(b) define "closed court order" in the same way as in recommendation 3.1, and

(c) define "disclose" in the same way as in recommendation 3.2.

9.231 Recommendation 9.24(a) is for these provisions to incorporate uniform language consistent with the classification of a requirement to make a closed court order. This can be achieved by replacing the requirements in these provisions for the relevant proceedings to be heard in "closed court" or "in camera" with a requirement to make a "closed court order" in the proceedings.

9.232 Recommendation 9.24(b) is for the uniform definition of a "closed court order", recommended in chapter 3, to be incorporated in the provisions. Under this definition, a "closed court order" has the effect of prohibiting disclosure (by publication or otherwise) of information from the closed part of proceedings. This means that information given in proceedings subject to s 119(1) of the *Adoption Act,* s 47 of the *Surrogacy Act,* s 24(1) of the *Status of Children Act* and s 21 of the *Guardianship of Infants Act* could not be disclosed or published. This is appropriate given the sensitive nature of such proceedings and the need to protect children involved in them from stigmatisation.

9.233 Recommendation 9.24(c) is for the uniform definition of "disclose" to be incorporated in the provisions. This is to clarify that a closed court order made under the provisions also prohibits a person from making information about closed proceedings available to any person, by publication or otherwise (chapter 3).

Interaction with the mechanism to lift the statutory prohibition

Recommendation 9.25: Interaction with the mechanism to lift the statutory prohibition in relation to adoption, surrogacy and parentage proceedings

(1) Section 180 of the *Adoption Act 2000* (NSW) should provide that consent of the person under s 180 of the Act also operates to lift any prohibition on disclosing the identity of the person arising from s 119(1) of the Act.

(2) Section 52 of the *Surrogacy Act 2010* (NSW) should provide that consent of the person under s 52 of the Act also operates to lift any prohibition on disclosing the identity of the person arising from s 47 of the Act.

(3) Section 25 of the *Status of Children Act 1996* (NSW) should provide that consent of the person under s 25 of the Act also operates to lift any prohibition on disclosing the identity of the person arising from s 24(1) of the Act.

9.234 As outlined above, closing the court also has a suppression effect (that is, prohibiting the disclosure, including by publication, of information in the closed part of the proceedings). The effect of our recommendations would be that in proceedings under

the *Adoption Act*, the *Status of Children Act* and the *Surrogacy Act* information is protected pursuant to:

- a statutory prohibition on publication of information, and
- a requirement to make a closed court order.

9.235 The Acts should specify that the mechanisms for lifting the statutory prohibition by consent of the person should also lift the suppression effect of the closed court order, to the extent that the order and statutory prohibition overlap. This is necessary to give full effect to the lifting mechanism.

10. Legislation relating to sexual offence proceedings

In Brief

Several exceptions to open justice apply in relation to sexual offence proceedings which seek to avoid stigmatisation and distress, and to encourage reporting. We classify these provisions according to our classification framework in chapter 3. These provisions should adopt uniform terminology and definitions consistent with these classifications. In some cases, other amendments should be made, such as adopting standard lifting mechanisms for the statutory prohibition on publishing the identity of a complainant in sexual offence proceedings, and adopting limited exceptions for journalists when exclusion orders are made.

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10.1 In this chapter, we deal with existing provisions in subject-specific legislation that prohibit the publication of the identity of certain people in, and restrict public access to, certain parts of court hearings in sexual offence proceedings.

10.2 We classify these provisions based on our framework for exceptions to open justice (chapter 3). We recommend they should be amended to incorporate standard language consistent with the classifications and uniform definitions of certain terms referred to in chapter 3. We also recommend a number of other changes to these provisions in response to submissions and consultations.

Exceptions to open justice in sexual offence proceedings

10.3 There are several exceptions to open justice that apply in relation to prescribed sexual offence proceedings. A "prescribed sexual offence" includes, among others, recording and distributing intimate images, child prostitution, incest, female genital mutilation, sexual assault, and sexual touching, and covers sexual acts against both adults and children.[1] We discuss other statutory prohibitions that apply to children in chapter 9.

10.4 Complainants and victims in sexual offence proceedings are a well-established category of people for whom exceptions to the open justice principle are made.[2] These complainants and victims are widely recognised as having particular needs which justify special provisions. This is because complainants and victims of sexual offences are:

- more likely to experience stigma than victims of other types of offences,[3] and
- may be subject to unnecessary distress and humiliation as a result of involvement in court proceedings.[4]

10.5 Protections may also encourage people to report sexual offences against them.[5] The fear of being identified publicly as a complainant is a barrier to reporting sexual offences.[6]

10.6 Our guiding principles recognise that exceptions to open justice are appropriate where necessary to protect vulnerable people and the administration of justice (chapter 1).

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1. *Criminal Procedure Act 1986* (NSW) s 3(1) definition of "prescribed sexual offence".
2. 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.
3. Tasmania Law Reform Institute, *Protecting the Anonymity of Victims of Sexual Crimes*, Final Report 19 (2013) [2.3.2].
4. Tasmania Law Reform Institute, *Protecting the Anonymity of Victims of Sexual Crimes*, Final Report 19 (2013) [2.3.2]; Legal Aid NSW, *Preliminary Submission PCI39*, 8.
5. Tasmania Law Reform Institute, *Protecting the Anonymity of Victims of Sexual Crimes*, Final Report 19 [2.3.2]; Legal Aid NSW, *Preliminary Submission PCI39*, 8; knowmore, *Preliminary Submission PCI35*, 2–3; Rape and Domestic Violence Services Australia, *Submission CI08* [33].
6. New Zealand Law Commission, *Suppressing Names and Evidence*, Report 109 (2009) [4.8]; 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.

Non-publication provisions

Statutory prohibition on publishing the identity of a complainant in a prescribed sexual offence proceeding

10.7 Section 578A of the *Crimes Act 1900* (NSW) (*Crimes Act*) prohibits a person from publishing any "matter" which identifies, or is likely to identify, a complainant in a proceeding for a prescribed sexual offence.[7]

10.8 A "matter" is defined to include a picture.[8] "Publish" is defined as:

(a) broadcast by radio or television, or

(b) disseminate by any other electronic means such as the internet.[9]

10.9 The prohibition does not apply to:

- a publication authorised by the presiding judicial officer, provided they have sought and considered any views of the complainant and are satisfied the publication is in the public interest[10]
- a publication made with the consent of the complainant, provided they are 14 or over
- a publication authorised by the court under s 15D of the *Children (Criminal Proceedings) Act 1987* (NSW) (*Children (Criminal Proceedings) Act*) (chapter 9)
- an official law report or official publication of the prescribed sexual offence proceedings
- the supply of transcripts of the prescribed sexual offence proceedings to persons with a genuine interest or for genuine research purposes, or
- a publication made after the complainant has died.[11]

10.10 We classify s 578A of the *Crimes Act* as a statutory prohibition on publication, in line with our classification framework (chapter 3).

10.11 Many submissions supported the prohibition on publishing the identity of complainants in prescribed sexual offence proceedings.[12] Some reasons include that the prohibition:

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7. *Crimes Act 1900* (NSW) s 578A(2).
8. *Crimes Act 1900* (NSW) s 578A(1) definition of "matter".
9. *Crimes Act 1900* (NSW) s 578A(1) definition of "publish".
10. *Crimes Act 1900* (NSW) s 578A(4)(a); *Crimes Act 1900* (NSW) s 578A(5).
11. *Crimes Act 1900* (NSW) s 578A(4).

- protects complainants from unnecessary distress and humiliation[13]
- shields complainants from stigma,[14] and
- encourages reporting of offences and the participation of complainants in the justice system.[15]

10.12 Of the 125 survey respondents who answered the question of when information should be kept from the public, 90 (72%) answered "to protect the identity of a victim of a sexual offence".[16]

10.13 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.[17]

Uniform terminology

Recommendation 10.1: Uniform terminology in the prohibition on publishing the identity of a complainant in sexual offence proceedings

Section 578A of the *Crimes Act 1900* (NSW) should:

(a) define "publish" in the same way as in recommendation 3.2

(b) adopt the term "information tending to identify" the complainant and define it in the same way as in recommendation 3.3, and

(c) adopt the term "official report of proceedings" and define it in the same way as in recommendation 3.6.

10.14 Recommendation 10.1 is for s 578A of the *Crimes Act* to adopt uniform definitions of key terms. This could be given effect by:

- replacing the definition of "publish" in s 578A(1) with the uniform definition of "publish", recommended in chapter 3
- replacing the terms "matter which identifies" and "matter which is likely to lead to the identification" of the complainant in s 578A(2) with "information tending to identify" the

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12. See, eg Legal Aid NSW, *Preliminary Submission PCI39*, 8; NSW Young Lawyers Criminal Law Committee, *Preliminary Submission PCI37*, 5; knowmore, *Preliminary Submission PCI35*, 2, 7; Rape and Domestic Violence Services Australia, *Submission CI08,* [10]; knowmore, *Submission CI10*, 5; Office of the Director of Public Prosecutions, *Submission CI17,* 25.
13. Legal Aid NSW, *Preliminary Submission PCI39*, 8.
14. Rape and Domestic Violence Services Australia, *Submission CI08* [11].
15. Legal Aid NSW, *Preliminary Submission PCI39*, 8; Rape and Domestic Violence Services Australia, *Submission CI08* [11], [33].
16. *Open Justice: Survey Results*, Research Report 16 (NSW Law Reform Commission, 2022) table 2.2.
17. *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.

complainant, and adopting the uniform definition of this term, recommended in chapter 3, and

- replacing the terms "official law report of the prescribed sexual offence proceedings" and "any official publication in the course of, and for the purposes of, those proceedings" in s 578A(4)(d) with "official report of proceedings", and adopting the uniform definition, recommended in chapter 3.

10.15 This is intended to clarify the scope of the prohibition and promote consistency with other legislation containing exceptions to open justice.

Commencement of the prohibition from when a complaint is made to police

Recommendation 10.2: When the prohibition on publishing the identity of a complainant in sexual offence proceedings commences

Section 578A of the *Crimes Act 1900* (NSW) should provide that the prohibition commences:

(a) where a complaint has been made to the police, and

(b) regardless of whether legal proceedings have commenced in relation to the offence.

10.16 Recommendation 10.2 is for the prohibition to apply to the period before proceedings have commenced, from the time that the alleged offence is reported to the police.

10.17 Currently, s 578A of the *Crimes Act* does not expressly state when the prohibition on publishing the complainant's identity commences. However, s 578A(3) clarifies that the prohibition applies even though the prescribed sexual offence proceedings have been finally disposed of.

10.18 Recommendation 10.2 is intended to protect the complainant as soon as they become involved with the criminal justice system, and in turn, encourage reporting.

10.19 The recommendation is the same as our draft proposal,[18] which some submissions supported.[19] It is also similar to legislation in Victoria.[20] We discuss the Victorian legislation, and recent reforms, later in this chapter.

10.20 Australia's Right to Know (ARTK) considered that the recommended change to s 578A would mean that the prohibition is no longer "certain and fixable in time".[21]

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18. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 5.3.
19. NSW Police Force, *Submission CI38*, 2; knowmore, *Submission CI43*, 14; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission CI49*, 3; NSW Bar Association, *Submission CI56* [7]; Legal Aid NSW, *Submission CI57*, 13; Children's Court of NSW, *Submission CI62*, 3.
20. *Judicial Proceedings Reports Act 1958* (Vic) s 4(1A)–(1B).
21. Australia's Right to Know, *Submission CI59*, 19.

10.21 Recommendation 10.2 makes clear that as soon as a report is made to the police, the complainant must not be identified.

Application of the prohibition when a complainant is deceased

Recommendation 10.3: Application of the prohibition on publication to a deceased complainant

Section 578A of the *Crimes Act 1900* (NSW) should apply even if the complainant protected by the prohibition is deceased at the time of publication.

10.22 Section 578A(3) of the *Crimes Act* provides that the prohibition in s 578A applies even after the conclusion of proceedings. Section 578A(4)(f) provides that the prohibition does not apply to publications made after the complainant's death.

10.23 Recommendation 10.3 is to extend the prohibition in s 578A of the *Crimes Act* so that it applies even if the complainant is deceased at the time of publication. This is the same as our draft proposal,[22] which was supported or not opposed in many submissions.[23]

10.24 Some submissions:

- noted that the purposes of the prohibition continue to operate after the person's death, and the prospect of automatic removal of protection after death may be a source of distress,[24] and
- emphasised that the ongoing significant impact of sexual assault on the complainant's family needs to be considered, particularly in Aboriginal and Torres Strait Islander communities.[25]

10.25 We acknowledge the increased community focus on enabling victims of sexual assault to tell their stories. This is important because it empowers victims, reduces the stigma of sexual assault, and educates the community.

10.26 However, it is also important to recognise that many complainants and victims may wish to remain anonymous, even after their death.[26] The knowledge that they may not be able to remain anonymous may operate as a deterrent to reporting and may result in distress.

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22. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 5.6.
23. NSW Police Force, *Submission CI38*, 2; knowmore, *Submission CI43*, 14, 26; NSW Bar Association, *Submission CI56* [7]; Legal Aid NSW, *Submission CI57*, 17–18; Supreme Court of NSW, *Submission CI55* [12].
24. Rape and Domestic Violence Services Australia, *Submission CI08* [21]–[22].
25. knowmore, *Submission CI10*, 6; Rape and Domestic Violence Services Australia, *Submission CI08* [22].
26. NSW Office of the Director of Public Prosecutions, *Preliminary Submission PCI12*, 7.

10.27 Anonymity for deceased complainants is difficult to achieve under the current legislation. The Office of the Director of Public Prosecutions (ODPP) observed that it is not possible to apply for a non-publication or non-disclosure order on behalf of a deceased complainant.[27]

10.28 Recommendation 10.3 is similar to Tasmanian legislation which also prohibits the publication of a deceased complainant's identity (unless the court makes an order allowing publication).[28]

10.29 A different approach has been taken in Victoria. Reforms, commenced on 16 December 2021, provide that the prohibition no longer applies when the complainant is deceased.[29] This reflects a recommendation made by the Victorian Law Reform Commission (VLRC) in its February 2020 report.[30]

10.30 The VLRC considered that when a complainant dies, "the balance of protection should be reversed so that the default is that a victim can be identified".[31] However, we take the opposite view, having regard to a primary purpose of the prohibition being to encourage reporting of offences. We discuss the reforms in Victoria later in this chapter.

Exception where the victim of the sexual offence is also the victim of an associated homicide

Recommendation 10.4: Exception to allow for publication of the identity of a victim of a sexual offence, where they are also the victim of an associated homicide

Section 578A of the *Crimes Act 1900* (NSW) should provide that the prohibition does not apply to a publication made after the death of a person against whom a prescribed sexual offence is alleged to have been committed if that person died in a homicide connected to the alleged sexual offence.

10.31 As discussed above, recommendation 10.3 is to extend the prohibition in s 578A of the *Crimes Act* to apply even if the complainant is deceased, in line with our draft proposal. Media criticism of our draft proposal included that it would be inconsistent and problematic if the identity of victims of murder could not be published when the murder is associated with a sexual offence.[32]

10.32 In response to these concerns, we recommend an exception in cases where a person against whom a sexual offence is alleged to have been committed dies in an associated

27. NSW Office of the Director of Public Prosecutions, *Preliminary Submission PCI12*, 7.
28. *Evidence Act 2001* (Tas) s 194K(2), s 194K(5)(b)(ii).
29. *Judicial Proceedings Reports Act 1958* (*Vic*) s 4(1BAB).
30. Victorian Law Reform Commission, *Contempt of Court*, Report (2020) rec 100.
31. Victorian Law Reform Commission, *Contempt of Court*, Report (2020) [12.77].
32. J Fife-Yeomans, "Ban on Naming Slain Sex Victims; Law Keeps us in the Dark", *The Daily Telegraph* (5 July 2021) 3; J Rumble "Law Reform Proposal Baffling", *The Daily Telegraph* (6 July 2021) 16.

homicide. In such cases, it should be possible to publish information tending to identify the complainant after their death.

10.33 This is because there is a significant public interest in reporting on such cases, given their particular gravity. Further, if the person is killed at the time of the sexual offence, they cannot report the offence, and therefore a central rationale behind the prohibition (to encourage reporting) does not apply.

10.34 Our intention is that this exception only covers cases where the sexual offence and homicide arise from the same incident. In these circumstances it is impossible for the victim to report the sexual offence. We do not intend the exception to cover a broader range of cases, including where, for example:

- a homicide victim was subject to a sexual offence many years before their death, or
- a person who was the victim of a sexual offence later takes their own life.

Lifting mechanism with leave of the court when the complainant is alive

Recommendation 10.5: Mechanism for the court to grant leave to lift the prohibition on publication when the complainant is alive

Section 578A of the *Crimes Act 1900* (NSW) should provide:

(1) A court may grant leave to publish a complainant's identity before, during and after the proceedings.

(2) Before granting leave, a court must take into account:

(a) the views of the complainant and of any other complainant who is protected by the prohibition and who may be identified by the publication (if these views are known or ascertainable), and

(b) the public interest.

(3) However, a court cannot grant leave to publish the identity of a complainant who is aged under 16 years at the time of publication.

10.35 Section 578A of the *Crimes Act* provides two ways for the court to authorise publication of a complainant's identity:

- Under s 578A(4)(a) of the *Crimes Act*, the presiding judicial officer can authorise publication of a complainant's identity. However, they must not do so unless they have sought and considered any views of the complainant and are satisfied the publication is in the public interest.[33] Tasmania has a similar two-limbed test, focused on the role of consultation with any person who may be identified and the public interest.[34]

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

34. *Evidence Act 2001* (Tas) s 194K(5).

- Section 578A(4)(c) of the *Crimes Act* recognises publication authorised by a court under s 15D of the *Children (Criminal Proceedings) Act* in respect of a complainant who is under 16 at the time of publication.

10.36 We recommend a new mechanism for lifting the prohibition with leave of the court, where the complainant is alive, consistent with our approach outlined in chapter 8. This new mechanism would replace s 578A(4)(a) and s 578A(4)(c) of the *Crimes Act*.

10.37 Currently s 578A(4)(a) of the *Crimes Act* implies that a court may authorise a publication during proceedings, but it is not clear whether a court may authorise a publication after proceedings have concluded. Recommendation 10.5(1) clarifies that a court would be able to grant leave to publish a complainant's identity before, during and after proceedings.

10.38 Recommendation 10.5(2) sets out factors that a court must consider before granting leave. Under recommendation 10.5(2)(a), a court must take into account the views of any complainant whose identity is protected by the prohibition. This includes the views of a complainant whose identity is sought to be published, as well as those of any other complainant involved in the proceedings.

10.39 This recommendation goes further than the current legislation, which requires the presiding judicial officer to seek and consider any views of "the complainant" only.[35] It recognises that in matters involving multiple complainants, or where an order has been made under s 294D of the *Criminal Procedure Act 1986* (NSW) (*Criminal Procedure Act*) to apply s 578A to a tendency witness (discussed below), each complainant is likely to be affected by the publication of one complainant's identity, even if they are not identified directly. The recommendation is intended to ensure that the court seeks and considers the views of all complainants.

10.40 Unlike in Victoria,[36] we do not recommend that the court should be prevented from granting leave for publication if this would identify a person protected by the prohibition who does not consent. This is because there may be other compelling reasons that justify publication.

10.41 Unlike the current legislation, which requires the presiding judicial officer to be "satisfied that the publication is in the public interest",[37] recommendation 10.5(2)(b) would require the court to take into account the public interest. We consider that a positive requirement that it be in the public interest poses too stringent a hurdle. Whether the public interest supports publication would depend on the circumstances of the case.

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35. *Crimes Act 1900* (NSW) s 578A(5)(a).
36. *Judicial Proceedings Reports Act 1958* (Vic) s 4(1BG)(b).
37. *Crimes Act 1900* (NSW) s 578A(5)(b).

10.42 Recommendation 10.5(3) clarifies that a court would not be able to grant leave to publish the identity of a complainant who is under 16. This could be given effect to by repealing s 578A(4)(c) of the *Crimes Act*. This aligns with our recommendations relating to statutory prohibitions applying to children (chapter 9). In our view, it is not appropriate for a court to be able to grant leave to publish the identity of a person under 16. Involvement in prescribed sexual offence proceedings may be especially stigmatising for children under 16.

Lifting mechanism with leave of the court when the complainant is deceased

Recommendation 10.6: Mechanism for the court to grant leave to lift the prohibition on publication when the complainant is deceased

Section 578A of the *Crimes Act 1900* (NSW) should provide:

(1) A court may grant leave to publish a deceased complainant's identity before, during and after the proceedings.

(2) Before granting leave, a court must take into account:

- (a) what the deceased complainant would have wanted if they had been alive
- (b) the views of family members of the deceased complainant, unless the family member is also the alleged or convicted offender
- (c) the views of any other complainant who is protected by the prohibition and who may be identified by the publication (if these views are known or ascertainable), and
- (d) the public interest.

10.43 Recommendation 10.6 is to introduce a mechanism to allow family members, media or other people to apply to the court to publish the identity of the complainant after their death. This is to ensure flexibility in appropriate cases.

10.44 Section 578A of the *Crimes Act* does not include a mechanism for lifting a deceased complainant's identity, as the prohibition does not currently apply to publications made after the complainant's death.[38]

10.45 The recommended lifting mechanism is consistent with our standard approach to lifting statutory prohibitions, outlined in chapter 8, where the person protected by the prohibition is deceased.

10.46 Recommendation 10.6(1) is that a court may grant leave to publish a deceased complainant's identity before, during and after the proceedings. As outlined in recommendations 10.2 and 10.3, the prohibition would apply from when a complaint is made to police, and continue to apply even if the complainant is deceased.

10.47 Recommendation 10.6(2)(a) recognises the importance of considering the deceased complainant's perspective. Some complainants may wish for their stories to be told after

38. *Crimes Act 1900* (NSW) s 578A(4)(f).

their death, while others may prefer to remain forever anonymous. We recognise that not many people would have directly contemplated whether they wish to be identified after death. This recommendation provides scope for a court to postulate what a complainant would have wanted if they were alive.

10.48 Recommendation 10.6(2)(b) recognises that surviving relatives may have specific views in relation to whether the deceased complainant's identity should be published. The leave process enables the court to consider any conflicting views among family members. It is not appropriate to consider the views of a family member who is also the alleged or convicted offender.

10.49 Recommendation 10.6(2)(c) recognises that another complainant whose identity is protected by the prohibition may have views about whether the deceased complainant's identity should be published. The leave process would also enable the court to consider these views.

10.50 Recommendation 10.6(2)(d) permits consideration and weighing of the public interest in both publication, and non-publication, of the deceased complainant's identity.

Where an application to lift a prohibition can be heard before proceedings have commenced

Recommendation 10.7: Where an application to lift the prohibition on publication can be heard before proceedings have commenced

Section 578A of the *Crimes Act 1900* (NSW) should provide that before proceedings have commenced, applications to publish the identity of a complainant protected by the prohibition can be heard by any court in which the proceedings could be commenced.

10.51 Where there is an application to lift the prohibition in s 578A of the *Crimes Act* before proceedings have commenced, there would be no presiding judicial officer or court. Recommendation 10.7 clarifies that such proceedings can be heard in any court in which proceedings could be commenced.

Lifting mechanism by consent

Recommendation 10.8: Mechanism for a complainant to consent to lifting the prohibition on publication

Section 578A of the *Crimes Act 1900* (NSW) should provide:

(1) A complainant aged under 16 years at the time of publication cannot consent to the publication of their identity.

(2) A complainant aged 16 years or over but under 18 years at the time of publication can consent to the publication of their identity after receiving advice from an Australian legal practitioner about the implications of consenting.

(3) A complainant aged 18 years or over at the time of publication can consent to the publication of their identity.

(4) However, a complainant cannot consent to the publication of their identity under recommendation 10.8(2)–(3) if:

(a) the publication may identify:

(i) a complainant who is protected by the prohibition and who is aged under 16 years, or

(ii) any other complainant who is protected by the prohibition and who has not consented to the publication of their identity, or

(b) the proceedings are ongoing.

10.52 Under s 578A(4)(b) of the *Crimes Act*, a complainant who is 14 or over at the time of publication can consent to publication of their identity. Equivalent prohibitions can be lifted by consent in all other Australian jurisdictions.[39]

10.53 Recommendation 10.8 aligns with our standard approach to lifting statutory prohibitions by consent outlined in chapter 8.

10.54 Recommendation 10.8(1)–(2) is consistent with our approach to consent provisions relating to children and young people (chapter 9).

10.55 Recommendation 10.8(3) makes it clear that a complainant over 18 can consent to the publication of their identity, subject to the exceptions in recommendation 10.8(4).

10.56 Recommendation 10.8(4)(a) is similar to the current approach in Victoria. A note to the provision in the Victorian legislation states that a person cannot consent to publication if it is likely to lead to the identification of another victim who does not give permission to publish.[40]

10.57 Recommendation 10.8(4)(b) is similar to the approach in the Northern Territory (NT).[41] While a person could not consent to lifting the prohibition during the proceedings, a court could grant leave to lift the prohibition in such circumstances (recommendation 10.5).

No "victim privacy orders" in respect of deceased complainants at this stage

10.58 The effect of our recommendations in relation to deceased complainants would be that:

- the identity of a complainant of a sexual offence who has died, other than as a result of a homicide connected to the alleged sexual offence, cannot be published, unless the court grants leave to lift the statutory prohibition (recommendations 10.3 and 10.6), and
- the identity of a person against whom a sexual offence is alleged to have been committed who died in a homicide connected to the alleged sexual offence can be

39. *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)–(4); *Judicial Proceedings Reports Act 1958* (Vic) s 4(1BB); *Evidence Act 1906* (WA) s 36C(6).

40. *Judicial Proceedings Reports Act 1958* (Vic) s 4(1BB), s 4(1BC).

41. *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 6(2)(a)).

published, without needing to seek leave of the court, as an exception to the statutory prohibition (recommendation 10.4).

10.59 As we observe above, Victoria has recently introduced amendments so that the prohibition on publishing a complainant's identity ceases to apply after the complainant has died.[42]

10.60 Victoria has also recently introduced "victim privacy orders", which are court orders that family or friends of the deceased complainant can apply for to restrict or prohibit the publication of the complainant's identifying details.[43] In introducing these amendments, the Victorian Government said:

> Some stakeholders emphasised the importance of being able to speak publicly about the sexual offences committed against their loved ones, especially when they have died…For other families, the opposite approach is needed to heal, to grieve and to honour their loved one. They do not wish to publicly discuss the details of the traumatic death of their loved ones … and find it distressing when this occurs against their will.[44]

10.61 Some features of the Victorian approach are:

- A person with sufficient interest (excluding the offender) can apply for an order.[45]
- The court must take into account, amongst other factors, the views of the deceased victim (if known) and the risk that the order might perpetuate family violence, but must not take into account the views of the offender.[46]
- The court may make a victim privacy order if it is satisfied that:
  - an order is necessary to avoid "undue distress" to the applicant, and
  - the particular circumstances make it necessary to displace relevant public interests in, for example, open justice and freedom of expression.[47]
- Orders may be made for a maximum of five years but can be extended.[48]
- Interim orders can be made in urgent situations.[49]

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42. *Judicial Proceedings Reports Act 1958* (Vic) s 4(1BAB).
43. *Judicial Proceedings Reports Act 1958* (Vic) s 4F.
44. Victoria, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 3 August 2021, 2532–2533.
45. *Judicial Proceedings Reports Act 1958* (Vic) s 4D(1), s 4D(5).
46. *Judicial Proceedings Reports Act 1958* (Vic) s 4F(2).
47. *Judicial Proceedings Reports Act 1958* (Vic) s 4F(1), s 4F(3).
48. *Judicial Proceedings Reports Act 1958* (Vic) s 4H, s 4I, s 4J.

- The court is required to take reasonable steps to notify relevant news media organisations when an application for an order is made.[50]
- Orders (including interim orders) can be reviewed.[51]

10.62 There has been some criticism in the media about the introduction of victim privacy orders in Victoria. While the legislation includes a list of factors for a court to consider when deciding whether to make a privacy order, this list does not include consideration of the views of other family or friends (that is, family or friends who are not the person making the application for the privacy order).[52]

10.63 There is also no requirement for family to be notified when an application is made by a person with sufficient interest. One news article says that this "could mean that the names of victims could be permanently suppressed without immediate family ever being notified or given a chance to object".[53]

10.64 At this stage, we do not recommend that victim privacy orders should be available in NSW. There have been mixed views in response to the Victorian reforms and they are too recent to evaluate effectively. We consider that the developments in Victoria should be monitored before considering whether such orders should be available in NSW. However, under the structure that we recommend, where the protection would generally endure after death, but subject to a lifting mechanism, there would be no need for such orders to be available.

Discretion to make a non-publication order in relation to a tendency witness

10.65 Section 294D(1)–(3) of the *Criminal Procedure Act 1986* extends certain protections for complainants of sexual offences to a "sexual offence witness" (that is, a witness in the proceedings who alleges the accused person has also committed a sexual offence against them, often referred to as a "tendency witness").

10.66 In addition, s 294D(4) of the *Criminal Procedure Act* contains a power for a court to make an order that the identity of a tendency witness is not to be "publicly disclosed". Under s 294D(5), when a court makes such an order, the sexual offence witness is also "taken to be a complainant" for the purposes of the statutory prohibition on publication in s 578A of the *Crimes Act*.

10.67 We classify s 294D(4) of the *Criminal Procedure Act* as a discretion to make a non-publication order (chapter 3). While the provision uses the expression "publicly

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49. *Judicial Proceedings Reports Act 1958* (Vic) s 4L.
50. *Judicial Proceedings Reports Act 1958* (Vic) s 4E(1).
51. *Judicial Proceedings Reports Act 1958* (Vic) s 4P.
52. *Judicial Proceedings Reports Act* 1958 (Vic) s 4F(2).
53. N Funnell, "New Law could Blindside Rape Victims' Families", *Herald Sun* (online, 17 August 2021).

disclosed", the agreement in principle speech used the expression "non-publication order" in relation to such orders.[54]

Uniform terminology

Recommendation 10.9: Uniform terminology in the discretion to make a non-publication order in relation to a tendency witness

Section 294D(4) of the *Criminal Procedure Act 1986* (NSW) should:

(a) adopt language consistent with a discretion to make a non-publication order

(b) define "non-publication order" in the same way as in recommendation 3.1

(c) define "publish" in the same way as in recommendation 3.2, and

(d) adopt the term "information tending to identify" a sexual offence witness and define it in the same way as in recommendation 3.3.

10.68 Recommendation 10.9(a) is to change the language of s 294D(4) of the *Criminal Procedure Act* to reflect its classification as a discretion to make a non-publication order. This could be done by replacing the court's discretion to make a direction with a discretion to make a "non-publication order".

10.69 Recommendation 10.9(b)–(c) is for the provision to contain the same definition of "non-publication order" and "publish" recommended in chapter 3.

10.70 Recommendation 10.9(d) is for the provision to use the term "information tending to identify" a sexual offence witness, instead of "identity of a sexual offence witness", and adopt the uniform definition of "information tending to identify" recommended in chapter 3.

No other changes to this provision

10.71 We do not recommend any other changes to s 294D of the *Criminal Procedure Act.*

10.72 As outlined above, when a court makes a non-publication order, this also has the effect of extending the statutory prohibition in s 578A of the *Crimes Act* to a sexual offence witness.[55] This would mean that the recommendations we make in respect of s 578A, apply to sexual offence witnesses when such an order is made. This should be given careful consideration in drafting.

10.73 Rape and Domestic Violence Services Australia (RDVSA) argued that the prohibition in s 578A should apply to all sexual offence witnesses in sexual offence proceedings, without the court needing to make an order.[56] We consider that the current approach

54. NSW, *Parliamentary Debates*, Legislative Assembly, Agreement in Principle Speech, 10 March 2010, 21195; *Criminal Procedure Act 1986* (NSW), as amended by *Crimes Amendment (Child Pornography and Abuse Material) Act 2010* (NSW) sch 2 [6].

55. *Criminal Procedure Act 1986* (NSW) s 294D(4)–(5).

56. Rape and Domestic Violence Services Australia, *Submission CI08* [20].

under s 294D of the *Criminal Procedure Act* is appropriate, as it enables a court to make a decision based on the facts of each case, rather than imposing a general exception to open justice in respect of all sexual offence witnesses.

Exclusion provisions

Requirement to make an exclusion order when the complainant gives evidence

10.74 Section 291(1) of the *Criminal Procedure Act* provides that any part of a prescribed sexual offence proceeding in which the complainant gives evidence, or an audio or audio visual recording of evidence of the complainant, is "to be held in camera" unless the court directs otherwise. This applies whether the complainant's evidence is given in the courtroom in person, through closed-circuit television, or through any other alternative arrangements.[57]

10.75 An exception provides that a complainant is entitled to choose one or more people to be present near them, and within their sight, when they are giving evidence.[58]

10.76 A court may also direct that the part of the proceedings in which the complainant gives evidence is to be held in open court, but 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 be held in open court, or
- the complainant consents to giving their evidence in open court.[59]

10.77 The principle that proceedings for an offence should generally be open or public, or that justice should be seen to be done, does not of itself constitute a special reason for the relevant part of the proceedings to be held in open court.[60]

10.78 When it was first introduced in 1999, the equivalent of s 291 provided that a court may direct that sexual offence proceedings, or parts of the proceedings, are to be held in camera.[61] It was amended in 2005 to provide that any part of a sexual offence proceeding in which the complainant gives evidence is to be held in camera unless the

57. *Criminal Procedure Act 1986* (NSW) s 291(2).
58. *Criminal Procedure Act 1986* (NSW) s 294C(1)–(2).
59. *Criminal Procedure Act 1986* (NSW) s 291(3).
60. *Criminal Procedure Act 1986* (NSW) s 291(4).
61. *Crimes Legislation Amendment (Sentencing) Act 1999* (NSW) sch 2[31], inserting *Criminal Procedure Act 1986* (NSW) s 118.

court directs otherwise.[62] This was intended to "give greater certainty and privacy to sexual assault complainants and … assist in the giving of best evidence".[63]

10.79 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.[64]

10.80 In 2010, the *Criminal Procedure Act* was amended to extend to tendency witnesses the same protections as those afforded to a complainant in the proceedings, including the protection in s 291.[65]

10.81 Several stakeholders supported s 291 of the *Criminal Procedure Act*.[66] The ODPP and knowmore highlighted that it encourages complainants to participate in criminal proceedings, protects their privacy, alleviates stress and embarrassment, and assists them to give their best evidence.[67] The ODPP also supported the current exceptions in s 291(3) and considered that they should remain in place.[68]

10.82 In our survey, we asked when courts should be closed to the public. Of the 133 respondents who answered this question, 90 (67.67%) selected "when a victim of a sexual offence is giving evidence".[69]

10.83 As in NSW, laws in the NT and Queensland require the evidence of a complainant in sexual offence proceedings to be heard in closed court.[70] By contrast:

- in the Australian Capital Territory, the court may order that the evidence of certain witnesses (including complainants) in sexual offence proceedings is to be heard in closed court during a pre-trial hearing[71]

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62. *Criminal Procedure Further Amendment (Evidence) Act 2005* (NSW) sch 1[7].
63. NSW, *Parliamentary Debates* Legislative Assembly, Second Reading Speech, 23 March 2005, 14900.
64. NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 23 March 2005, 14899.
65. *Criminal Procedure Act 1986* (NSW) s 294D, inserted by *Crimes Amendment (Child Pornography and Abuse Material) Act 2010* (NSW) sch 2[6].
66. Rape and Domestic Violence Services Australia, *Submission CI08* [6], [34]; knowmore, *Submission CI10*, 10–11; NSW Office of the Director of Public Prosecutions, *Submission CI17*, 25; Women's Legal Service NSW, *Consultation CIC07*.
67. knowmore, *Submission CI10*, 10–11; NSW Office of the Director of Public Prosecutions, *Submission CI17*, 25.
68. NSW Office of the Director of Public Prosecutions, *Submission CI17*, 25.
69. *Open Justice: Survey Results*, Research Report 16 (NSW Law Reform Commission, 2022) table 2.1.
70. *Evidence Act 1939* (NT) s 21F; *Criminal Law (Sexual Offences) Act 1978* (Qld) s 5.

- in Victoria, a court may make a closed court order if it is satisfied that the order is necessary to avoid causing undue distress or embarrassment to a complainant or witness in any criminal proceeding involving a sexual offence or a family violence offence,[72] and

- in South Australia, the court may order that the defendant be excluded from the place where the evidence is taken, or otherwise be prevented from directly seeing and hearing the complainant while giving evidence.[73]

Requirement to make an exclusion order when a victim impact statement is read out

10.84 Section 30I of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (*Crimes (Sentencing Procedure) Act*) provides that in prescribed sexual offence cases, the part of the proceedings in which the victim impact statement is read out is to be held in "closed court". A victim impact statement contains particulars of the personal, emotional and economic harm suffered by a primary victim, or by the members of the primary victim's immediate family, as a direct result of an offence.[74] However, the court may direct that the proceedings are to be held in open court if a party requests this, and the court is satisfied that:

- special reasons in the interests of justice require the 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.[75]

10.85 The principle that proceedings for an offence should generally be open or public in nature, or that justice should be seen to be done, does not of itself constitute special reasons in the interests of justice requiring the part of the proceedings to be held in open court.[76]

10.86 Section 30I was inserted in 2018.[77] It was intended to "provide greater protections and support to victims of sexual violence and minimise further trauma and embarrassment".[78]

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71. *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 73.
72. *Open Courts Act 2013* (Vic) s 30(2)(d).
73. *Evidence Act 1929* (SA) s 13A(2)(d), s 4 definition of "vulnerable witness".
74. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 28.
75. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30I(1).
76. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30I(2).
77. *Crimes Legislation Amendment (Victims) Act 2018* (NSW) sch 3[1].
78. NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 21 June 2017, 3.

Uniform terminology

Recommendation 10.10: Uniform terminology in requirements to make exclusion orders in sexual offence proceedings

Section 291 of the *Criminal Procedure Act 1986* (NSW) and s 30I of the *Crimes (Sentencing Procedure) Act 1999* (NSW) should:

(a) adopt language consistent with a requirement to make an exclusion order, excluding all people other than those whose presence is necessary for the proceedings, and

(b) provide that "exclusion order" has the same meaning and effect as it has in recommendation 3.1.

10.87 We classify s 291 of the *Criminal Procedure Act* as a requirement to make an exclusion order, rather than a closed court order, as it is not directed at preventing disclosure of the evidence given in the proceedings (chapter 3). Rather, s 291 is intended to facilitate a complainant to give their best evidence, and to otherwise participate in the proceedings, by permitting them to do so in the absence of the public. This is because:

> Sexual assault complainant evidence must include precise and explicit details of sexual acts and of intimate sexual violence. Evidence may include swear words, slang usage for body parts, name calling, derogatory terms or remarks of a personal nature. It is embarrassing and humiliating evidence to give.[79]

10.88 We also classify s 30I of the *Crimes (Sentencing Procedure) Act* as a requirement to make an exclusion order (chapter 3), as the purpose of the provision is to minimise trauma and embarrassment to the victim of a sexual offence by excluding the public while their victim impact statement is read out.

10.89 We considered whether s 291 of the *Criminal Procedure Act* and s 30I of the *Crimes (Sentencing Procedure) Act* should be classified as statutory exclusion provisions instead of requirements to make an exclusion order. As discussed in chapter 3, statutory exclusion provisions apply automatically, without the court needing to make an order, which is beneficial in high-volume jurisdictions.

10.90 Sexual offence proceedings can be heard in high-volume summary jurisdictions, such as the Local Court and Children's Court. From July 2020 to June 2021, 8,190 finalised charges for sexual assault or a related offence were heard by NSW courts. Of these, 4,780 were heard by the District Court, 2,832 by the Local Court, and 561 by the Children's Court.[80]

10.91 We have concluded that s 291 of the *Criminal Procedure Act* and s 30I of the *Crimes (Sentencing Procedure) Act* should require courts to make an exclusion order rather than apply automatically. As these provisions only apply to particular parts of

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79. NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 23 March 2005, 14899.

80. BOCSAR, *NSW Criminal Courts Statistics Jul 2016-Jun 2021* (December 2021), Tab 2.

proceedings, a court is already required to take steps to exclude the public when that part of proceedings occurs. Recommendation 10.10 formalises and gives effect to that practice. It is not intended to change substantively the effect of the current law or to limit the circumstances in which the public is excluded from sexual offence proceedings.

10.92 Recommendation 10.10(a) is for s 291 of the *Criminal Procedure Act* and s 30I of the *Crimes (Sentencing Procedure) Act* to adopt language consistent with a requirement to make an exclusion order excluding all people other than those whose presence is necessary. This reflects the broad application of the provisions, which currently require the relevant parts of the proceedings to be "in camera" or "closed court". The intent is that all people not required for the proceedings are to be excluded.

10.93 Recommendation 10.10(a) could be given effect by replacing:

- the requirement in s 291(1) of the *Criminal Procedure Act* to hold "in camera" any part of any proceedings in respect of a prescribed sexual offence in which evidence is given by a complainant, or an audio visual or audio recording of evidence of the complainant is heard by the court, unless the court otherwise directs, with a requirement to make an "exclusion order", excluding all people other than those whose presence is necessary, in that part of the proceedings, unless the court otherwise directs, and

- the requirement in s 30I of the *Crimes (Sentencing Procedure) Act* for the part of prescribed sexual offence proceedings in which the statement is read to be held in "closed court", unless s 30I(1)(a)–(b) applies, with a requirement to make an "exclusion order", excluding all people other than those whose presence is necessary, in that part of the proceedings, unless s 30I(1)(a)–(b) applies.

10.94 Under recommendation 3.1, an "exclusion order" can apply to a specified person or class of people, or all people other than those whose presence is necessary. Recommendation 10.10(a) makes plain that in this case, it is to apply to all people other than those whose presence is necessary.

10.95 Thus, we recommend that s 291 of the *Criminal Procedure Act* and s 30I of the *Crimes (Sentencing Procedure) Act* should provide that "exclusion order" has the same meaning and effect as it has in recommendation 3.1. This is to clarify that an exclusion order made under these provisions results in physical exclusion from the court but does not have any consequential impact on disclosure of information from the proceedings.

Discretion to make an exclusion order in other parts of prescribed sexual offence proceedings

10.96 Section 291A(1) of the *Criminal Procedure Act* provides that a court may direct that any other part of sexual offence proceedings, or the entire proceedings, are to be "held in

camera". The court may make such a direction on its own motion or at the request of a party.[81] In deciding whether to make a direction, the court must consider:

- 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.[82]

10.97 If the court makes a direction under s 291A, it may exempt a person from the direction to allow them to be present as a support for a person giving evidence, or for any other purpose that the court thinks fit.[83]

10.98 We classify s 291A of the *Criminal Procedure Act* as a discretion to make an exclusion order (chapter 3).

10.99 knowmore supported s 291A of the *Criminal Procedure Act.*[84] However, ARTK argued that s 291A should be repealed, noting that a court could make a non-publication order or non-disclosure order if further restrictions were necessary.[85]

10.100 It is important that courts be able to make exclusion orders in parts of proceedings other than when the complainant gives evidence. This serves important functions, in terms of reducing distress to the complainant and enabling other witnesses to give their best evidence.

Uniform terminology

Recommendation 10.11: Uniform terminology in the discretion to make an exclusion order in sexual offence proceedings

Section 291A of the *Criminal Procedure Act 1986* (NSW) should:

(a) adopt language consistent with a discretion to make an exclusion order, and

(b) provide that "exclusion order" has the same meaning and effect as it has in recommendation 3.1.

10.101 Recommendation 10.11(a) is for s 291A of the *Criminal Procedure Act* to adopt terminology consistent with its classification. This could be done by replacing the discretion in s 291A(1) to direct that any other part of any proceedings in respect of a

81. *Criminal Procedure Act 1986* (NSW) s 291A(2).
82. *Criminal Procedure Act 1986* (NSW) s 291A(3).
83. *Criminal Procedure Act 1986* (NSW) s 291A(5).
84. knowmore, *Submission CI10*, 10–11.
85. Australia's Right to Know Media Coalition, *Submission CI27*, 81.

prescribed sexual offence, or the entire proceedings, be held "in camera" with a discretion to make an "exclusion order" in such circumstances.

10.102 Under recommendation 10.11(a), there is no limit on the scope of the exclusion order. This means that an order made under s 291A could apply to a specified person, class of people or all people other than those whose presence is necessary for the proceedings. This reflects the discretionary nature of s 291A. It would also enable the court to make an exclusion order of whatever scope is appropriate in the circumstances of the case.

10.103 Under recommendation 10.11(b), "exclusion order" in s 291A of the *Criminal Procedure Act* would have the same meaning and effect as it has in recommendation 3.1. This clarifies that an order made under s 291A results in physical exclusion from the court but has no consequential impact on disclosure of information from the proceedings.

Limited exception for journalists when an exclusion order is made in sexual offence proceedings

Recommendation 10.12: Limited exception for journalists when an exclusion order is made in sexual offence proceedings

(1) Section 291C of the *Criminal Procedure Act 1986* (NSW) should provide that if a court makes an exclusion order under s 291 or s 291A of the Act, a journalist may:

(a) view or hear the proceedings, or view or hear a record of the proceedings, if:

(i) the complainant is aged 16 years or over but under 18 years and consents to this, after receiving advice from an Australian legal practitioner about the implications of consenting, or

(ii) the complainant is aged 18 years or over and consents to this, or

(iii) the complainant is aged 16 years or over and the court is satisfied that the public interest in allowing the journalist to view or hear the proceedings, or view or hear a record of the proceedings significantly outweighs the complainant's wishes, but

(b) not be present in the courtroom or other place where the evidence is given.

(2) Section 30I of the *Crimes (Sentencing Procedure) Act 1999* (NSW) should provide that if a court makes an exclusion order under s 30I of the Act, a journalist may:

(a) view or hear the part of the proceedings in which the victim impact statement is read out if:

(i) the victim is aged 16 years or over but under 18 years and consents to this, after receiving advice from an Australian legal practitioner about the implications of consenting, or

(ii) the victim is aged 18 years or over and consents to this, or

(iii) the victim is aged 16 years or over and the court is satisfied that the public interest in allowing the journalist to view or hear the part of the proceedings in which the victim impact statement is read out significantly outweighs the victim's wishes, but

(b) not be present in the courtroom or other place where the victim impact statement is read out.

(3) In s 291C of the *Criminal Procedure Act 1986* (NSW) and s 30I of the *Crimes (Sentencing Procedure) Act 1999* (NSW), "journalist" should be defined in the same way as in recommendation 3.5.

10.104 Section 291C of the *Criminal Procedure Act* contains exceptions for the media when proceedings for a prescribed sexual offence are held "in camera" pursuant to s 291 or s 291A. There is no equivalent exception for the media when a victim impact statement is read in closed court in prescribed sexual offence proceedings.

10.105 Section 291C provides:

- if a complainant gives evidence from a place other than the courtroom, and the proceedings are held in camera, a media representative may, unless the court otherwise directs, enter or remain in the courtroom while the evidence is given from that other place, and
- if any part of proceedings is held in camera, the court may make arrangements to allow media representatives to view or hear the evidence while it is given, or to view or hear a record of that evidence (so long as media representatives are not present in the place where the evidence is given).[86]

10.106 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 to be made. The media may be liable for additional costs for arranging their viewing.[87]

10.107 There is a tension between the exception for the media in s 291C of the *Criminal Procedure Act* and the policy that underpins s 291 and s 291A, which is to facilitate complainants to give their best evidence, and to otherwise participate in the proceedings, by permitting them to do so in the absence of the public.

10.108 On the one hand, the media play an important role in promoting open justice by producing fair and accurate reports of proceedings (chapter 1). In the case of sexual offence proceedings, facilitating media access to and reporting of these proceedings may generate public awareness and discussion of sexual offending, encourage reporting of offences and reduce the stigma that might otherwise lead to underreporting.

10.109 On the other hand, for some complainants, having a journalist view or hear their evidence would be distressing. It could also discourage some complainants from reporting offences and participating in proceedings.[88] Media publicity about sexual

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86. *Criminal Procedure Act 1986* (NSW) s 291C(1)–(2).

87. Supreme Court of NSW, *Practice Note SC CL 8: Supreme Court Common Law Division: 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,* 28 November 2005 [2]–[5].

88. knowmore, *Submission CI43*, 21; Rape and Domestic Violence Services Australia, *Submission CI61* [27].

offending can be triggering and re-traumatising for some people.[89] knowmore and RDVSA submitted that it should only be possible for journalists to be present in these proceedings with the consent of the complainant.[90]

10.110 The existing safeguards in respect of media access, including that the media cannot be present in the place where the complainant's evidence is given, and the statutory prohibition on publication of the complainant's identity, do not resolve this tension. The comfort that complainants might gain from the assurance that their evidence will be given in the absence of the public could be significantly undermined by knowledge that it could nonetheless be heard and observed (even if only remotely), and therefore reported on, by the media. Providing an entitlement for the media to observe sits uncomfortably with the fundamental policy.

10.111 For these reasons, recommendation 10.12(1) is to limit the exception for the media in sexual offence proceedings in s 291C of the *Criminal Procedure Act*. Recommendation 10.12(2) is to introduce the same limited exception in s 30I of the *Crimes (Sentencing Procedure) Act.* ARTK supports enabling journalists to view the reading of a victim impact statement in sexual offence proceedings.[91]

10.112 Although there is less reason to facilitate a complainant to make a victim impact statement than to give evidence – as a victim impact statement is optional whereas giving evidence is essential – it is desirable to apply the same limited exception for journalists, which balances the need to minimise distress to complainants with the need for journalists to report on matters of public interest. Enabling media reporting of victim impact statements in sexual offence proceedings may help to increase general knowledge in the community about the impact of offending on victims, which is particularly important for evolving attitudes to sexual offences.

10.113 The exceptions in recommendation 10.12(1)–(2) are narrower than our draft proposal.[92] Recommendations 10.12(1)(a)(i)–(ii) and 10.12(2)(a)(i)–(ii) are similar to a provision in the ACT, which provides that, if a pre-trial hearing in a sexual offence proceeding is closed while a complainant gives evidence or a recording of their evidence is played, a "person who is preparing a news report of the proceeding and who is authorised to attend the court for that purpose by the person's employer" may be present in court if the complainant agrees.[93]

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89. knowmore, *Submission CI43*, 21; Rape and Domestic Violence Services Australia, *Submission CI61* [29].
90. knowmore, *Submission CI43*, 21–22; Rape and Domestic Violence Services Australia, *Submission CI61* [28].
91. Australia's Right to Know Media Coalition, *Submission CI27*, 7–8.
92. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 7.5.
93. *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 73(5)(b).

10.114 Recommendations 10.12(1)(a)(iii) and 10.12(2)(a)(iii) recognise that there may be some cases where the public interest in proceedings is so strong that it is appropriate for journalists to be permitted to view or hear the evidence, or the reading of the victim impact statement, even if this is against the wishes of the complainant or victim.

10.115 Recommendations 10.12(1)(b) and 10.12(2)(b) are consistent with the existing exception for the media in prescribed sexual offence proceedings.[94] Under recommendation 10.12(3), "journalist" would be defined in the same way as that recommended in chapter 3, for consistency with other legislation relating to open justice.

10.116 We note that where journalists are permitted to view or hear proceedings under recommendation 10.12, there would still be restrictions on publishing the identity of a complainant under s 578A of the *Crimes Act*, which we discuss above. A non-publication or non-disclosure order could also be made under the new Act where necessary to avoid causing undue distress or embarrassment to a complainant or victim in any proceeding relating to a prescribed sexual offence.[95]

Closed court provisions

Requirement to make a closed court order in incest proceedings

10.117 Section 291B(1) of the *Criminal Procedure Act* provides that incest proceedings "are to be held entirely in camera". However, the court may exempt a person to allow them to be present as a support for a person giving evidence, or for any other purpose that the court thinks fit.[96]

10.118 We classify s 291B of the *Criminal Procedure Act* as a requirement to make a closed court order (chapter 3).

Uniform terminology

Recommendation 10.13: Uniform terminology in the requirement to make a closed court order in incest proceedings

Section 291B of the *Criminal Procedure Act 1986* (NSW) should:

(a) adopt language consistent with a requirement to make a closed court order

(b) define "closed court order" in the same way as in recommendation 3.1, and

(c) define "disclose" in the same way as in recommendation 3.2.

94. *Criminal Procedure Act 1986* (NSW) s 291C.

95. Recommendation 6.4(d)–(e).

96. *Criminal Procedure Act 1986* (NSW) s 291B(2).

10.119 Recommendation 10.13(a) is for s 291B of the *Criminal Procedure Act* to be amended to incorporate standard language consistent with its classification. This could be done by replacing references to a requirement that the proceedings be held "in camera" with a requirement to make a "closed court order".

10.120 Under recommendation 10.13(b), the provision would adopt the recommended definition of "closed court order". As discussed in chapter 3, such an order requires all people, other than those whose presence is necessary, to be excluded from the proceedings and also prohibits disclosure of information from these proceedings. This is appropriate given the highly sensitive nature of incest offences.

10.121 Recommendation 10.13(c) is for the uniform definition of "disclose" to be incorporated in the provisions. This is to clarify that a closed court order made under s 291B also prohibits a person from making information about closed proceedings available to any person, by publication or otherwise (chapter 3).

Interaction with the mechanism to lift the statutory prohibition on publishing a complainant's identity

Recommendation 10.14: Interaction with the mechanism to lift the statutory prohibition on publishing the identity of a complainant

The *Crimes Act 1900* (NSW) should provide that consent of the person under s 578A of the Act also operates to lift any prohibition on disclosing the identity of the person arising from s 291B of the *Criminal Procedure Act 1986* (NSW).

10.122 The effect of our recommendations would be that, in incest proceedings, the identity of the complainant is protected under both:

- a statutory prohibition on publication, as s 578A of the *Crimes Act* prohibits publishing the identity of the complainant in the proceedings, and
- a requirement to make a closed court order, as such an order also prohibits disclosure of information from the closed part of proceedings.

10.123 Recommendation 10.14 is for the mechanisms for lifting the statutory prohibition also to lift the suppression effect of an overlapping closed court order, to the extent of the overlap (that is, only in relation to the identifying information). This is necessary to give full effect to the lifting mechanism.

10.124 Other information from the closed proceedings should not be affected by the lifting mechanism.

11. Legislation relating to domestic violence proceedings

In Brief

Some exceptions to open justice in subject-specific legislation apply to domestic violence offence and apprehended violence order proceedings. These exceptions acknowledge that people who experience domestic violence may need additional protections, and may encourage them to participate in the justice system. We classify these provisions according to our classification framework in chapter 3. These provisions should adopt uniform terminology and definitions consistent with these classifications. Where appropriate, other amendments should be made, for example, there should be a limited exception to enable journalists to view or hear certain domestic violence related proceedings where the public are excluded.

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11.1 In this chapter, we deal with existing provisions in subject-specific legislation that prohibit the publication of information or restrict public access to court hearings in domestic violence offence proceedings and in apprehended violence order (AVO) proceedings.

11.2 We classify these provisions based on our framework for exceptions to open justice (chapter 3). We recommend that these provisions adopt standard language consistent with those classifications and relevant definitions in chapter 3. We also recommend other changes to these provisions in response to submissions and consultations, including limited exceptions allowing journalists to view and hear evidence in the proceedings.

Exceptions to open justice in domestic violence related proceedings

11.3 Several exceptions to open justice apply in domestic violence offence proceedings and AVO proceedings. The statutory basis for domestic violence offence proceedings and AVO proceedings in NSW is set out in the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) (*Crimes (Domestic and Personal Violence) Act*).

11.4 In this chapter, a "domestic violence offence proceeding" means a proceeding involving a "domestic violence offence". A "domestic violence offence" is a personal violence offence, another offence occurring from the same circumstances as a personal violence offence, or another offence committed to coerce, control or intimidate the victim, which is committed against a person with whom the offender has or has had a domestic relationship.[1] A domestic relationship includes an intimate personal relationship, a familial relationship, and cohabiting.[2]

11.5 "AVO proceeding" means a proceeding involving an application for an apprehended domestic violence order (ADVO) or an apprehended personal violence order (APVO).[3] "ADVO proceeding" means an AVO proceeding only involving an application for an ADVO (as opposed to an application for an APVO).

11.6 In relation to some exceptions to open justice in the *Criminal Procedure Act 1986* (NSW) (*Criminal Procedure Act*), ADVO proceedings can be related to domestic violence offence proceedings where the defendant in the ADVO proceedings has also been charged with a domestic violence offence, and the protected person in the ADVO proceedings is the alleged victim of that offence.[4]

11.7 Exceptions to open justice that apply in domestic violence offence and AVO proceedings reflect increasing recognition that people who have experienced domestic violence may need additional protections. Such protections may assist the justice system's response to domestic violence, which in turn may increase victim attendance rates and the finalisation of matters in court.[5]

11.8 The public policy reasons for protecting sexual offence complainants, outlined in chapter 10, also apply for people who have experienced domestic violence. These include preventing stigma and distress and encouraging reporting of offences. Some of

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1. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 11.
2. *Crimes (Domestic and Personal Violence Act) 2007* (NSW) s 5(1).
3. *Crimes (Domestic and Personal Violence Act) 2007* (NSW) s 3(1).
4. *Criminal Procedure Act 1986* (NSW) s 289T(1)(b); NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 22 October 2020, 4989.
5. NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 22 October 2020, 4990.

the exceptions to open justice discussed in this chapter were introduced to "close the gap" and ensure that "domestic violence complainants in criminal proceedings are provided with the same protections" as sexual offence complainants.[6]

11.9 Specific protections for children and young people involved in AVO proceedings are similar to those available for children and young people in other types of court proceedings (chapter 9). These protections recognise the particular vulnerability of children and young people.

11.10 Exceptions to open justice in domestic violence related proceedings recognise that the public interest in protecting domestic violence victims (both adults and children) outweighs the public interest in open justice.

Non-publication provisions

Statutory prohibition on publishing the identity of a child involved in an AVO proceeding

11.11 Section 45(1) of the *Crimes (Domestic and Personal Violence) Act* prohibits the publication of the name of a child involved, or who is reasonably likely to become involved, in an AVO proceeding as:

- the person sought to be protected by the AVO or against whom an AVO is sought
- who appears, or is reasonably likely to appear, as a witness in the proceedings, or
- who is, or is reasonably likely to be, mentioned or otherwise involved in the proceedings.

11.12 We classify s 45(1) of the *Crimes (Domestic and Personal Violence) Act* as a statutory prohibition on publication in line with our classification framework (chapter 3).

11.13 The Northern Territory (NT), Tasmania and Victoria have statutory prohibitions specifically protecting the identity of children involved in proceedings related to protection orders.[7] In other Australian jurisdictions, there are also general prohibitions on publishing identifying information about people involved in proceedings related to protection orders.[8]

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6. NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 22 October 2020, 4990.
7. *Domestic and Family Violence Act 2007* (NT) s 123; *Family Violence Act 2004* (Tas) s 32(3); *Children, Youth and Families Act 2005* (Vic) s 534.
8. *Family Violence Act 2016* (ACT) s 149; *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).

11.14 Section 45(2) of the *Crimes (Domestic and Personal Violence) Act* provides that the court may direct that the name of a person involved in AVO proceedings (who is not covered by the statutory prohibition under s 45(1)) must not be published or broadcast. We classify this as a discretion to make a non-publication order (chapter 3). We discuss this provision later in the chapter.

Uniform terminology

Recommendation 11.1: Uniform terminology in s 45 of the *Crimes (Domestic and Personal Violence) Act*

Section 45 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) should:

(a) adopt the term "publish" and define it in the same way as in recommendation 3.2

(b) adopt the term "information tending to identify" a person and define it in the same way as in recommendation 3.3, and

(c) define "official report of proceedings" in the same way as in recommendation 3.6.

11.15 Section 45 of the *Crimes (Domestic and Personal Violence) Act* includes the expressions "published or broadcast" and "publishes or broadcasts", but does not define them. Recommendation 11.1(a) could be given effect by replacing these terms with "published" and "publishes" respectively, and by defining "publish" in keeping with our uniform definitions (chapter 3).

11.16 Section 45 also refers to the "name" of a person. Section 45(5) of the *Crimes (Domestic and Personal Violence) Act* provides that a reference to a person's name includes a reference to any information, picture or other material:

(a) that identifies the person, or

(b) that is likely to lead to the identification of the person.

11.17 Recommendation 11.1(b) can be given effect by replacing the term "name" in s 45(5) of the Act with the uniform definition of "information tending to identify" a person (chapter 3).

11.18 Section 45(4) of the *Crimes (Domestic and Personal Violence) Act* provides that the name of a person can be published in an official report of proceedings, which is not defined. Recommendation 11.1(c) is to define "official report of proceedings" in the same way as our uniform definition (chapter 3).

The prohibition should apply to all children and young people

Recommendation 11.2: The prohibition on publication should apply to both a child under 16 and a young person under 18

Section 45(1) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) should apply to information tending to identify a child or young person who is under the age of 18 years.

11.19 The statutory prohibition in s 45(1) of the *Crimes (Domestic and Personal Violence) Act* currently applies to a child involved in AVO proceedings, which is defined as a person under 16.[9]

11.20 Legal Aid submitted that the rationale for protecting the identity of a child in AVO proceedings applies equally to a young person (aged 16 or 17), so providing different protections to a child and young person is "unfair and creates an unhelpful disparity".[10] Some other statutory prohibitions in NSW protect the identity of both children and young people (chapter 9).

11.21 To resolve this inconsistency, recommendation 11.2 is for the statutory prohibition in s 45(1) also to apply to a young person (aged 16 or 17) involved in AVO proceedings.

11.22 The NT prohibition relating to children involved in proceedings related to protection orders applies to a person under 18,[11] and the Tasmanian prohibition applies to a "child", which is not defined.[12]

Application of the prohibition when a person is deceased

Recommendation 11.3: Application of the prohibition on publication to a deceased person

Section 45(1) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) should apply even if the person protected by the prohibition is deceased at the time of publication.

11.23 Currently, s 45(1) of the *Crimes (Domestic and Personal Violence) Act* provides that the prohibition applies before the proceedings have commenced or after they have commenced, but ends once the proceedings have concluded.

11.24 Our draft proposal was that the prohibition should apply after the proceedings have concluded, but be lifted once the person protected by the prohibition is deceased, so long as this publication does not identify another living person whose identity is protected (for example, a sibling of the deceased person).[13]

11.25 Recommendation 11.3 is for s 45(1) to apply even when the person protected by the prohibition (who could be a child, young person or adult) is deceased. Recommendation 11.3 would also extend the prohibition in s 45(1) past the conclusion of proceedings. The intended effect of our recommendation is that the prohibition would apply before, during and after the proceedings, and beyond the death of the person

9. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 3 definition of "child".
10. Legal Aid NSW, *Submission CI24*, 21–22.
11. *Domestic and Family Violence Act 2007* (NT) s 4 definition of "child".
12. *Family Violence Act 2004* (Tas) s 32(3).
13. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 5.5.

protected by the prohibition. This is consistent with our approach to other statutory prohibitions involving children (chapter 9).

11.26 The Children's Court and Legal Aid supported the extension of the prohibition to beyond when a person is deceased.[14] Legal Aid argued that the same factors arising in relation to other prohibitions involving children (such as the potential for lifelong stigma) apply in these proceedings.[15] The Children's Court also observed that it is important for statutory prohibitions relating to children to have the same duration because some children and young people are protected by multiple statutory prohibitions.[16]

Lifting mechanism with leave of the court when the person is alive

Recommendation 11.4: Mechanism for the court to grant leave to lift the prohibition on publication when the person is alive

Section 45 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) should provide, in relation to the statutory prohibition in s 45(1) of the Act:

(1) A court may grant leave to publish a person's identity before, during and after the proceedings.

(2) Before granting leave, a court must take into account:

(a) the views of the person and of any other person who is protected by the prohibition and who may be identified by the publication (if these views are known or ascertainable), and

(b) the public interest.

(3) However, a court cannot grant leave to publish the identity of a person who is aged under 16 years at the time of publication.

11.27 Under s 45(4)(b) of the *Crimes (Domestic and Personal Violence) Act*, the name of the person protected by the prohibition in s 45(1) can be published with the consent of the court. This applies to a person whose identity is protected by the statutory prohibition in s 45(1) or by an order made under s 45(2) of the Act.

11.28 Recommendation 11.4 could be given effect by replacing s 45(4)(b) of the *Crimes (Domestic and Personal Violence) Act* with the standard mechanism for lifting a statutory prohibition with leave of the court, where the person is alive, outlined in chapter 8.

11.29 Recommendation 11.4(1) is that a court may grant leave to publish the identity of a person protected by the prohibition before, during and after proceedings. As a result of recommendation 11.3, the prohibition would apply in all of these circumstances.

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14. Children's Court of NSW, *Submission CI62*, 4; Legal Aid NSW, *Submission CI24*, 21–22.
15. Legal Aid NSW, *Submission CI24*, 22.
16. Children's Court of NSW, *Submission CI62*, 4. See also chapter 9.

11.30 Recommendation 11.4(2) sets out factors for a court to take into account before granting leave. This includes the views of any other person protected by the prohibition, which could include, for example, a sibling. The court must also consider the public interest in both publication, and non-publication. In the Australian Capital Territory (ACT) and Victoria, courts also consider the public interest when determining whether to lift similar prohibitions.[17]

11.31 Recommendation 11.4(3) aligns with our approach to statutory prohibitions involving children (chapter 9). We do not consider that it is appropriate for the court to grant leave to publish the identity of a person under 16 (chapter 8).

11.32 Recommendation 11.4 would apply only to the statutory prohibition in s 45(1). To lift an order made under s 45(2) of the Act, an applicant could apply to vary or revoke an order (recommendation 11.10(2)).

Lifting mechanism with leave of the court when the person is deceased

Recommendation 11.5: Mechanism for the court to grant leave to lift the prohibition on publication when the person is deceased

Section 45 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) should provide, in relation to the statutory prohibition in s 45(1) of the Act:

(1) A court may grant leave to publish a deceased person's identity before, during and after the proceedings.

(2) Before granting leave, a court must take into account:

- (a) what the deceased person would have wanted if they had been alive
- (b) the views of family members of the deceased person
- (c) the views of any other person who is protected by the prohibition and who may be identified by the publication (if these views are known or ascertainable), and
- (d) the public interest.

11.33 As discussed above, recommendation 11.3 is for the statutory prohibition in s 45(1) of the *Crimes (Domestic and Personal Violence) Act* to apply even if person protected by the prohibition is deceased. However, there may be situations where a family member or friend of the deceased person, or the media, wish to publish their identity.

11.34 To ensure flexibility, recommendation 11.5 is to insert a new mechanism for lifting the prohibition where the person is deceased. This mechanism is consistent with our standard approach to lifting statutory prohibitions when a person is deceased outlined in chapter 8.

11.35 Recommendation 11.5(2) sets out a range of factors for a court to consider before granting leave to publish a deceased person's identity. This includes what the deceased person would have wanted when they were alive, the views of family members of the

17. *Family Violence Act 2016* (ACT) s 150(2)(a); *Family Violence Protection Act 2008* (Vic) s 169(1)(a).

deceased person and the views of any other person who is protected by the prohibition and who may be identified by the publication. Recommendation 11.5(2)(d) also requires the court to consider the public interest. Whether the public interest supports publication, or non-publication, would depend on the circumstances of the case.

11.36 This recommendation would apply only to the statutory prohibition in s 45(1). The mechanism for varying or revoking an order made under s 45(2) of the *Crimes (Domestic and Personal Violence) Act* is discussed below (recommendation 11.10(2)).

Where an application to lift a prohibition can be heard before proceedings have commenced

Recommendation 11.6: Where an application to lift the prohibition on publication can be heard before proceedings have commenced

Section 45 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) should provide, in relation to the statutory prohibition in s 45(1) of the Act, that before proceedings have commenced, applications to publish the identity of a person protected by the prohibition can be heard by any court in which the proceedings could be commenced.

11.37 Where there is an application to lift the prohibition in s 45(1) of the *Crimes (Domestic and Personal Violence) Act* before proceedings have commenced, recommendation 11.6 provides that proceedings can be heard by any court in which proceedings could be commenced.

Lifting mechanism by consent

Recommendation 11.7: Mechanism for a person to consent to lifting the prohibition on publication on publication

Section 45 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) should provide, in relation to the statutory prohibition in s 45(1) of the Act:

(1) A child aged under 16 years at the time of publication cannot consent to the publication of their identity.

(2) A person aged 16 years or over but under 18 years at the time of publication can consent to the publication of their identity after receiving advice from an Australian legal practitioner about the implications of consenting.

(3) A person aged 18 years or over at the time of publication can consent to the publication of their identity.

(4) However, a person cannot consent to the publication of their identity under recommendation 11.7(2)–(3) if:

  (a) the publication may identify:

    (i) a child who is protected by the prohibition and who is aged under 16 years, or

    (ii) any other person who is protected by the prohibition and who has not consented to the publication of their identity, or

  (b) the proceedings are ongoing.

11.38 Section 45(4)(b) of the *Crimes (Domestic and Personal Violence) Act* enables the person protected by the prohibition in s 45(1), or a person protected by an order under s 45(2), to consent to publication of their identity.

11.39 Recommendation 11.7 could be given effect by replacing s 45(4)(b) with our standard approach to lifting statutory prohibitions by consent outlined in chapter 8. Consistent with this approach, a child under 16 would not be able to consent to publication of their identity, and a person aged 16 or 17 could only consent after receiving advice from an Australian legal practitioner. A person 18 or over would be able to consent to publication of their identity, subject to some exceptions.

11.40 Recommendation 11.7(4) sets out the exceptions to a person's ability to consent to publication of their identity. This includes where the publication may identify another child or person protected by the prohibition and where the proceedings are ongoing.

11.41 Legislation in some other Australian jurisdictions contains mechanisms for lifting similar prohibitions by consent.[18] Queensland legislation requires the consent of each "person to whom the information relates" before the prohibition can be lifted.[19]

11.42 As with the mechanisms for lifting the prohibition with leave of the court, recommendation 11.7 applies only to the statutory prohibition in s 45(1). Mechanisms for varying or revoking an order made under s 45(2) are discussed below (recommendation 11.10(2)).

No new statutory prohibitions

11.43 We considered whether there should be two new statutory prohibitions in proceedings related to domestic violence:

- a new statutory prohibition on publishing the identity of a complainant in a domestic violence offence proceeding, and
- a new statutory prohibition on publishing the identity of an adult involved in ADVO proceedings (as the person sought to be protected by the ADVO or against whom an ADVO is sought, a witness, or a person who is mentioned or otherwise involved in the proceedings).

11.44 Several submissions supported the introduction of a statutory prohibition on the identity of a complainant in a domestic violence offence related matter.[20] They argued that the

18. *Domestic and Family Violence Protection Act 2012* (Qld) s 159(2)(b); *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 33.
19. *Domestic and Family Violence Protection Act 2012* (Qld) s 159(2)(b).
20. 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; Domestic Violence NSW, *Preliminary Submission PCI42*, 5; Rape and Domestic Violence Services Australia, *Submission CI08* [18], [34]; NSW Office of the Director of Public Prosecutions, *Submission CI17*, 6.

same policy reasons for a statutory prohibition on publishing the identity of sexual offence complainants applies in the context of domestic violence,[21] in particular:

- there is a need to encourage complainants to report their experiences of domestic violence[22]
- complainants should be protected from re-traumatisation, stigma, shame and distress when taking part in the court process[23]
- fear of media exposure can be used by perpetrators to discourage victims from reporting offences and participating in court proceedings,[24] and
- when domestic violence is reported by the media and shared on social media, victims can be subject to pressure from family, friends and the public, which can discourage them from participating in proceedings.[25]

11.45 Arguments in favour of a statutory prohibition prohibiting publication of the identity of an adult in an ADVO proceeding include that:

- an applicant for an ADVO may be deterred from participating in proceedings if they are aware their identity may be published[26]
- there is a relatively low threshold for obtaining an ADVO, and the allegations do not have to be proven to a criminal standard[27]
- ADVO proceedings are similar to family law proceedings, where there is a statutory prohibition on publishing the identity of the parties,[28] and
- in other Australian jurisdictions, there are statutory prohibitions on publishing identifying information about people involved in proceedings related to protection orders.[29]

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21. NSW Office of the Director of Public Prosecution, *Preliminary Submission PCI12*, 6; No to Violence, *Preliminary Submission PCI38*, 1–2.
22. NSW Young Lawyers Criminal Law Committee, *Preliminary Submission PCI37*, 5; Rape and Domestic Violence Services Australia, *Submission CI08* [18]; NSW Office of the Director of Public Prosecutions, *Submission CI17*, 6.
23. Domestic Violence NSW, *Preliminary Submission PCI42*, 5; Rape and Domestic Violence Services Australia, *Submission CI08* [18].
24. Legal Aid NSW, *Submission CI24*, 11.
25. Legal Aid NSW, *Submission CI24*, 11.
26. Legal Aid NSW, *Submission CI24*, 11.
27. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 16.
28. *Family Law Act 1975* (Cth) s 121.

11.46 On the other hand, the New Zealand Law Commission has observed that a statutory prohibition in domestic violence offence proceedings may add to the hidden nature of domestic violence, as in many cases it would require protection of the defendant's name, to avoid identifying the complainant.[30]

11.47 Legal Aid submitted that ADVO and domestic violence offence proceedings constitute a large proportion of cases heard in the Local Court.[31] Such proceedings are generally heard in open court and are not (except in the case of children in AVO proceedings) subject to restrictions on publication. In 2020, 37,981 AVOs were granted in the Local Court. Of these, 33,830 were ADVOs and 4151 were APVOs.[32] Given this, Legal Aid argued that a statutory prohibition in these proceedings would constitute a "significant departure from the principle of open justice". It may also lead to increased criminalisation of defendants for inadvertent breaches, particularly as many are unrepresented.[33]

11.48 We have concluded that new statutory prohibitions on publishing the identify of people involved in domestic violence offence proceedings and ADVO proceedings would amount to a significant exception to the principle of open justice. We consider that it is preferable for a court to consider a person's circumstances on a case by case basis.

11.49 We recommend specific grounds in the new Act to enable a court to make a non-publication or non-disclosure order where necessary to avoid causing undue distress or embarrassment to a party or witness in criminal or civil proceedings related to a domestic violence offence.[34] Legal Aid supported such an approach.[35]

Discretion to make a non-publication order in AVO proceedings

11.50 Section 45(2) of the *Crimes (Domestic and Personal Violence) Act* enables a court to prohibit publication or broadcast of the name of a person (other than a child covered by the statutory prohibition in s 45(1)) who is involved in, or reasonably likely to be involved in, AVO proceedings. This includes the person protected or against whom an AVO is sought, a witness, or a person mentioned or otherwise involved in proceedings.

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29. *Family Violence Act 2016* (ACT) s 149; *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).
30. New Zealand Law Commission, *Suppressing Names and Evidence*, Report 109 (2009) [4.18].
31. Legal Aid NSW, *Submission CI24*, 11.
32. NSW Bureau of Crime Statistics and Research, *NSW Criminal Courts Statistics Jan 2016–Dec 2020* (May 2021) table 7.
33. Legal Aid NSW, *Submission CI24*, 11.
34. Recommendation 6.4(d)–(e).
35. Legal Aid NSW, *Submission CI24*, 11–12.

11.51 The name of the person protected by an order made under s 45(2) must not be published or broadcast before the proceedings are commenced or after the proceedings are commenced but before they are disposed of.

11.52 Similar orders can be made under Tasmanian legislation.[36]

Uniform terminology

Recommendation 11.8: Uniform terminology in the discretion to make a non-publication order under s 45(2) of the *Crimes (Domestic and Personal Violence) Act*

Section 45(2) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) should:

(a) adopt language consistent with a discretion to make a non-publication order, and

(b) define "non-publication order" in the same way as in recommendation 3.1.

11.53 Recommendation 11.8(a) is to change the language of s 45(2) to reflect the classification of the provision as a discretion to make a non-publication order. This could be done by replacing the court's discretion to make a direction with a discretion to make a "non-publication order".

11.54 Recommendation 11.8(b) is for the provision to contain the same definition of "non-publication order" recommended in chapter 3.

11.55 Recommendation 11.1, which would adopt and define the terms "publish" and "information tending to identify" for the whole of s 45 of the *Crimes (Domestic and Personal Violence) Act*, would also apply to the discretion to make a non-publication order.

Duration of the non-publication order

Recommendation 11.9: Duration of non-publication orders under s 45(2) of the *Crimes (Domestic and Personal Violence) Act*

Section 45 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) should provide, in relation to an order made under s 45(2) of the Act:

(1) A non-publication order must specify the period for which the order operates.

(2) A court, in deciding the period for which an order is to operate, must ensure that the order operates for no longer than is reasonably necessary to achieve the purpose for which the order is made.

(3) The period for which an order operates is to be determined by reference to:

  (a) a fixed or ascertainable period, or

  (b) the occurrence of a specified future event.

(4) An order may be specified to operate indefinitely in exceptional circumstances or where it is not reasonably practicable to specify a duration.

36. *Family Violence Act 2004* (Tas) s 32(1).

11.56 Currently, orders under s 45(2) of the *Crimes (Domestic and Personal Violence) Act* apply only until proceedings have concluded. Recommendation 11.9 is to insert a duration provision that reflects the new Act,[37] to ensure that:

- courts have the discretion to set a duration for the order that is reasonably necessary to achieve its purpose, and
- an order can be made to apply indefinitely only in exceptional circumstances or where it is not reasonably possible to specify a duration.

11.57 This is intended to give courts the flexibility to make orders that apply beyond the conclusion of the proceedings, while also ensuring that orders only apply for as long as necessary in the circumstances of the case. In addition, in circumstances where the statutory prohibition in s 45(1) of the *Crimes (Domestic and Personal Violence) Act* applies to a child or young person who is related to the adult protected by the order, the court is able to make an order for a period past the conclusion of proceedings to ensure the prohibition is not undermined.

Procedures for applying for and reviewing a non-publication order

Recommendation 11.10: Procedures for applying for and reviewing a non-publication order under s 45(2) of the *Crimes (Domestic and Personal Violence) Act*

Section 45 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) should provide, in relation to an order made under s 45(2) of the Act:

(1) A non-publication order may be made on:

(a) the court's own initiative, or

(b) the application of a party to the proceedings or a person that the court considers has sufficient interest.

(2) The court that made a non-publication order may vary or revoke it on:

(a) the court's own initiative, or

(b) the application of a party to the proceedings or a person that the court considers has sufficient interest.

11.58 Recommendation 11.10(1) clarifies that a court may make an order under s 45(2) on its own initiative, or on the application of a party or a person with sufficient interest (for example, a witness or person mentioned in the proceedings). This makes clear that a person who may need the protection of an order can seek one.

11.59 Section 45(7) of the *Crimes (Domestic and Personal Violence) Act* provides that a court may vary or revoke a direction given under s 45(2). Recommendation 11.10(2) is that a party or person with sufficient interest may also apply to vary or revoke the order.

37. Recommendation 6.9.

11.60 Unlike our draft proposal, [38] we do not recommend that a broad range of persons (such as a government agency or the media) should have standing to apply for, and appear and be heard on, an application for an order. AVO proceedings are often personal and private in nature.

11.61 However, in appropriate circumstances, a journalist or news media organisation could qualify as a person with sufficient interest to apply to vary or revoke an order.

Exclusion provisions

Statutory exclusion provisions in AVO proceedings concerning children and young people

11.62 Section 41 (in relation to children) and s 41AA (in relation to young people) of the *Crimes (Domestic and Personal Violence) Act* provide that the following proceedings must be heard "in the absence of the public", unless the court directs otherwise:

- proceedings in which an AVO is sought or proposed to be made for the protection of a child or a young person
- proceedings relating to an application for the variation or revocation of an AVO, if the protected person or one of the protected people is a child or young person
- any part of proceedings in which an AVO is sought or proposed to be made in which a child or a young person appears as a witness
- any part of proceedings in relation to an application for the variation or revocation of an AVO in which a child or a young person appears as a witness
- any part of proceedings for the variation or revocation of a recognised non-local domestic violence order or for a declaration that a domestic violence order is a recognised domestic violence order in which a child or a young person appears as a witness
- proceedings in which an AVO is sought or proposed to be made against a child or a young person, and
- proceedings in relation to an application for the variation or revocation of an AVO made against a child or a young person.[39]

38. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 6.1.

39. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 41(1)–(2), s 41AA(1).

11.63 For the purposes of these provisions, a "child" is defined as a person under 16 and a "young person" is defined as a person aged 16 or 17.[40]

11.64 Under s 58 of the *Crimes (Domestic and Personal Violence) Act*, proceedings in relation to an application for the making of a final AVO or an interim order must be held "in the absence of the public" if the defendant is under 18.[41] However, the court may, if it considers it appropriate, permit people who are not parties to the proceedings or Australian legal practitioners to be present during the hearing of the proceedings.[42]

11.65 Section 41 was included in the *Crimes (Domestic and Personal Violence) Act* when it was originally enacted. Sections 41AA and 58 were inserted in 2018,[43] to:

- ensure that the protections were extended to both children and young people (not just children under 16), and
- make the laws consistent with the approach to child defendants in criminal proceedings.[44]

11.66 Legislation in other Australian states and territories provides that courts are to be, or may be, closed for proceedings similar to NSW AVO proceedings generally (that is, not only those involving children or young people).[45]

11.67 Few submissions commented on these provisions in the *Crimes (Domestic and Personal Violence) Act*, although some expressed general support for excluding the public in AVO proceedings involving children.[46]

Uniform terminology

Recommendation 11.11: Uniform terminology in statutory exclusion provisions in AVO proceedings involving children

(1) Section 41(2) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) should provide that all people, other than those whose presence is necessary, are excluded from the proceedings or part of proceedings to which s 41 applies, unless the court hearing the proceedings otherwise directs.

(2) Section 41AA(1) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) should provide that all people, other than those whose presence is necessary, are excluded from the proceedings or part of proceedings to which s 41AA applies, unless the court hearing the proceedings otherwise directs.

40. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 3(1) definition of "child", s 41AA(2).
41. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 47 definition of "application", s 58(1)(a).
42. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 58(2).
43. *Crimes Legislation Amendment (Victims) Act 2018* (NSW) sch 2 [2], [3].
44. NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 24 October 2018, 76.
45. *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.
46. Fighters Against Child Abuse Australia, *Submission CI32*, 24; Legal Aid NSW, *Submission CI24*, 21.

(3) Section 58(1)–(2) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) should provide:

(a) In application proceedings before the court, if the defendant is under the age of 18 years, all people, other than those whose presence is necessary, are excluded from the proceedings, unless the court hearing the proceedings otherwise directs.

(b) In any other circumstances, application proceedings are to be heard in open court.

11.68 We classify s 41(2), s 41AA(1) and s 58(1)(a) as statutory exclusion provisions (chapter 3). We have not classified these provisions as requirements to make exclusion orders as they operate in a high-volume summary jurisdiction. Requiring a court to make an exclusion order in these cases would create a substantial burden of additional work for judicial officers and court registries.

11.69 Unlike other provisions that require the public to be excluded from only part of proceedings, s 41(2), s 41AA(1) and s 58(1)(a) of the *Crimes (Domestic and Personal Violence) Act* can apply to the entirety of the proceedings.

11.70 Recommendation 11.11 is for these provisions each to adopt uniform terminology that reflects their classification as a statutory exclusion provision. That is, the provisions should be amended to provide that all people, other than those who are necessary, are "excluded" from proceedings or part of proceedings to which the relevant provision applies, unless the court hearing the proceedings otherwise directs.

11.71 We note that, under s 58(2) of the *Crimes (Domestic and Personal Violence) Act,* the court may permit people who are not parties to the proceedings, Australian legal practitioners or other representatives of the parties to be present in application proceedings from which the public are excluded. Recommendation 11.11(3)(a), which refers to the court directing otherwise, would provide scope for the court to permit these categories of people to remain in the proceedings.

Requirement to make an exclusion order in domestic violence proceedings

11.72 Section 298U of the *Criminal Procedure Act* provides that proceedings must be held "in camera" (unless the court directs otherwise), when evidence is given by a complainant in domestic violence offence proceedings, or when a recording of evidence of the complainant is heard by the court.[47] This provision also applies to AVO proceedings if:

- the defendant in the proceedings is a person charged with a domestic violence offence, and
- the protected person is the alleged victim of the offence.[48]

47. *Criminal Procedure Act 1986* (NSW) s 289T(1)(a), s 289U(1).

48. *Criminal Procedure Act 1986* (NSW) s 289T(1)(b).

11.73 There is an exception to enable the complainant to choose a person to be present near them when giving evidence.[49]

11.74 The court may also direct that a part of the proceedings may be in open court, but only if a party requests it 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 complainant consents to giving their evidence in open court.[50]

11.75 The principle that proceedings for an offence should generally be open or public in nature, or that justice should be seen to be done, does not of itself constitute special reasons in the interests of justice requiring the part of the proceedings to be held in open court.[51]

11.76 Section 289U of the *Criminal Procedure Act* is similar to s 291, which applies in prescribed sexual offence proceedings (chapter 10). Section 289U was introduced in 2020.[52] The rationale was that, given the sensitive dynamic of domestic violence offences and potential for the complainant to experience trauma and distress as a result of giving evidence in public, limiting access to the courtroom is appropriate.[53]

11.77 Legislation in the NT similarly requires proceedings to be closed while the complainant in a domestic violence offence proceeding gives evidence.[54] Further:

- legislation in Queensland and Tasmania allows the court to close proceedings relating to a domestic or family violence offence when the complainant gives evidence or a recording of their evidence is presented, and
- legislation in Victoria allows the court to close the whole or any part of family violence offence proceedings where this is necessary to avoid causing undue distress or embarrassment to a complainant or witness.[55]

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49. *Criminal Procedure Act 1986* (NSW) s 306ZQ(1).
50. *Criminal Procedure Act 1986* (NSW) s 289U(2).
51. *Criminal Procedure Act 1986* (NSW) s 289U(3).
52. *Stronger Communities Legislation Amendment (Domestic Violence) Act 2020* (NSW) sch 2 [3].
53. NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 22 October 2020, 4990.
54. *Evidence Act 1939* (NT) s 21AB(d), s 21A(2AD)(b).
55. *Evidence Act 1977* (Qld) s 21A(1)(d) definition of “special witness”, s 21A(2)(b), s 21AAA(1)–(2); *Evidence (Children and Special Witnesses) Act 2001* (Tas) s 8(2)(b)(iii), s 8(2A)–(2B); *Open Courts Act 2013* (Vic) s 30(2)(d).

11.78 There was strong support for the general principle that the public should be excluded from the court when a complainant gives evidence in domestic violence offence proceedings.[56] Submissions and consultations highlighted that this:

- avoids the intimidation and trauma that may be caused by giving evidence in public
- assists domestic violence complainants to give their best evidence, and
- encourages reporting of domestic violence offences.[57]

11.79 In addition, there was support for allowing complainants to consent to giving evidence in open court.[58] This provides complainants with autonomy and allows them to share their experiences if they choose to do so.[59]

11.80 Some argued that a defendant should not be allowed to request that the complainant give evidence in open court.[60] There was a concern that defendants could make these requests to deter complainants from participating in the proceedings or make it more difficult for them to do so.[61]

11.81 We do not recommend changes to a party's (including a defendant's) ability to request that the complainant gives evidence in open court. Under s 289U(2) of the *Criminal Procedure Act* a request by a party is insufficient of itself: the court must also be satisfied that special reasons in the interests of justice require that part of the proceedings be held in open court or that the complainant consent to this. This would ensure that applications are granted only in limited and appropriate circumstances.

A new requirement to make an exclusion order in all ADVO proceedings

Recommendation 11.12: Requirement to make an exclusion order in all ADVO proceedings involving adults

(1) Section 289U of the *Criminal Procedure Act 1986* (NSW) should apply only to domestic violence offence proceedings.

(2) A new provision, based on s 289U of the *Criminal Procedure Act 1986* (NSW), should be inserted into the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) that

56. Rape and Domestic Violence Services Australia, *Submission CI08* [6]; Roundtable 3, *Consultation CIC05*; Women's Legal Service NSW, *Consultation CIC07*; Women's Legal Service NSW, *Preliminary Consultation PCI04*.
57. NSW Young Lawyers Criminal Law Committee, *Preliminary Submission PCI37,* 5; Women's Legal Service NSW, *Preliminary Consultation PCI04.*
58. Legal Aid NSW, *Submission CI24*, 22–23; Roundtable 3, *Consultation CIC05*; Women's Legal Service NSW, *Preliminary Consultation PCI04.*
59. Legal Aid NSW, *Submission CI24*, 22–23.
60. Feminist Legal Clinic Inc, *Submission CI16*, 2; Legal Aid NSW, *Submission CI24*, 22; Women's Legal Service NSW, *Preliminary Consultation PCI04*.
61. Women's Legal Service NSW, *Preliminary Consultation PCI04*; Legal Aid NSW, *Submission CI24*, 22.

applies when a person in need of protection aged 18 years or over gives evidence in an apprehended domestic violence order proceeding.

11.82 As discussed above, s 289U of the *Criminal Procedure Act* only applies to ADVO proceedings that involve the same defendant and victim (referred to as the person in need of protection or protected person in ADVO proceedings) as those in criminal proceedings for a domestic violence offence.

11.83 There is no corresponding provision in the *Crimes (Domestic and Personal Violence Act)* that applies in ADVO proceedings generally. The effect of recommendation 11.12 is that the same protection would apply to all ADVO proceedings, whether or not they are related to domestic violence offence proceedings.

11.84 There was support for the general principle that the public should be excluded from ADVO proceedings when the person in need of protection gives evidence.[62] Legal Aid observed that the experience for victims may be the same, regardless of whether the ADVO proceedings are connected to domestic violence offence proceedings.[63]

11.85 Recommendation 11.12 is similar to our draft proposal,[64] which some submissions supported.[65] It is also similar to legislation in:

- Queensland, which requires applications relating to domestic violence orders be closed to the public,[66] and
- the NT, which requires proceedings for domestic violence orders be closed to the public when a protected person gives evidence.[67]

11.86 As ADVO proceedings are not criminal proceedings, the *Criminal Procedure Act* is an inappropriate place for provisions that relate only to ADVO proceedings. Therefore:

- s 289U of the *Criminal Procedure Act* should apply only in domestic violence offence proceedings, and
- a new provision, based on s 289U, should be introduced into the *Crimes (Domestic and Personal Violence) Act* and apply in ADVO proceedings when the protected person gives evidence.

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62. Rape and Domestic Violence Services Australia, *Submission CI08* [7]; Roundtable 3, *Consultation CIC05*; Women's Legal Service NSW, *Consultation CIC07*; Women's Legal Service NSW, *Preliminary Consultation PCIC04.*
63. Legal Aid NSW, *Submission CI57*, 21.
64. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 7.4, proposal 7.14.
65. NSW Office of the Director of Public Prosecutions, *Submission CI48*, 3; Legal Aid NSW, *Submission CI57*, 21; Rape and Domestic Violence Services Australia, *Submission CI61* [31].
66. *Domestic and Family Violence Protection Act 2012* (Qld) s 158.
67. *Domestic and Family Violence Act 2007* (NT) s 104(a) definition of "vulnerable witness", s 106(1)(b).

11.87 The new provision in the *Crimes (Domestic and Personal Violence) Act* should only apply where a protected person in ADVO proceedings is over 18. This is because other provisions in this Act provide for the exclusion of the public in AVO proceedings concerning children and young people, see above.

Uniform terminology

Recommendation 11.13: Uniform terminology in the requirements to make exclusion orders in domestic violence proceedings and ADVO proceedings

Section 289U of the *Criminal Procedure Act 1986* (NSW) and the new provision referred to in recommendation 11.12(2) should:

(a) adopt language consistent with a requirement to make an exclusion order, excluding all people other than those whose presence is necessary for the proceedings, and

(b) provide that "exclusion order" has the same meaning and effect as it has in recommendation 3.1.

11.88 We classify s 289U of the *Criminal Procedure Act,* and the equivalent provision in the *Crimes (Domestic and Personal Violence) Act* recommended above (recommendation 11.12(2)), as requirements to make an exclusion order (chapter 3).

11.89 We considered whether these provisions should be classified as statutory exclusion provisions. As discussed in chapter 3, a statutory exclusion provision applies automatically, without the court needing to make an order, which is beneficial in high-volume jurisdictions.

11.90 Domestic violence related proceedings are generally heard in high-volume summary jurisdictions, such as the Local Court. For example, 43,794 AVOs were granted in the Local Court in 2020. Of these, 38,669 were ADVOs.[68]

11.91 We have concluded that s 289U, and the equivalent provision in the *Crimes (Domestic and Personal Violence) Act,* should require courts to make an exclusion order, rather than apply automatically. This is because the provisions would apply to only part of proceedings (that is, when the complainant or protected person gives evidence). Recommendation 11.13(a) means that a court must take steps to exclude the public when that part of proceedings arises.

11.92 Recommendation 11.13(a) is for s 289U of the *Criminal Procedure Act*, and the equivalent provision in the *Crimes (Domestic and Personal Violence) Act,* to adopt language consistent with a requirement to make an exclusion order excluding all people other than those whose presence is necessary. This reflects the broad application of s 289U, which requires the parts of proceedings in which the complainant gives evidence, or a recording of their evidence is heard, to be "held in camera". The intent of

68. NSW Bureau of Crime Statistics and Research, *NSW Criminal Courts Statistics July 2016–June 2021* (December 2021) table 7.

the current language is plainly that all people not required for the proceedings are to be excluded.

11.93 Recommendation 11.13(a) could be given effect by replacing the requirement in s 289U of the *Criminal Procedure Act* for the parts of proceedings in which the complainant gives evidence, or a recording of their evidence is heard by the court, to be "held in camera" with a requirement for the court to make an "exclusion order excluding all people other than those who are necessary" in these parts of the proceedings.

11.94 Under recommendation 3.1, an exclusion order can have a narrow application (for example, to a specified person or class of people), whereas under recommendation 11.13(a), the court is required to make a broad exclusion order that excludes all people other than those whose presence is necessary for the proceedings. Recommendation 11.13(a) makes plain that in this case, it is to apply to all people other than those whose presence is necessary.

11.95 Thus, recommendation 11.13(b), is for s 289U of the *Criminal Procedure Act* and the equivalent provision in the *Crimes (Domestic and Personal Violence) Act* to provide that "exclusion order" has the same meaning and effect as it has in recommendation 3.1. This is intended to clarify that an order made under these provisions results in physical exclusion from the court but has no consequential impact on disclosure of information from the proceedings.

Discretions to make an exclusion order in domestic violence related proceedings

11.96 Section 289UA(1) applies to domestic violence offence proceedings, and provides that a court may direct that the parts of proceedings other than when the complainant gives evidence, or the entire proceedings, be held "in camera". The court may make this direction either on its own motion or at the request of a party.[69]

11.97 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.[70]

11.98 If the court makes a direction, it may still exempt a person to allow them to be present as 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.[71]

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69. *Criminal Procedure Act 1986* (NSW) s 289UA(2).
70. *Criminal Procedure Act 1986* (NSW) s 289UA(1)–(3).

11.99 Section 289UA of the *Criminal Procedure Act* is similar to s 291A, which applies in prescribed sexual offence proceedings (chapter 10). It was introduced in 2020.[72]

11.100 Section 41(3) of the *Crimes (Domestic and Personal Violence) Act* applies to AVO proceedings in respect of children under 16, and provides that, even if the court has exercised its residual discretion in s 41(2) to allow that the proceedings or a part of proceedings are open to the public, the court may direct any person (other than a person who is directly interested in the proceedings) to leave the place where the proceedings are being heard during the examination of any witness.[73] The residual discretion in s 41(2) must have been exercised before a court can direct a person to leave under s 41(3).

A new discretion to make exclusion orders in ADVO proceedings involving adults

Recommendation 11.14: Discretion to make an exclusion order in all ADVO proceedings involving adults

A new provision, based on s 289UA of the *Criminal Procedure Act 1986* (NSW), should be inserted into the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) that applies in apprehended domestic violence order proceedings when a protected person is aged 18 years or over.

11.101 Section 289UA of the *Criminal Procedure Act* applies only to domestic violence offence proceedings.[74] Recommendation 11.14 is to allow exclusion orders to be made in all ADVO proceedings where the protected person is 18 years or over. This would mean that the court would have the discretion to make an exclusion order in the parts of proceedings other than when the protected person gives evidence, or for the entire proceedings.

11.102 This recommendation is also similar to legislation in Victoria and the ACT, which allows the court to close the whole or part of proceedings for a family violence intervention order or protection order, or to permit only certain people to be present.[75]

Uniform terminology

Recommendation 11.15: Uniform terminology in the discretions to make exclusion orders in domestic violence proceedings and ADVO proceedings

(1) Section 289UA of the *Criminal Procedure Act 1986* (NSW) and the new provision referred to in recommendation 11.14 should adopt language consistent with a discretion to make an exclusion order.

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71. *Criminal Procedure Act 1986* (NSW) s 289UA(5).
72. *Stronger Communities Legislation Amendment (Domestic Violence) Act 2020* (NSW) sch 2[3].
73. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 41(3).
74. *Criminal Procedure Act 1986* (NSW) s 289UA(1).
75. *Family Violence Act 2016* (ACT) s 60(1)(a); *Family Violence Protection Act 2008* (Vic) s 68.

(2) Section 41(3) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) should adopt language consistent with a discretion to make an exclusion order excluding any person (other than a person who is directly interested in the proceedings).

(3) Section 289UA of the *Criminal Procedure Act 1986* (NSW), the new provision referred to in recommendation 11.14 and s 41(3) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) should provide that "exclusion order" has the same meaning and effect as it has in recommendation 3.1.

11.103 We classify s 289UA of the *Criminal Procedure Act,* the new provision in the *Crimes (Domestic and Personal Violence) Act* referred to in recommendation 11.14 and s 41(3) of the *Crimes (Domestic and Personal Violence) Act* as discretions to make an exclusion order (chapter 3). Recommendation 11.15(1)–(2) is to amend these provisions to incorporate language reflecting this classification.

11.104 Recommendation 11.15(1) could be given effect by replacing the discretion in s 289UA of the *Criminal Procedure Act* to hold any other part of the proceedings, or the entire proceedings, "in camera" with a discretion to make an "exclusion order" in such circumstances.

11.105 Under recommendation 11.15(1), there is no limit on the scope of the discretion to make an exclusion order. This means that an order made under s 289UA of the *Criminal Procedure Act* or the equivalent provision in the *Crimes (Domestic and Personal Violence) Act* could be made to apply to a specified person or class of people, or all people other than those whose presence is necessary for the proceedings. This reflects the discretionary nature of s 289UA. It would also enable the court to make an exclusion order of whatever scope is appropriate in the circumstances of the case.

11.106 Recommendation 11.15(2) could be given effect by replacing the discretion in s 41(3) of the *Crimes (Domestic and Personal Violence) Act* to "direct any person (other than a person who is directly interested in the proceedings) to leave the place where the proceedings are being heard during the examination of any witness" with a discretion to make an "exclusion order excluding any person (other than a person who is directly interested in the proceedings)" in these circumstances. The scope of the discretion to make an exclusion order is limited to reflect the current scope of the provision.

11.107 Under recommendation 11.15(3), the provisions would state that "exclusion order" has the same meaning and effect as it has in recommendation 3.1. This clarifies that an order made under these provisions involves physical exclusion from the court but has no consequential impact on disclosure of information from the proceedings.

Limited exceptions for journalists

Recommendation 11.16: Limited exceptions for journalists in domestic violence proceedings, AVO and ADVO proceedings

(1) The *Criminal Procedure Act 1986* (NSW) should provide that if a court makes an exclusion order under s 289U or s 289UA of the Act, a journalist may:

(a) view or hear the proceedings, or view or hear a record of the proceedings, if:

(i) the complainant is aged 16 years or over but under 18 years and consents to this, after receiving advice from an Australian legal practitioner about the implications of consenting, or

(ii) the complainant is aged 18 years or over and consents to this, or

(iii) the complainant is aged 16 years or over and the court is satisfied that the public interest in allowing the journalist to view or hear the proceedings, or view or hear a record of the proceedings significantly outweighs the complainant's wishes, but

(b) not be present in the courtroom or other place where the evidence is given.

(2) The *Crimes (Domestic and Personal Violence) Act 2007* (NSW) should provide that if a court makes an exclusion order under the new provisions referred to in recommendations 11.12(2) and 11.14, a journalist may:

(a) view or hear the proceedings, or view or hear a record of the proceedings, if:

(i) the protected person is aged 16 years or over but under 18 years and consents to this, after receiving advice from an Australian legal practitioner about the implications of consenting, or

(ii) the protected person is aged 18 years or over and consents to this, or

(iii) the protected person is aged over 16 years or over and the court is satisfied that the public interest in allowing the journalist to view or hear the proceedings, or view or hear a record of the proceedings significantly outweighs the protected person's wishes, but

(b) not be present in the courtroom or other place where the evidence of the protected person is given.

(3) Section 41AA and s 58(1)(a) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) should provide that despite anything else in that section, a journalist may:

(a) view or hear the proceedings, or view or hear a record of the proceedings, if:

(i) the young person consents to this on the advice of an Australian legal practitioner about the implications of consenting, or

(ii) the court is satisfied that the public interest in allowing the journalist to view or hear the proceedings, or view or hear a record of the proceedings significantly outweighs the young person's wishes, but

(b) not be present in the courtroom or other place where the evidence is given.

(4) In these provisions, "journalist" should be defined in the same way as in recommendation 3.5.

11.108 Recommendation 11.16 is to introduce limited exceptions for journalists in domestic violence offence proceedings, ADVO proceedings concerning adults and AVO proceedings involving young people where the public is excluded. It is similar to the limited exception for journalists recommended for sexual offence proceedings (chapter 10). It is discussed further in chapter 8.

11.109 Permitting journalists to view or hear, and report on, domestic violence proceedings, ADVO proceedings concerning adults and AVO proceedings is consistent with the trend towards raising awareness about the nature and prevalence of domestic violence more generally.[76] There was some support in submissions for exceptions for journalists in domestic violence proceedings, ADVO proceedings concerning adults and AVO proceedings.[77] Banki Haddock Fiora observed that the current law, which does not contain exceptions for journalists:

> tends to result in under-reporting of the prevalence of domestic violence and the outcomes of those cases, as key details of the offences have been heard in camera and are unable to be reported.[78]

11.110 Recommendation 11.16 is similar to the limited exception for journalists recommended for sexual offence proceedings (chapter 10). In the case of domestic violence offence proceedings and ADVO proceedings concerning adults, a journalist would be able to view or hear the proceedings, or view or hear a record of the proceedings, if:

- the complainant or protected person consents, or
- the court is satisfied that the public interest in allowing the journalist to view or hear the proceedings, or view or hear a record of the proceedings significantly outweighs the complainant or protected person's wishes.

11.111 In relation to AVO proceedings involving young people, journalists would be able to view or hear the proceedings, or view or hear a record of the proceedings, if:

- the young person consents to this on the advice of an Australian legal practitioner about the implications of consenting, or
- the court is satisfied that the public interest in allowing the journalist to view or hear the proceedings, or view or hear a record of the proceedings significantly outweighs the young person's wishes.

11.112 We do not recommend including the same limited exception for journalists in s 41 of the *Crimes (Domestic and Personal Violence) Act,* to apply in AVO proceedings concerning children. This is because of the lack of maturity of children under 16, the risk of their being subject to undue influence and the potential long-term consequences of allowing journalists to view or hear, and report on, the proceedings.

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76. See, eg, Victorian Law Reform Commission, *Contempt of Court*, Report (2020) [12.148].
77. Australia's Right to Know, *Submission CI27*, 78–79; Banki Haddock Fiora, *Submission CI29*, 4; Roundtable 1, *Consultation CIC02*.
78. Banki Haddock Fiora, *Submission CI29*, 4.

12. Other legislation containing exceptions to open justice

In Brief

There are a range of other exceptions to open justice in subject-specific legislation that do not fall within the topics covered in the preceding three chapters. For clarity and consistency, these provisions should adopt uniform terminology consistent with their classifications and relevant uniform definitions in chapter 3. Other changes should also be made, including a new exception for journalists when an exclusion order is made for the reading of a victim impact statement.

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12.1 In this chapter, we deal with existing provisions in subject-specific legislation that prohibit the publication and disclosure of information or restrict public access to court hearings, which are not dealt with elsewhere in the report.

12.2 We classify these provisions based on our classification framework and recommend that they should be amended to incorporate uniform terminology and definitions (chapter 3). We also recommend other changes to the provisions, including revised mechanisms for lifting certain statutory prohibitions on publication and a standard duration provision in certain discretions to make non-publication orders.

Statutory prohibitions on publication

12.3 In this section, we deal with seven provisions in subject-specific legislation that we classify as statutory prohibitions on publication.

Prohibitions relating to proceedings following acquittals

12.4 There are two Acts that contain three statutory prohibitions on publication relating to proceedings following acquittals.

12.5 Section 111 of the *Crimes (Appeal and Review) Act 2001* (NSW) (*Crimes (Appeal and Review) Act*) prohibits the publication of any matter for the purpose of identifying or having the effect of identifying an acquitted person who is the subject of a police investigation referred to in s 109, an application for retrial or appeal, an order for a retrial, or a retrial. This is meant to ensure potential jurors in a second trial 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.[1]

12.6 Section 108 of the *Crimes (Appeal and Review) Act* provides that the Attorney General or the Director of Public Prosecutions may submit a question of law, for determination

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

by the Court of Criminal Appeal, arising at or in connection with acquittals of a person in any proceedings tried:

- on indictment, or
- by the Supreme Court or the Land and Environment Court in its summary jurisdiction in which the Crown was a party.[2]

12.7 Section 108(6) of the *Crimes (Appeal and Review) Act* prohibits publication of reports of submissions or proceedings about a question of law arising from a trial of an acquitted person. This provision "make[s] it clear that the person charged and acquitted ought not to be further identified".[3]

12.8 Section 101A of the *Supreme Court Act 1970* (NSW) (*Supreme Court Act*) provides that at any time after the conclusion of contempt proceedings in which an alleged contemnor is found not to have committed contempt, the Attorney General may submit to the Court of Appeal any question of law arising from or in connection with the proceedings. Section 101A(8) of the *Supreme Court Act* prohibits the publication of reports of submissions or appeals on questions of law where the alleged contemnor has earlier been found not to have committed contempt.

12.9 The statutory prohibitions in s 108(6) of the *Crimes (Appeal and Review) Act* and s 101A(8) of the *Supreme Court Act* allow the prosecution to settle questions of law raised by the trial (which may be relevant to future proceedings), without causing negative publicity to the person who was acquitted, thereby casting doubt on the acquittal.

12.10 There are no close equivalents in other Australian states and territories.[4]

12.11 We consider these statutory prohibitions should be retained, given the potential for any information, if made public, to undermine the right to a fair trial (where there may be the possibility of a retrial) or to impact the acquitted person's reintegration into society.

Prohibitions relating to prohibited associates and people named in non-association orders

12.12 Section 89 of the *Bail Act 2013* (NSW) (*Bail Act*) prohibits publishing or broadcasting 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 under their bail conditions).

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2. *Crimes (Appeal and Review) Act 2001* (NSW) s 108(1)–(2).
3. *Re Burton* [2021] NSWCCA 87 [6].
4. Australia's Right to Know, *Submission CI27*, 5, 7.

12.13 Similarly, s 100H of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (*Crimes (Sentencing Procedure) Act*) prohibits publishing or broadcasting information that identifies a person named in a non-association order (other than the offender). A non-association order prohibits an offender from associating with a specified person for a specified term.

12.14 The prohibitions do not apply to:

- publication or broadcast in an official report of proceedings,[5] or
- disclosures to a list of prescribed persons, including the accused person, an associate of the accused person, and a member of the Police Force (among others).[6]

12.15 Australia's Right to Know (ARTK) argued that the prohibitions should be abolished because no other Australian jurisdictions have a prohibition similar to s 89 of the *Bail Act* and only the Australian Capital Territory (ACT) and the Northern Territory have equivalent provisions to s 100H of the *Crimes (Sentencing Procedure) Act*.[7]

12.16 We consider these prohibitions should be retained. They are justified by their purpose, which is to protect people named in non-association conditions or orders, who may not themselves be accused of a criminal offence, from negative connotations.[8]

Prohibition relating to forensic procedures

12.17 Section 43 of the *Crimes (Forensic Procedures) Act 2000* (NSW) (*Crimes (Forensic Procedures) Act*) 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, unless the suspect has been charged with the offence. A "suspect" includes a person whom a police officer suspects on reasonable grounds has committed an offence.[9]

12.18 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.[10] Publication of the suspect's identifying information is permitted solely for the purpose of the internal management of the Police Force.[11]

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5. *Bail Act 2013* (NSW) s 89(4); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 100H(2).
6. *Bail Act 2013* (NSW) s 89(3); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 100H(2).
7. Australia's Right to Know, *Submission CI27*, 20.
8. NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 26 October 2001, 18106.
9. *Crimes (Forensic Procedures) Act 2000* (NSW) s 3 definition of "suspect".
10. *Crimes (Forensic Procedures) Act 2000* (NSW) s 3 definition of "forensic procedure", definition of "intimate forensic procedure", definition of "non-intimate forensic procedure".
11. *Crimes (Forensic Procedures) Act 2000* (NSW) s 43(2).

12.19 The purposes of the prohibition appear to be to ensure that any ongoing investigation or the prospects of a fair trial are not jeopardised and that the privacy of people who are subject to forensic procedures, where they have not been charged, is maintained.

12.20 There are similar provisions in several other Australian jurisdictions.[12]

12.21 We consider this statutory prohibition should be retained, given the potential for any information, if made public, to undermine the right to a fair trial.

Prohibition relating to case conference material

12.22 Section 80 of the *Criminal Procedure Act 1986* (NSW) (*Criminal Procedure Act*) prohibits publishing case conference material. A case conference is a meeting held between the prosecution and defence to determine whether there are any offences to which the accused person is willing to plead guilty.[13]

12.23 "Case conference material" includes the "case conference certificate" and evidence of things done during a case conference or for the purposes of plea negotiations.[14] A case conference certificate records:

- the offence(s) for which the prosecution will seek committal for trial or sentence, and
- if an offer made to or by the accused person to plead guilty to an offence has been accepted, the agreed facts and details of any facts in dispute.[15]

12.24 ARTK suggested amending s 80 of the *Criminal Procedure Act* so that that the prohibition does not apply to publishing:

> (a) The offence or offences for which the prosecution will seek committal for trial or sentence, or
>
> (b) If an offer made to or by the accused person to plead guilty to an offence has been accepted – details of the agreed facts on the basis of which the accused person is pleading guilty and details of the facts (if any) in dispute, or
>
> (c) Any matter comprising part of the case conference material that is disclosed in court.[16]

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12. *Crimes (Forensic Procedures) Act 2000* (ACT) s 48; *Criminal Law (Forensic Procedures) Act 2007* (SA) s 51; *Forensic Procedures Act 2000* (Tas) s 24.
13. *Criminal Procedure Act 1986* (NSW) s 70(2).
14. *Criminal Procedure Act 1986* (NSW) s 78(5).
15. *Criminal Procedure Act 1986* (NSW) s 75(1).
16. Australia's Right to Know, *Submission CI27*, 104.

12.25 We do not recommend any changes to the scope of the prohibition. It is important to keep case conference material private to encourage accused people to make offers to plead guilty to offences.[17]

Uniform terminology

Recommendation 12.1: Uniform terminology in certain prohibitions on publication

Section 108(6) and s 111 of the *Crimes (Appeal and Review) Act 2001* (NSW), s 101A(8) of the *Supreme Court Act 1970* (NSW), s 89 of the *Bail Act 2013* (NSW), s 100H of the *Crimes (Sentencing Procedure) Act 1999* (NSW), s 43 of the *Crimes (Forensic Procedures) Act 2000* (NSW) and s 80 of the *Criminal Procedure Act 1986* (NSW) should, where relevant:

(a) adopt the term "publish" and define it in the same way as in recommendation 3.2

(b) define "disclose" in the same way as in recommendation 3.2, and

(c) adopt the term "information tending to identify" a person and define it in the same way as in recommendation 3.3.

12.26 Recommendation 12.1 is to to adopt uniform definitions of key terms consistent with the classification of a statutory prohibition on publication (chapter 3).

12.27 Recommendation 12.1(a) could be given effect by:

- removing unnecessary references to "broadcast" or "broadcasting" of information in s 89 of the *Bail Act* and s 100H of the *Crimes (Sentencing Procedure) Act*
- introducing the uniform definition of "publish" into s 108(6) and s 111 of the *Crimes (Appeal and Review) Act*, s 101A(8) of the *Supreme Court Act*, s 89 of the *Bail Act,* s 100H of the *Crimes (Sentencing Procedure) Act* and s 43 of the *Crimes (Forensic Procedures) Act,* as these provisions do not currently define the term "publish", and
- replacing the current definition of "publish" in s 80(2) of the *Criminal Procedure Act* (as "disseminate or provide public access to one or more persons by means of the internet, radio, television or other media") with the uniform definition of "publish".

12.28 Recommendation 12.1(b) could be given effect by introducing the uniform definition of "disclose" into s 89 of the *Bail Act* and s 100H of the *Crimes (Sentencing Procedure) Act,* as these provisions use this term, but do not currently define it.

12.29 Recommendation 12.1(c) could be given effect by using the term "information tending to identify" instead of:

- "identity" in s 108(6) of the *Crimes (Appeal and Review) Act*

17. See, eg, NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 11 October 2017, 280.

- "any matter for the purposes of identifying or having the effect of identifying" in s 111(1) of the *Crimes (Appeal and Review) Act*
- "name or identity" in s 101A(8) of the *Supreme Court Act*
- "information calculated to identify" in s 89(1) of the *Bail Act* and s 100H(1) of the *Crimes (Sentencing Procedure) Act*, and
- "name" and "information likely to enable the identification" in s 43 of the *Crimes (Forensic Procedures) Act*.

Exceptions to the prohibitions

Exception for an official report of proceedings

Recommendation 12.2: Exception for an official report of proceedings in certain prohibitions on publication

Section 101A(8) of the *Supreme Court Act 1970* (NSW) and s 111 of the *Crimes (Appeal and Review) Act 2001* (NSW) should:

(a) include an exception for an official report of proceedings, and

(b) define "official report of proceedings" in the same way as in recommendation 3.6.

12.30 For consistency with other statutory prohibitions on publication, s 101A(8) of the *Supreme Court Act* and s 111 of the *Crimes (Appeal and Review) Act* should include an exception for publication in an official report of proceedings.

12.31 Section 43 of the *Crimes (Forensic Procedures) Act* need not include an exception for an official report of proceedings, as forensic procedures take place before, and not in the course of, proceedings. If a charge is laid, the prohibition lapses.

12.32 We also do not recommend including an exception to the prohibition in s 80 of the *Criminal Procedure Act* for an official report of proceedings. As this provision deals with the pre-trial stage of a proceeding, there is no need to include an exception for official reports of proceedings.

Exceptions to the prohibitions relating to prohibited associates

Recommendation 12.3: Exceptions to the prohibitions relating to prohibited associates

Section 89(3) of the *Bail Act 2013* (NSW) and s 100H(2) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) should provide that, for the avoidance of doubt, the prohibition does not apply to the disclosure of information to the people prescribed in each provision.

12.33 Recommendation 12.3 ensures that, "for the avoidance of doubt", the prohibitions do not apply to the disclosure of information to the prescribed people in each provision.

12.34 While a prohibition on publication prohibits only publication of the relevant information to the public or a section of the public, and does not prohibit disclosure of the information to an individual, greater clarity and certainty would be provided by clarifying when

information can be disclosed. This would also avoid any risk that the amendment to incorporate the uniform definition was intended to narrow the field of permitted disclosure.

Mechanisms for lifting the prohibitions

Lifting mechanism by consent in the *Supreme Court Act*

Recommendation 12.4: Mechanism for a person to consent to lifting the prohibition in proceedings following acquittals

Section 101A(8)(b) of the *Supreme Court Act 1970* (NSW) should provide that the alleged contemnor:

(a) can consent to publication of their identity during or after proceedings, but

(b) cannot consent to publication of their identity if it may identify any other person who is protected by the prohibition and who has not consented to the publication of their identity.

12.35 Section 101A(8)(b) of the *Supreme Court Act* provides that an alleged contemnor may, during the proceedings, consent to their name or identity being disclosed in a report of the proceedings.

12.36 This mechanism for lifting the statutory prohibition was added in response to *John Fairfax Publications Pty Ltd v AG (NSW)*, in which the Court of Appeal considered s 101A of the *Supreme Court Act*.[18] At the time of that case, the statutory prohibition provided that a person must not publish any report of any submission made in the proceedings (s 101A(8)(a)) or any report of proceedings that disclosed the name or identity of the alleged contemnor (s 101A(8)(b)), without exception. Section 101A(7) also provided that proceedings under s 101A were to be heard in camera, with no discretion for the court to order otherwise.

12.37 The claimant in *John Fairfax* argued that s 101A(7)–(8) infringed the implied freedom of political communication on governmental and political matters, which is "a qualified limitation on legislative power implied in order to ensure that the people of the Commonwealth may exercise a free and informed choice as electors".[19] Whether a law infringes the implied freedom depends upon answers to the following questions:

- Does the law effectively burden the freedom in its terms, operation and effect?
- Are the purpose of the law and the means adopted to achieve that purpose legitimate, in the sense that they are compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

18. *John Fairfax Publications Pty Ltd v AG (NSW)* [2000] NSWCA 198.

19. *McCloy v NSW* [2015] HCA 34, 257 CLR 178 [2] citing *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 560.

- Is the law reasonably appropriate and adapted to advance that legitimate object or end?[20]

12.38 A majority of the court accepted that the institution and conduct of proceedings by the Attorney General under s 101A of the *Supreme Court Act* would be a governmental and political matter and that the freedom was enlivened.[21]

12.39 A majority of the court also concluded that s 101A(7)–(8) had a legitimate objective compatible with representative government and justified a restriction on freedom of communication, which was "protecting persons found not to be guilty of an alleged criminal contempt from questioning of the successful defence of the charges".[22]

12.40 However, Chief Justice Spigelman, with whom Justice Priestley agreed, concluded that s 101A(7) (which requires the proceedings to be heard in camera) and s 101A(8)(a) (which prohibits publication of submissions in the proceedings) infringed the implied freedom of political communication and were invalid, as they were not reasonably appropriate and adapted to achieving that objective. His Honour considered that the provisions "went well beyond what was required in order to serve the objective of the legislation".[23] On the other hand, s 101A(8)(b) (which prevents publishing a report of proceedings that discloses the contemnor's identity) constituted a "legitimate legislative choice" and was therefore valid.[24]

12.41 At the time of the case, s 101A(8)(b) did not permit the alleged contemnor to consent to their name or identity being disclosed. In obiter, Chief Justice Spigelman identified a possible problem with the provision, in that:

> even a person who wishes not to remain anonymous and to actively defend her or his or its position in a public manner - a position which it can be anticipated would frequently be the case with media companies like the Claimant - cannot disclose her or him or itself to be the subject of the curial proceedings.[25]

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20. *John Fairfax Publications Pty Ltd v AG (NSW)* [2000] NSWCA 198 [78] citing *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 561–562.
21. *John Fairfax Publications Pty Ltd v AG (NSW)* [2000] NSWCA 198 [107], [157].
22. *John Fairfax Publications Pty Ltd v AG (NSW)* [2000] NSWCA 198 [123], [157].
23. *John Fairfax Publications Pty Ltd v AG (NSW)* [2000] NSWCA 198 [127]–[129], [157].
24. *John Fairfax Publications Pty Ltd v AG (NSW)* [2000] NSWCA 198 [133] (Spigelman CJ); but see [173] (Meagher JA disagreeing).
25. *John Fairfax Publications Pty Ltd v AG (NSW)* [2000] NSWCA 198 [131].

12.42 Although s 101A(8)(b) was not found to be invalid, an exception was introduced in 2000 enabling the identity of the contemnor to be published where they consent to their identity being disclosed.[26]

12.43 In light of the comments of Chief Justice Spigelman outlined above, the lifting mechanism in s 101A(8)(b) of the *Supreme Court Act* should be retained. However, recommendation 12.4(a) is for the alleged contemnor to be able to consent to publication of their identity during or after proceedings have concluded.

12.44 Recommendation 12.4(b) is for s 101A(8)(b) to specify that a person cannot consent to publication if doing so may identify another person whose identity is protected and who has not consented to the publication of their identity. This issue could arise where, for example, two persons are jointly tried for contempt.

No new mechanisms to lift the prohibitions relating to acquittals

12.45 There are no consent-based lifting mechanisms in either s 108(6) or s 111 of the *Crimes (Appeal and Review) Act.* On one view, this is appropriate, as both provisions operate to protect the integrity of the legal process:

- s 108(6) operates to protect the submissions of the Attorney General or Director of Public Prosecutions, as well as the identity of the acquitted person, and
- s 111 prohibits publication of the identity of the person to protect the integrity of any retrial.

12.46 If a mechanism to lift these prohibitions by consent of the acquitted person was introduced, this could reveal the submissions of the Attorney General or Director of Public Prosecutions, or jeopardise a new trial.

12.47 On another view, s 108(6) of the *Crimes (Appeal and Review) Act* is very similar to s 101A(8) of the *Supreme Court Act,* which has a consent based lifting mechanism. This may raise a question of whether s 108(6) of the *Crimes (Appeal and Review) Act*, in its present form, may similarly be found to infringe the implied freedom of political communication, given the decision in *John Fairfax*.

12.48 While we make no recommendations to address this issue specifically, we raise as a consideration for Government whether it might be prudent to include a similar consent-based lifting mechanism in s 108(6) of the *Crimes (Appeal and Review) Act*.

12.49 The prohibition in s 111 of the *Crimes (Appeal and Review) Act* can be lifted if authorised by the Court of Criminal Appeal or by the court before which the acquitted person is being retried.[27] Before granting leave to lift the prohibition, the court must be

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26. *Courts Legislation Amendment Act 2000* (NSW) sch 13[3] amending *Supreme Court Act 1970* (NSW) s 101A(8)(b).

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

satisfied that this is in the interests of justice, and have given the acquitted person a reasonable opportunity to be heard.[28] The court may also vary or revoke any order made to lift the prohibition.[29] We consider this lifting mechanism is appropriate and do not recommend any changes.

12.50 There is no mechanism for lifting the prohibition in s 101A(8) of the *Supreme Court Act* with leave of the court, nor in s 108(6) of the *Crimes (Appeal and Review) Act*. We do not recommend introducing such a mechanism into these prohibitions, as this is unnecessary for such proceedings.

No new mechanisms to lift the prohibitions relating to prohibited associates

12.51 The prohibitions in s 89 of the *Bail Act* and s 100H of the *Crimes (Sentencing Procedure) Act* have no mechanisms for lifting them.

12.52 Given the sensitivity of the information being protected, introducing lifting mechanisms would be inappropriate. Revealing details of prohibited associates or people named in non-association orders could not only pose risks to the associates but also any related proceedings or police investigations in which they are involved.

Revised mechanisms for lifting the prohibition relating to forensic procedures

Recommendation 12.5: Lifting mechanisms for the prohibition in relation to forensic procedures

Section 43 of the *Crimes (Forensic Procedures) Act 2000* (NSW) should provide:

(1) In making an order authorising publication under s 43(1) of the Act, a magistrate must take into account:

  (a) the views of the suspect and of any other person who is protected by the prohibition and who may be identified by the publication (if these views are known or ascertainable), and

  (b) the public interest.

(2) A magistrate cannot make an order authorising publication under s 43(1) of the Act in relation to a person aged under 16 years at the time of publication.

(3) A suspect aged under 16 years at the time of publication cannot consent to the publication of their identity.

(4) A suspect aged 16 years or over but under 18 years at the time of publication can consent to the publication of their identity after receiving advice from an Australian legal practitioner about the implications of consenting.

(5) A suspect aged 18 years or over at the time of publication can consent to the publication of their identity.

(6) However, the suspect cannot consent to the publication of their identity under recommendation 12.5(4)–(5) if:

  (a) the publication may identify:

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

29. *Crimes (Appeal and Review) Act 2001* (NSW) s 111(4).

(i) a child who is protected by the prohibition and who is aged under 16 years, or

(ii) any other person who is protected by the prohibition and who has not consented to the publication of their identity, or

(b) the proceedings under the Act are ongoing.

12.53 Currently, the prohibition in s 43 of the *Crimes (Forensic Procedures) Act* can be lifted if a magistrate authorises the publication.[30] Recommendation 12.5(1)–(2) would align the lifting mechanism with the standard mechanism for lifting a prohibition with leave of the court outlined in chapter 8.

12.54 Although recommendation 12.5(1)(a) is intended to ensure that a magistrate considers the views of any person affected by the authorisation, the suspect will likely be the only person affected.

12.55 Consistent with our standard mechanism for lifting a prohibition with leave, recommendation 12.5(2) is that a magistrate should not be able to authorise publication of information that identifies a suspect under 16. Due to their vulnerability, the identity of a child under 16 should be protected by the prohibition in all cases.

12.56 Recommendation 12.5(3)–(6) is to amend s 43 of the *Crimes (Forensic Procedures) Act* in line with the standard mechanism for lifting a statutory prohibition by consent outlined in chapter 8. South Australian legislation similarly allows a suspect to consent to publication of their identity.[31]

12.57 Although the statutory prohibition in s 43 operates until a suspect is charged, recommendation 12.5(4)–(5) would allow a person to identify themselves as having undergone a forensic procedure that produced a negative result.

12.58 However, under recommendation 12.4(6)(b), a person would not be able to identify themselves as having undergone a forensic procedure if proceedings under the Act are ongoing. This is to protect the integrity of proceedings, for example during an appeal of a decision made by a magistrate to authorise a procedure.

Duration of prohibitions applying in proceedings following acquittals

12.59 In our draft proposals, we sought views about whether it is appropriate for all statutory prohibitions to state a duration.[32]

12.60 The prohibitions in s 108(6) of the *Crimes (Appeal and Review) Act* and s 101A(8) of the *Supreme Court Act* have an implied indefinite duration. There are no express duration provisions in either prohibition.

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30. *Crimes (Forensic Procedures) Act 2000* (NSW) s 43(1).

31. *Criminal Law (Forensic Procedures) Act 2007* (SA) s 51(a).

32. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication,* Draft Proposals (2021) [5.17]–[5.19].

12.61 The statutory prohibition in s 111 of the *Crimes (Appeal and Review) Act* ends when the retrial has concluded or there is no longer any step that could be taken which would lead to the acquitted person being retried, whichever is the earliest.[33]

12.62 The prohibitions in s 108(6) of the *Crimes (Appeal and Review) Act* and s 101A(8) of the *Supreme Court Act,* with implied indefinite duration, allow the prosecution to settle questions of law raised by the trial (which may be relevant to future proceedings) without attracting negative publicity for the person who was ultimately acquitted and thereby undermining the benefit of the acquittal. Accordingly, the prohibitions on publishing the submissions of the Attorney General or the Director of Public Prosecutions and the identity of the person should continue to apply indefinitely, regardless of the outcome.

12.63 However, the purpose of the prohibition in s 111 of the *Crimes (Appeal and Review) Act* is to protect the integrity of the new trial and ensure that potential jurors are not exposed to adverse publicity about the person who may be subject to a retrial. This justifies the protection of the person's identity, but only until the retrial has concluded, or where there is no potential for a retrial to take place.

No prohibition on publishing the identity of defendants in earlier stages of indictable proceedings

12.64 Legal Aid submitted that in order to protect the fairness of a future trial, there should be a statutory prohibition on publishing or disclosing information in early parts of indictable proceedings, such as a bail hearing. As an example, the submission suggested that if details of the bail applicant's previous convictions are reported in the media, they are accessible to jurors and may be prejudicial to the fairness of the defendant's subsequent trial.[34]

12.65 We do not support such a prohibition. There is significant public interest in open justice in bail proceedings, which involve decisions about a person's liberty. Decisions on bail, and the information the court takes into account when making its decision, should remain public (subject to the prohibition on publishing the identity of prohibited associates, discussed above).

12.66 In our view, there are adequate measures in place to dissuade jurors from making enquiries or from taking into account information they have seen or heard about a defendant when considering the evidence. The time that elapses from a bail decision to the commencement of a trial will usually mean that jurors are not exposed to the potentially prejudicial information.

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

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

12.67 Further, an order could be made under the new Act if the court making or reviewing a bail decision forms the view that non-publication of the prior convictions (or any other information) is necessary to prevent prejudice to the proper administration of justice.[35]

Discretions to make a non-publication order

12.68 In this section, we deal with three provisions in subject-specific legislation that we classify as discretions to make a non-publication order (chapter 3).

Provisions applying in applications for the appointment of receivers

12.69 The *Conveyancers Licensing Act 2003* (NSW) (*Conveyancers Licensing Act*) governs the licensing and responsibilities of conveyancers in NSW. Part 8, division 3 of the Act outlines the procedures for the appointment of a receiver of the property of a conveyancer or conveyancing firm. A receiver of property is a person appointed by a court to sell or safeguard the property.

12.70 The *Property and Stock Agents Act 2002* (NSW) (*Property and Stock Agents Act*) governs the licensing and responsibilities of real estate agents, stock and station agents and strata managing agents in NSW. Similar to the *Conveyancers Licensing Act,* part 9, division 3 of the Act outlines procedures for the appointment of a receiver of the property of an agent.

12.71 The *Conveyancers Licensing Act* and the *Property and Stock Agents Act* provide that the Supreme Court may appoint a receiver over a licensee's property on the application of the Commissioner of Fair Trading.[36]

12.72 Under s 107(2) of the *Conveyancers Licensing Act* and s 140(2) of the *Property and Stock Agents Act,* in proceedings related to the appointment of a receiver, the Supreme Court may make orders prohibiting the publication of any report relating to the evidence or orders made, whether or not at the instance of a party. This is likely meant to avoid irreparable damage to a business from publicity about the appointment of an interim receiver.

12.73 A provision similar to s 107(2) of the *Conveyancers Licensing Act* exists in Victoria.[37] There are no equivalent provisions to s 140(2) of the *Property and Stock Agents Act* in other Australian jurisdictions.

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35. Recommendation 6.4(a).
36. *Conveyancers Licensing Act 2003* (NSW) s 105(1), s 3 definition of "Secretary"; *Property and Stock Agents Act 2002* (NSW) s 138(1), s 3 definition of "Secretary".
37. *Conveyancers Act 2006* (Vic) s 113.

12.74 ARTK argued that discretions to make non-publication orders in certain proceedings under the *Conveyancers Licensing Act* and *Property and Stock Agents Act* should be repealed, with these powers brought under the general Act.[38]

Provisions relating to the use of lie detectors

12.75 Section 5 of the *Lie Detectors Act 1983* (NSW) (*Lie Detectors Act*) makes it an offence to use a lie detector, the output of a lie detector, or any analysis or opinion based on that output, for a prohibited purpose.[39]

12.76 A lie detector is an instrument or apparatus to measure or monitor the physiological reactions of the body of a person, or elements of stress, tonal variation or vibration in the voice of a person.[40] The list of prohibited purposes include employment, considerations of claims under insurance contracts, or determining whether a person is guilty of an act or omission punishable by imprisonment or fine.[41]

12.77 It is also an offence to request or require another person to undergo an examination based on the use of a lie detector.[42]

12.78 The output of a lie detector, and any analysis or opinion based on that output, is normally inadmissible in evidence.[43] However, it can be admitted into evidence under s 6(2) of the *Lie Detectors Act*, for the purpose of proving the commission of an offence under the Act. In such a case, the court may make an order under s 6(3) to prohibit publication of the evidence or a report of the evidence.

Uniform terminology

Recommendation 12.6: Uniform terminology in discretions to make non-publication orders under the *Conveyancers Licensing Act,* the *Property and Stock Agents Act* and the *Lie Detectors Act*

Section 107(2) of the *Conveyancers Licensing Act 2003* (NSW), s 140(2) of the *Property and Stock Agents Act 2002* (NSW) and s 6(3) of the *Lie Detectors Act 1983* (NSW) should:

(a) adopt language consistent with a discretion to make a non-publication order

(b) define "non-publication order" in the same way as in recommendation 3.1, and

(c) define "publish" in the same way as in recommendation 3.2.

12.79 Recommendation 12.6(a) provides for the adoption of uniform terminology consistent with the classification of a discretion to make a non-publication order. This can be achieved by replacing:

38. Australia's Right to Know, *Submission CI27*, 46.
39. *Lie Detectors Act 1983* (NSW) s 5(1).
40. *Lie Detectors Act 1983* (NSW) s 5(1)(a).
41. *Lie Detectors Act 1983* (NSW) s 4 definition of "prohibited purpose".
42. *Lie Detectors Act 1983* (NSW) s 5(2).
43. *Lie Detectors Act 1983* (NSW) s 6(1).

- the discretions in s 107(2) of the *Conveyancers Licensing Act* and s 104(2) of the *Property and Stock Agents Act* to "prohibit the publication of any report relating to the evidence or other proceedings or of any order made on the hearing of an application for the appointment of a receiver" with a discretion to make a "non-publication order" in respect of such information, and

- the discretion in s 6(3) of the *Lie Detectors Act* to make "an order forbidding publication of evidence that, but for subsection (2), would be inadmissible in those proceedings, or of any report of, or report of the substance or purport of, that evidence" with a discretion to make a "non-publication order" in respect of such information.

12.80 The provisions do not presently define "non-publication order" or "publish". The uniform definitions of these terms that we recommend in chapter 3 should therefore be adopted.

Duration of non-publication orders

Recommendation 12.7: Duration of non-publication orders under the *Conveyancers Licensing Act,* the *Property and Stock Agents Act* and the *Lie Detectors Act*

Section 107(2) of the *Conveyancers Licensing Act 2003* (NSW), s 140(2) of the *Property and Stock Agents Act 2002* (NSW) and s 6(3) of the *Lie Detectors Act 1983* (NSW) should provide:

(1) A non-publication order must specify the period for which the order operates.

(2) A court, in deciding the period for which an order is to operate, must ensure that the order operates for no longer than is reasonably necessary to achieve the purpose for which the order is made.

(3) The period for which an order operates is to be determined by reference to:

  (a) a fixed or ascertainable period, or

  (b) the occurrence of a specified future event.

(4) An order may be specified to operate indefinitely in exceptional circumstances or where it is not reasonably practicable to specify a duration.

12.81 Non-publication orders made under s 107(2) of the *Conveyancers Licensing Act*, s 140(2) of the *Property and Stock Agents Act* or s 6(3) of the *Lie Detectors Act* should specify a duration. This is intended to ensure orders are made for only as long as is necessary or appropriate in the circumstances of the case.

12.82 Orders should be indefinite only in exceptional circumstances where it is not reasonably practical to specify a duration, consistent with the approach in the new Act.[44]

44. Recommendation 6.9.

Requirement to make a non-disclosure order

12.83 In forensic proceedings (that is, proceedings in which an accused person has been found not criminally responsible by reason of mental illness or cognitive impairment), a victim can provide a victim impact statement in court to express the harm they have experienced.[45] A victim impact statement contains particulars of the personal, emotional and economic harm suffered by a primary victim, or by the members of the primary victim's immediate family, as a direct result of an offence.[46]

12.84 Under s 30N of the *Crimes (Sentencing Procedure) Act* a victim in forensic proceedings may request that:

- the court does not disclose all or part of the victim impact statement to the accused person, or
- the statement is not read out to the court.[47]

12.85 The court "is to agree to a request of a victim not to disclose the whole or part of a victim impact statement to the accused person" unless the court considers it is not in the interests of justice.[48]

12.86 However, the court may disclose all or part of a victim impact statement 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 statement is not disclosed to any other person.[49]

12.87 We classify s 30N of the *Crimes (Sentencing Procedure) Act* as a requirement to make a non-disclosure order (chapter 3).

12.88 Section 30N reflects a recommendation made in a review of the Mental Health Review Tribunal in respect of forensic patients.[50] The review considered that a discretion not to disclose the victim impact statement, on request of the victim, would "allow the victim to openly discuss concerns without fear of repercussion from the forensic patient".[51]

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45. NSW, *Parliamentary Debates*, Legislative Council, Second Reading Speech, 21 November 2018, 1075–1077.
46. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 28.
47. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30N(1).
48. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30N(2).
49. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30N(3).
50. A Whealy, *Mental Health Review Tribunal: A Review in Respect of Forensic Patients* (2017) rec 5.
51. A Whealy, *Mental Health Review Tribunal: A Review in Respect of Forensic Patients* (2017) 37.

12.89 In Queensland, the court must not disclose the victim impact statement to the offender in forensic proceedings, except if requested by the victim or close relative (unless the court is satisfied that the disclosure may adversely affect the person's health and wellbeing).[52] So far as we are aware, other jurisdictions do not provide for victim impact statements in forensic proceedings.

Uniform terminology

Recommendation 12.8: Uniform terminology in the requirement to make a non-disclosure order under s 30N of the *Crimes (Sentencing Procedure) Act*

Section 30N of the *Crimes (Sentencing Procedure) Act 1999* (NSW) should:

(a) adopt language consistent with a requirement to make a non-disclosure order

(b) define "non-disclosure order" in the same way as in recommendation 3.1, and

(c) define "disclose" in the same way as in recommendation 3.2.

12.90 Recommendation 12.8(a) is for s 30N of the *Crimes (Sentencing Procedure) Act* to adopt language consistent with the classification as a requirement to make a non-disclosure order. This could be done by replacing the requirement to "not disclose" the victim impact statement to the accused person with a requirement to make a "non-disclosure order" over the statement in relation to the accused person.

12.91 Section 30N does not define "disclose" or "non-disclosure order". For consistency with other legislation containing exceptions to open justice, the definitions of these terms, recommended in chapter 3, should apply.

No other changes to this provision

12.92 Our draft proposal was that orders made under subject-specific legislation should not be able to operate indefinitely and that courts should be required to specify the period for which the order operates.[53]

12.93 It is implicit that orders made under s 30N of the *Crimes (Sentencing Procedure) Act* operate indefinitely. We do not recommend any changes to the duration of orders made under this provision. An indefinite duration is appropriate, given the provision's purpose.

Discretions to make an exclusion order

12.94 Section 30K of the *Crimes (Sentencing Procedure) Act* allows a victim of any offence to ask that the court be closed while they read out their victim impact statement.[54] In

52. *Mental Health Act 2016* (Qld) s 164.

53. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication,* Draft Proposals (2021) proposal 6.3.

54. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30K(1).

deciding whether to allow a victim to read out their statement in a closed court, the court is to consider:

- whether it is reasonably practicable to exclude the public
- whether special reasons in the interests of justice require the statement to be read in open court, and
- any other matter that the court considers relevant.[55]

12.95 The principle that proceedings for an offence should generally be open or public in nature, or that justice should be seen to be done, does not of itself constitute special reasons in the interests of justice requiring the statement to be read in open court.[56]

12.96 We classify s 30K of the *Crimes (Sentencing Procedure) Act* as a discretion to make an exclusion order (chapter 3).

12.97 Section 30K was introduced in 2018 as part of broader reforms to the victim impact statement scheme.[57] It was intended to ensure that special arrangements, including the capacity to read a victim impact statement in closed court or by closed-circuit television, which were previously available only to certain classes of victims, were available to all victims.[58]

12.98 There are strong policy reasons behind s 30K. Victim impact statements often include deeply personal and sensitive information. By reading a statement in public, or having it read out on their behalf, a victim may experience embarrassment or further trauma and distress.

12.99 Similar provisions exist in some other Australian jurisdictions:

- In Queensland, a sentencing court may order all people other than those specified by the court to be excluded from the courtroom while a victim impact statement is read out if, having regard to all relevant circumstances, the court considers it appropriate.[59]
- In Victoria, a court may make an order permitting only people specified by the court to be present while a victim impact statement is read aloud.[60]

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55. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30K(2).
56. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30K(3).
57. *Crimes Legislation Amendment (Victims) Act 2018* (NSW) sch 3[1] inserting *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30K.
58. NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 24 October 2018, 74.
59. *Penalties and Sentences Act 1992* (Qld) s 179N(2)(b).
60. *Sentencing Act 1991* (Vic) s 8R(1)(d).

- In the ACT, a court may order that the court is closed to the public during the reading of a victim impact statement if the court considers that the victim has a vulnerability that affects their ability to read the victim impact statement.[61]

Uniform terminology

Recommendation 12.9: Uniform terminology in the discretion to make an exclusion order when a victim reads out a victim impact statement

Section 30K of the *Crimes (Sentencing Procedure) Act 1999* (NSW) should:

(a) adopt language consistent with a discretion to make an exclusion order, excluding all people other than those whose presence is necessary, and

(b) provide that "exclusion order" has the same meaning and effect as it has in recommendation 3.1.

12.100 Recommendation 12.9(a) is for s 30K of the *Crimes (Sentencing Procedure) Act* to adopt language consistent with the classification of a discretion to make an exclusion order excluding all people other than those whose presence is necessary. This reflects the current provision, which allows a victim of an offence to ask to read out their victim impact statement in "closed court", which clearly intends that all people not required for the proceedings are excluded.

12.101 Recommendation 12.9(a) could be given effect by replacing the discretion in s 30K(1) of the *Crimes (Sentencing Procedure) Act* to "give leave to the victim to read out the victim's victim impact statement in closed court" with a discretion to make an "exclusion order excluding all people other than those whose presence is necessary" when the victim reads out a victim impact statement.

12.102 Under recommendation 12.9(b), s 30K would provide that "exclusion order" has the same meaning and effect as it has in recommendation 3.1. This is to clarify that an exclusion order made under these provisions results in physical exclusion from the court but does not have any consequential impact on disclosure of information from the proceedings (chapter 3).

No change to considerations for making an exclusion order

12.103 Our draft proposal was to replace the factors a court must consider in deciding whether to grant leave to a victim to read out a victim impact statement in closed court with a single consideration: "whether the order is necessary to avoid causing undue distress or embarrassment to the victim".[62]

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61. *Crimes (Sentencing) Act 2005* (ACT) s 52(4)–(6); *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 102.

62. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 7.16(2).

12.104 After further consideration, we do not recommend making this change. As we explain in chapter 8, we do not recommend substantive changes to provisions in subject-specific legislation, unless submissions and consultations demonstrated a clear need for change. We did not receive any such feedback in relation to this provision.

Exception for journalists when an exclusion order is made

Recommendation 12.10: Exception for journalists when an exclusion order is made for the reading of a victim impact statement

Section 30K of the *Crimes (Sentencing Procedure) Act 1999* (NSW) should provide that an exclusion order made under this section does not exclude a journalist unless the court is satisfied that it is in the interests of justice that they are excluded.

12.105 Recommendation 12.10 is to introduce an exception to s 30K of the *Crimes (Sentencing Procedure) Act* that would enable journalists to remain when an exclusion order is made for the reading of a victim impact statement.

12.106 Enabling media reporting of victim impact statements can help the victim's voice to be heard. It may also increase general knowledge about the impact of offending on victims in the community.

12.107 In chapter 10, we recommend a limited exception for journalists when an exclusion order is made for the reading of a victim impact statement in prescribed sexual offence proceedings.[63] It would be inconsistent to allow journalists to view or hear (and report on) the reading of a victim impact statement in sexual offence proceedings from which the public is excluded, but not in other proceedings (for example, murder or assault proceedings).

12.108 There may be some situations where it is not appropriate for journalists to be present for the reading of a victim impact statement. Under recommendation 12.10, a journalist would not be permitted to remain if the court is satisfied that it is in the interests of justice that they are excluded.

Requirements to make a closed court order

12.109 In this section, we deal with five provisions in subject-specific legislation that we classify as requirements to make a closed court order (chapter 3).

Provisions applying in proceedings following acquittals

12.110 Section 108(5) of the *Crimes (Appeal and Review) Act* provides that the hearing and determination of a question of law arising at or in connection with certain acquittals,

63. Recommendation 10.12(2).

submitted by the Attorney General or Director of Public Prosecutions for determination by the Court of Criminal Appeal, is to be held "in camera".

12.111 Similarly, s 101A(7) of the *Supreme Court Act* provides that proceedings in respect of questions of law, arising from or in connection with contempt proceedings in which an alleged contemnor is found not to have committed contempt, submitted by the Attorney General to the Court of Appeal, are to be held "in camera". However:

- a court may order otherwise, "whether on the application of a party to the proceedings or of its own accord", and
- there is an exception allowing 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 NSW.

12.112 Further background about these Acts is outlined above.

Provisions under the *Public Health Act*

12.113 Section 58 of the *Public Health Act 2010* (NSW) (*Public Health Act*) provides that the Secretary of the Ministry of Health may apply to the District Court for an order authorising a medical practitioner to be served with a notice requiring them to disclose the name and address of a person with HIV.[64] Section 58(3) provides that such an application is "to be heard and determined in the absence of the public".

12.114 Section 59 of the *Public Health Act* provides that proceedings for certain offences in the Act are "to be heard and determined in the absence of the public". These are offences which apply to medical practitioners and laboratories, including offences of failing to notify the Secretary that a patient has (or had) certain diseases,[65] and failing to protect the identity of a person who has (or had) certain diseases.[66]

12.115 Section 80 of the *Public Health Act* similarly provides that proceedings for certain other offences are "to be heard and determined in the absence of the public". The offences to which this section applies are:

- in relation to a medical practitioner: failing to provide information to a person who the practitioner suspects of having a sexually transmitted infection[67]
- in relation to a person who knows that they have a sexually transmissible disease: failing to take reasonable precautions against spreading the disease,[68] and

64. *Public Health Act 2010* (NSW) s 58(1)–(2), sch 1 "Category 5".
65. *Public Health Act 2010* (NSW) s 54(5), s 55(2), s 55(3), s 55(5).
66. *Public Health Act 2010* (NSW) s 56(5).
67. *Public Health Act 2010* (NSW) s 78(1)–(2).
68. *Public Health Act 2010* (NSW) s 79(1).

- in relation to an owner or occupier of a building or place: knowingly permitting a person with a sexually transmissible disease to have sexual intercourse for the purpose of prostitution without taking reasonable precautions.[69]

12.116 Other Australian states have similar provisions. In Tasmania, in any proceedings relating to a notifiable disease, a court may make an order closing the court if satisfied that it is in the public interest to do so.[70] In Victoria, if evidence is to be given before a court or tribunal of any matter relating to HIV or Hepatitis C, the court or tribunal may order that the proceedings be heard in closed session, or that only certain people may be present during the proceedings.[71]

Uniform terminology

Recommendation 12.11: Uniform terminology in the requirements to make closed court orders in proceedings following acquittals and under the *Public Health Act*

Section 108(5) of the *Crimes (Appeal and Review) Act 2001* (NSW), s 101A(7) of the *Supreme Court Act 1970* (NSW) and s 58(3), s 59 and s 80 of the *Public Health Act 2010* (NSW) should:

(a) adopt language consistent with a requirement to make a closed court order

(b) define "closed court order" in the same way as in recommendation 3.1, and

(c) define "disclose" in the same way as in recommendation 3.2.

12.117 Recommendation 12.11(a) ensures these provisions incorporate language consistent with their classification as requirements to make a closed court order. This could be achieved by replacing:

- the requirement for proceedings to be heard "in camera" under s 108(5) of the *Crimes (Appeal and Review) Act* and s 101A(7) of the *Supreme Court Act* with a requirement to make a "closed court" order, and

- the requirement for proceedings subject to s 58(3), s 59 or s 80 of the *Public Health Act* to "be heard and determined in the absence of a public" with a requirement to make a "closed court order".

12.118 Recommendation 12.11(b) is for the uniform definition of "closed court order", recommended in chapter 3, to be incorporated in the provisions. As a "closed court order" also prohibits disclosure (by publication or otherwise) of information from the closed part of proceedings, this means that information given in these proceedings could not be disclosed.

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69. *Public Health Act 2010* (NSW) s 79(2).
70. *Public Health Act 1997* (Tas) s 62(3).
71. *Public Health and Wellbeing Act 2008* (Vic) s 133; *Public Health and Wellbeing Regulations 2019* (Vic) reg 103.

12.119 It is appropriate to prohibit disclosure of information from closed proceedings following an acquittal. An accused person who has been acquitted should not be deprived of the benefit of that acquittal by disclosure or publication of the further proceedings.

12.120 It is also appropriate to prohibit disclosure of information from closed proceedings under the *Public Health Act*. Health information is often very personal and it is reasonable for people to expect a level of privacy in legal proceedings relating to this information. All three provisions in the *Public Health Act* are likely directed at avoiding stigmatising patients with infectious diseases. In relation to HIV specifically, allowing public or media access to proceedings concerning a person's HIV status could lead to stigma and discrimination.[72]

12.121 Recommendation 12.11(c) is for the uniform definition of "disclose" to be incorporated in the provisions, as recommended in chapter 3. This is to clarify the effect of a closed court order made under these requirements.

Exceptions to the requirement in the *Supreme Court Act*

Recommendation 12.12: Exception to s 101A(7) of the *Supreme Court Act*

The exception allowing an Australian legal practitioner to be present at the proceedings for the purpose of reporting the case for any lawful purpose of the Council of Law Reporting for New South Wales in s 101A(7) of the *Supreme Court Act 1970* (NSW) should be repealed.

12.122 Recommendation 12.12 is to repeal the exception in s 101A(7) of the *Supreme Court Act* allowing a legal practitioner "reporting the case for any lawful purpose of the Council of Law Reporting for New South Wales" to be present.

12.123 Such an exception is unnecessary as reports of proceedings prepared by the Council of Law Reporting for NSW are based on the judgment published by the court, rather than observations in court.

12.124 As discussed above, we recommend an exception to the statutory prohibition in s 101A(8) of the *Supreme Court Act* to permit publication in an official report of proceedings. The uniform definition of "official report of proceedings", which we recommend in chapter 3, would also be included (recommendation 12.2).

12.125 We do not recommend changes to the existing exception in s 101A(7) of the *Supreme Court Act* that allows a court to order that proceedings concerning a question of law, arising from or in connection with contempt proceedings in which the alleged contemnor

72. National Association of People with HIV Australia, HIV/AIDS Legal Centre Inc (NSW), *Preliminary Submission PCI28*, 5–6.

was acquitted, are not to be closed. This exception was inserted in 2000.[73] The then President of the Court of Appeal had suggested that:

> it seems anomalous that the hearing of such a question of law should occur in camera where the parties consent to a public hearing and the court thinks it proper to do so. This is particularly the case since it is the usual practice of the court to defer the hearing of contempt proceedings until the verdict has been reached in the particular trial.[74]

12.126 The exception in s 101A(7) would enable the court to order that the proceedings be open in such circumstances. As discussed above, the previous form of s 101A(7), which did not include such a discretion, was found to infringe the implied freedom of political communication in *John Fairfax Publications Pty Ltd.*[75]

12.127 Section 108(5) of the *Crimes (Appeal and Review) Act* does not have a comparable exception to that found in s 101A(7) of the *Supreme Court Act*. This raises the question of whether s 108(5) of the *Crimes (Appeal and Review Act)*, in its present form, may similarly be found to infringe the implied freedom of political communication. While we make no recommendations to address this issue specifically, we raise it as a consideration for Government.

Interaction with the mechanism to lift the statutory prohibition in the *Supreme Court Act*

Recommendation 12.13: Interaction with the mechanism to lift the statutory prohibition in the *Supreme Court Act*

Section 101A of the *Supreme Court Act 1970* (NSW) should provide that consent of the person under s 101A(8)(b) of the Act also operates to lift any prohibition on disclosing the identity of the person arising from s 101A(7) of the Act.

12.128 The effect of our recommendations would be that, under s 101A of the *Supreme Court Act,* the identity of a contemnor is protected under both:

- a statutory prohibition on publishing the contemnor's identity (contained in s 101A(8)), and
- a closed court order (which must be made under s 101A(7)), as closed court orders also have the effect of prohibiting disclosure of information in the closed part of proceedings (chapter 3).

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73. *Courts Legislation Amendment Act 2000* (NSW) sch 13[2], amending *Supreme Court Act 1970* (NSW) s 101A(7).
74. NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 30 May 2000, 6111.
75. *John Fairfax Publications Pty Ltd v AG (NSW)* [2000] NSWCA 198 [127]–[129] (Spigelman CJ), [157] (Priestley JA agreeing).

12.129 Recommendation 12.13 is for s 101A of the *Supreme Court Act* to specify that the mechanism for lifting the prohibition by consent of the contemnor under s 101A(8)(b) also lifts the suppression effect of the closed court order, to the extent that the order and statutory prohibition overlap (that is, only in relation to the identifying information). This is necessary to give full effect to the lifting mechanism in s 101A(8)(b).

12.130 Other information from the closed proceedings should not be affected by the lifting mechanism.

Discretions to make an exclusion order or a closed court order

12.131 In this section, we deal with four provisions in subject-specific legislation that we classify as discretions to make an exclusion order or closed court order (chapter 3).

Provisions applying in applications for appointment of receivers

12.132 The near-identical provisions in s 107(1) of the *Conveyancers Licensing Act* and s 140(1) of the *Property and Stock Agents Act* relating to applications for the appointment of a receiver provide that the Supreme Court may order from the precincts of the Court any person who is not:

- an officer of the court
- a party, a legal representative of a party or a clerk of such a legal representative
- a member of the same firm of licensees as the respondent
- a person who is in the course of giving evidence, or
- a person permitted by the court to be present in the interests of justice.

12.133 The *Property and Stock Agents Act* also includes an "authorised officer" in the list of people who may not be ordered from the court.[76] This is defined as:

- an employee of the Department of Finance, Services and Innovation for the time being appointed as an authorised officer
- an investigator appointed under s 18 of the *Fair Trading Act 1987* (NSW), or
- a police officer.[77]

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76. *Property and Stock Agents Act 2002* (NSW) s 140(1)(e).
77. *Property and Stock Agents Act 2002* (NSW) s 104(1)(e), s 3 definition of "authorised officer", definition of "Department".

12.134 Victoria contains a similar provision.[78] There are no other equivalent provisions in other Australia states and territories.[79]

Provisions applying in examinations of defaulting officers of co-operative housing bodies

12.135 The *Co-operative Housing and Starr-Bowkett Societies Act 1998* (NSW) (*Co-operative Housing and Starr-Bowkett Societies Act*) governs co-operative housing societies and Starr-Bowkett societies. Co-operative Housing Societies and Star-Bowkett Societies are types of lending institutions that provide funds for home ownership and/or other purposes to low and middle-income earners.

12.136 As of 1 July 2019, no new Co-operative Housing Societies or Starr-Bowkett Societies may be formed or registered in NSW.[80] It appears there are few such societies in other Australian states and territories.

12.137 Section 214 outlines the procedure for an officer or former officer of a co-operative housing body to be examined in court where the body is being wound-up, is under the management of an administrator, has ceased to carry on business, has entered into an arrangement with creditors, or in relation to which a receiver has been appointed.

12.138 Section 214(5)(a) provides that an examination "must not be held in open court unless the Court otherwise orders".

Provision applying to Land and Environment Court proceedings

12.139 Section 62 of the *Land and Environment Court Act 1979* (NSW) (*Land and Environment Court Act)* provides that all proceedings before the Land and Environment Court "shall, unless the Court otherwise orders, be heard in open court".

12.140 Equivalent courts in Queensland and South Australia have similar powers to direct that proceedings are not to be heard in open court.[81]

12.141 Consultations indicated that the power to close proceedings in s 62 of the *Land and Environment Court Act* is rarely used.[82]

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78. *Conveyancers Act 2006* (Vic) s 112.
79. Australia's Right to Know, *Submission CI27*, 13–14.
80. NSW Department of Fair Trading, "Co-operative Housing and Starr-Bowkett Societies" <https://www.fairtrading.nsw.gov.au/associations-and-co-operatives/co-operatives/about-co-operatives/co-operative-housing-and-starr-bowkett-societies> (retrieved 24 May 2022).
81. *Land Court Act 2000* (Qld) s 7A(1)(b); *Supreme Court of Queensland Act 1991* (Qld) s 8(2); *Environment, Resources and Development Court Act 1993* (SA) s 20(2)(e).
82. Land and Environment Court of NSW, *Consultation CIC29*.

Uniform terminology

Recommendation 12.14: Uniform terminology in discretions to make an exclusion or closed court order in proceedings to appoint a receiver, examinations of defaulting officers and Land and Environment Court proceedings

Section 107(1) of the *Conveyancers Licensing Act 2003* (NSW), s 140(1) of the *Property and Stock Agents Act 2002* (NSW), s 214(5)(a) of the *Co-operative Housing and Starr-Bowkett Societies Act 1998* (NSW) and s 62 of the *Land and Environment Court Act 1979* (NSW) should:

(a) provide that the court may make an exclusion order or a closed court order

(b) define "exclusion order" and "closed court order" in the same way as in recommendation 3.1, and

(c) define "disclose" in the same way as in recommendation 3.2.

12.142 Recommendation 12.14(a) is for various provisions to be amended to confer a discretion to make an exclusion order or closed court order. Under recommendation 12.14(b)–(c), the provisions would incorporate the uniform definitions of "exclusion order", "closed court order" and "disclose", recommended in chapter 3.

12.143 Section 107(1) of the *Conveyancers Licensing Act* and s 140(1) of the *Property and Stock Agents Act* should be amended to confer a discretion to make an exclusion or closed court order as this would give the court the flexibility to make the type of order that is most appropriate in the circumstances. Where, for example, there is a need to preserve the confidentiality of the particular proceedings, a court may elect to make a closed court order rather than an exclusion order.

12.144 The recommendation could be given effect by replacing the discretion in s 107(1) of the *Conveyancers Licensing Act* and s 140(1) of the *Property and Stock Agents Act* of the Supreme Court to order a person "from the precincts of the court" with a discretion to make an exclusion order or a closed court order.

12.145 The list of people that the court may not "order from the precincts of the court" need not be retained, as the court would have the flexibility to make an exclusion order that applies only to a specified person or class of people (chapter 3). Moreover, some of the listed people (for example, "an officer of the Court" or "a party, a legal representative of a party or a clerk of such a legal representative") would not be captured by an exclusion or closed court order, as defined in recommendation 3.1, because their presence is necessary for the proceedings.

12.146 Section 214(5)(a) of the *Co-operative Housing and Starr-Bowkett Societies Act* should also be amended to confer a discretion to make an exclusion order or closed court order. This could be achieved by amending s 214(5)(a), which provides that an examination of a defaulting officer "must not be held in open court unless the Court otherwise orders", to provide instead that an examination is to be heard in open court, unless the court makes an exclusion or closed court order.

12.147 There are no compelling reasons for examinations of defaulting officers of these societies to be held in the absence of the public in all cases. Similar provisions in the

Bankruptcy Act 1966 (Cth) and the *Corporations Act 2001* (Cth) provide that examinations are to be in open court or in public.[83] A public examination may be beneficial to the commercial and general community.[84]

12.148 Finally, s 62 of the *Land and Environment Court Act* should be amended to confer a discretion to make an exclusion order or a closed court order, as this section has general application. The court should be given maximum flexibility to make either type of order, depending on the characteristics and requirements of the case before it. We received support for this change.[85]

12.149 The recommendation could be given effect by amending s 62, which currently provides that "[a]ll proceedings before the Court shall, unless the Court otherwise orders, be heard in open court", to instead provide that "all proceedings before the Court shall, unless the Court makes an exclusion order or closed court order, be heard in open court".

12.150 We note that the Land and Environment Court is constituted by both judicial officers and commissioners. In relation to the new Act, we recommend that the power to make orders (including exclusion and closed court orders) under the Act should be exercised only by judicial officers, not commissioners or other non-judicial officers, unless otherwise provided for in court rules.[86] This is to ensure that the question of whether to make an order is subject to judicial consideration, as this has consequences for open justice and requires the application of complex legal decision-making. Consideration could therefore be given to including a similar limitation in s 62 of the *Land and Environment Court Act* or by addressing this issue through rules of the court and delegations.

83. *Bankruptcy Act 1966* (Cth) s 31(1)(b), s 81(2); *Corporations Act 2001* (Cth) s 597(4).

84. See, eg, R P Austin and A J Black, *Austin and Black's Annotations to the Corporations Act* (LexisNexis, 2022) [5.597].

85. Land and Environment Court of NSW, *Consultation CIC29*.

86. Recommendation 4.8.

13. Dealing with breaches

In Brief

All breaches (including of orders made under the new Act) should be punishable as statutory offences or, where relevant, as contempt. Statutory offences should be standardised, to improve understanding and facilitate prosecutions. There should be a register of non-publication, non-disclosure and closed court orders. A working group should clarify responsibility for dealing with breaches.

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13.1 This chapter deals with:

- statutory prohibitions on publication and disclosure
- statutory exclusion and closed court provisions, and
- non-publication, non-disclosure, exclusion and closed court orders.

Legislation should expressly provide that breaches of these are punishable as statutory offences. To provide flexibility, it should be possible, where relevant, for a breach to be punished as a contempt rather than as a statutory offence.

13.2 We make several recommendations to achieve greater consistency in respect of statutory offences. These include standard elements, and provisions for directors'

liability. These recommendations are also reflected in the offence in the new Act.[1] However, we do not recommend standardising other aspects of the offences in the new Act and in other legislation, such as maximum penalties.

13.3 The recommendations refer to a range of statutory prohibitions on publication and disclosure, statutory exclusion and closed court provisions, and discretions and requirements to make orders. The recommendations do not apply to provisions that we are excluding from this report (appendix B) or to provisions relating to the tribunals and specialised courts (chapter 15).

13.4 A register should be established of all non-publication, non-disclosure and closed court orders made by courts under the new Act, or under a discretion to make such orders in other Acts. Finally, a working group should be formed to clarify responsibility for dealing with breaches and to improve communication and coordination between agencies.

Breaches should be punishable

Recommendation 13.1: How breaches of statutory prohibitions, statutory provisions and orders may be punished

All statutory prohibitions on publication and disclosure, statutory exclusion and closed court provisions, and discretions and requirements to make non-publication, non-disclosure, exclusion and closed court orders, should provide:

(a) breach of the prohibition, provision or order constitutes an offence

(b) if conduct that constitutes an offence is also a contempt of court, it may be punished as a contempt of court or as an offence, and

(c) the offender is not liable to be punished both for contempt and an offence with respect to the same conduct.

13.5 Recommendation 13.1(a), by creating offences for breaches, seeks to ensure that breach of a prohibition, provision or order can be enforced. Enforceability is essential to their effectiveness. Punishment plays an important role in deterring breaches and signalling the importance of the statutory prohibition, statutory provision or order. It also accords with our aim to create an effective regime for compliance and enforcement (chapter 1).

13.6 Existing provisions relating to breaches vary. Some provide that a breach constitutes a statutory offence, while others provide that a breach gives rise to a contempt of court.[2] Some provide that a breach constitutes a contempt of court or a statutory offence.[3]

1. Recommendation 7.10.
2. See, eg, *Crimes (Appeal and Review) Act 2001* (NSW) s 108(6), s 111(7).
3. See, eg, *Court Suppression and Non-publication Orders Act 2010* (NSW) s 16(2).

Other provisions do not state whether and how a breach can be punished.[4] This recommendation seeks to resolve inconsistencies among these provisions.

13.7 Recommendation 13.1(a) will result in the enactment of new offences.

13.8 The Local Court raised concerns that this may lead to an increase in the volume of matters before it.[5] The statutory offences will usually be prosecuted in the Local Court as summary criminal matters.

13.9 We examined the data relating to 20 statutory offences for breaching a statutory prohibition on publication or disclosure or non-publication or non-disclosure order.[6] In the 11 years from 2010 to 2020, 32 charges for offences of this nature were finalised. The 32 charges were finalised for defendants in only 13 court appearances, indicating that in some cases a defendant faced more than one such charge. The results in these 13 court appearances were:

- in three appearances, the prosecution withdrew all charges
- four appearances resulted in a defended hearing (with two appearances resulting in a finding of guilt for at least one charge), and
- six appearances proceeded to sentence after a guilty plea.[7]

13.10 In three of the eight sentencing proceedings for relevant offences, the breach was considered serious enough to warrant a sentence of imprisonment.

13.11 Given the relatively small number of matters that have been prosecuted over the last 11 years under existing arrangements, including that there have been only four defended hearings, we do not consider that any new offences will have a significant impact on the workload of the Local Court.

13.12 Recommendation 13.1(b) allows courts flexibility to deal with a breach that is also a contempt.[8]

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4. See, eg, *Minors (Property and Contracts) Act 1970* (NSW) s 43(5); *Conveyancers Licensing Act 2003* (NSW) s 107; *Property and Stock Agents Act 2002* (NSW) s 140; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30N.
5. Local Court of NSW, *Submission CI58*, 6.
6. *Crimes Act 1900* (NSW) s 578A(2); *Lie Detectors Act 1983* (NSW) s 6(3)–(4); *Young Offenders Act 1997* (NSW) s 65(2); *Status of Children Act 1996* (NSW) s 25; *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 105(2); *Crimes (Forensic Procedures) Act 2000* (NSW) s 43(1); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 100H(1); *Adoption Act 2000* (NSW) s 180(1), s 186(3); *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 45(3); *Children (Criminal Proceedings) Act 1987* (NSW) s 15A(7); *Surrogacy Act 2010* (NSW) s 52(1); *Court Suppression and Non-publication Orders Act 2010* (NSW) s 16(1); *Bail Act 2013* (NSW) s 89(1); *Criminal Procedure Act 1986* (NSW) s 80(1).
7. NSW Bureau of Crime Statistics and Research, reference ac22-20964.

13.13 Australia's Right to Know (ARTK) argued that contempt should not be available to punish breaches and that all breaches should be punishable only as a statutory offence.[9] However, flexibility in dealing with breaches is desirable. For example, it may be appropriate for a breach closely connected with the proceedings to be dealt with directly by the judicial officer as a contempt of court, and for a breach that is more removed from the proceedings to be prosecuted separately as an offence. The Office of the Director of Public Prosecutions (ODPP) observed that:

> situations may arise where contempt proceedings are a more practical alternative to a prosecution for a statutory offence for a variety of reasons, and there is no difficulty with that option remaining available.[10]

13.14 Preserving the ability for a court to deal with a breach that is also a contempt of court also reflects our guiding principle that a judicial officer's power and discretion to control court proceedings and to determine open justice issues, in accordance with the circumstances of each case, should be preserved to the maximum extent possible (chapter 1).

13.15 Recommendation 13.1(c) is intended to ensure that alleged offenders are not subject to vexation by having to defend multiple prosecutions in relation to the same conduct.[11] It reflects principles of avoiding double jeopardy.

13.16 This approach is consistent with the *Court Suppression and Non-publication Orders Act 2010* (NSW) which provides that conduct that constitutes an offence which is also a contempt of court may be punished as either but not both.[12]

The law of contempt

13.17 Although the law of contempt is outside the scope of this review (chapter 1), in this section, we briefly explain three types of contempt relevant to open justice.

13.18 First, a person may commit contempt if they disobey a court order, for example, by disclosing information that a court has ordered is not to be disclosed. This is sometimes called "disobedience contempt".[13]

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8. Children's Court of NSW, *Consultation CIC25*; District Court of NSW, *Consultation CIC27*; Land and Environment Court of NSW, *Consultation CIC29*.
9. Australia's Right to Know, *Submission CI27*, 60.
10. NSW Office of the Director of Public Prosecutions, *Submission CI17*, 15.
11. Banki Haddock Fiora, *Submission CI29*, 10.
12. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 16(2)–(4).
13. *Australasian Meat Industry Employees' Union v Mudginberri Station Pty Ltd* (1986) 161 CLR 98; *Witham v Holloway* (1995) 183 CLR 525; *O'Shane v Channel Seven Sydney Pty Ltd* [2005] NSWSC 1358. See also Judicial Commission of NSW, *Criminal Trial Courts Bench Book* [1-250] (retrieved 24 May 2022).

13.19 Second, there is contempt by publication (also known as "sub judice contempt"). The purpose of contempt by publication is to maintain a fair trial by ensuring that jurors are not exposed to prejudicial information. 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.[14]

13.20 Third, there is contempt in the face of the court. This covers any conduct that occurs in, or near the court, which interferes with, or tends to interfere with, the proper administration of justice.[15]

13.21 Contempt is a unique offence that has both criminal and civil features. Liability must be proved to the criminal standard of "beyond reasonable doubt".[16] However, contempt is dealt with as a form of civil proceeding. It is heard summarily, without a jury.[17] Appeals from convictions for contempt are heard by the Court of Appeal, not the Court of Criminal Appeal.[18]

13.22 Proceedings for contempt may be brought by a party to proceedings, 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".[19]

13.23 The Supreme, District and Local Courts all have jurisdiction to deal with contempt proceedings. The power of the Supreme Court comes from its inherent jurisdiction,[20] while the powers of the District and Local Courts come from statute and are more limited; those courts have power to deal only with contempt in the face of the court,[21] and any other form of contempt can be dealt with only by referral to the Supreme Court.[22]

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14. *John Fairfax and Sons Pty Ltd v McRae* (1955) 93 CLR 351, 372; *Hinch v AG (Vic)* (1987) 164 CLR 15, 34. See also Judicial Commission of NSW, *Criminal Trial Courts Bench Book* [1-250] (retrieved 24 May 2022).
15. *Fraser v R* [1984] 3 NSWLR 212. See also Judicial Commission of NSW, *Criminal Trial Courts Bench Book* [1-250] (retrieved 24 May 2022).
16. NSW Law Reform Commission, *Contempt by Publication*, Report 100 (2003) [12.1].
17. NSW Law Reform Commission, *Contempt by Publication*, Report 100 (2003) [12.2], [12.61].
18. NSW Law Reform Commission, *Contempt by Publication*, Report 100 (2003) [12.2].
19. 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 24 May 2022).
20. *R v Metal Trades Employers' Association* (1951) 82 CLR 208, 241–243.
21. *District Court Act 1973* (NSW) s 199; *Local Court Act 2007* (NSW) s 24.
22. *District Court Act 1973* (NSW) s 203; *Local Court Act 2007* (NSW) s 24(4)–(5).

13.24 The Attorney General is primarily responsible for instituting contempt proceedings.[23] The Attorney General's power to bring proceedings for contempt derives from the *Criminal Procedure Act 1986* (NSW).[24] Prosecutions are often brought by the Attorney General after a referral by the trial judge.[25]

13.25 Because contempt is a common law offence, there is no maximum penalty if a person is proceeded against in the Supreme Court.[26] 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 or a fine of more than 20 penalty units ($2,200).[27]

13.26 As contempt proceedings are civil and not criminal, the *Crimes (Sentencing Procedure) Act 1999* (NSW) does not apply and the sentencing options set out in it are not available.[28] The principles that the courts follow when sentencing for contempt are set out in case law and the penalty imposed depends on the facts found in each case.[29] In the Supreme Court, the power of punishment for contempt is set out in the *Supreme Court Rules 1970* (NSW) (*Supreme Court Rules*) which state that:

- an individual may be punished "by committal to a correctional centre or fine or both"
- a corporation may be punished "by sequestration or fine or both".[30]

13.27 The Court may also suspend punishment with or without security for good behaviour and, where an individual has been committed to a correctional centre, may order their "discharge before the expiry of the term".[31] The *Supreme Court Rules*, however, do not exhaust the court's power of punishment.[32]

13.28 The ODPP supported introducing legislation to codify the law of sub judice contempt.[33] In a previous review, *Contempt by Publication*, the Law Reform Commission

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23. NSW Law Reform Commission, *Contempt by Publication*, Report 100 (2003) [12.6].
24. *Criminal Procedure Act 1986* (NSW) s 316, sch 3 pt 1(1).
25. Judicial Commission of NSW, *Criminal Trial Courts Bench Book* [1-250] (retrieved 24 May 2022).
26. *Wood v Galea* (1997) 92 A Crim R 287, 290.
27. *District Court Act 1973* (NSW) s 199(7); *Local Court Act 2007* (NSW) s 24(1).
28. *Dowling v Prothonotary of the Supreme Court of NSW* [2018] NSWCA 340, 99 NSWLR 229 [56]–[58]; *Sun v He (No 2)* [2020] NSWSC 1298 [20].
29. *DPP (NSW) v John Fairfax and Sons Ltd* (1987) 8 NSWLR 732, 739–747.
30. *Supreme Court Rules 1970* (NSW) pt 55 div 4 r 13(1)–(2).
31. *Supreme Court Rules 1970* (NSW) pt 55 div 4 r 13(3), r 14.
32. *Registrar of the Court of Appeal v Maniam (No 2)* (1992) 26 NSWLR 309, 314.
33. NSW Office of the Director of Public Prosecutions, *Preliminary Submission PCI12*, 8.

recommended that there should be legislative reforms to the law of sub judice contempt.[34]

13.29 However, as explained in chapter 1, this report does not make any recommendations to amend the law of contempt or its operation as this is outside the scope of this review.

Standardising offences for breach

13.30 All offences for breach of statutory prohibitions on publication and disclosure, statutory exclusion and closed court provisions, and non-publication, non-disclosure, exclusion and closed court orders should contain standard elements. This includes offences in subject-specific legislation and the offence for breaching an order made under the new Act.[35] All offences should:

- require the offender to have contravened the order or prohibition
- contain standard elements as to the mental state required to prove liability, depending on the classification of the exception, and
- provide that directors of corporations may be personally liable for offences in some circumstances.

13.31 Offences for breach of statutory prohibitions, statutory provisions and orders are currently set out in a range of ways. Many offences are defined briefly and do not state key elements.

13.32 Most specify either that the person must not "publish", "broadcast", or "disclose" the protected information.[36] Others require that the person "contravenes" or "fails to obey" an order or direction.[37]

13.33 Some offences require that the offence is done "knowingly", "intentionally", "wilfully" or "recklessly".[38] Others state that the offence is one of strict liability.[39]

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34. NSW Law Reform Commission, *Contempt by Publication*, Report 100 (2003).
35. Recommendation 7.10.
36. See, eg, *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 29(1)(f), s 254(1); *Bail Act 2013* (NSW) s 89(1).
37. See, eg, *Lie Detectors Act 1983* (NSW) s 6(3)–(4), s 7(1); *Court Suppression and Non-publication Orders Act 2010* (NSW) s 16(1).
38. See, eg, *Crimes (Forensic Procedures) Act 2000* (NSW) s 43(1); *Court Suppression and Non-publication Orders Act 2010* (NSW) s 16(1).
39. 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(1)–(1AA), s 105(2).

13.34 It is desirable for all offences to be described consistently, to improve understanding of the law and facilitate prosecution of breaches. Recommendations 13.2–13.5 are intended to establish a more comprehensive and uniform offence regime.

Liability should require contravention of the prohibition or order

Recommendation 13.2: The physical element of offences for breaches

All offences for breaches of statutory prohibitions on publication and disclosure, statutory exclusion and closed court provisions, and non-publication, non-disclosure, exclusion and closed court orders should provide that it is an offence to contravene the prohibition, provision or order.

13.35 Recommendation 13.2 is that all offences for breach of a statutory prohibition, statutory provision or orders, should require the person to have contravened the prohibition, provision or order. This recommendation applies to all offences, including the offence of breaching an order made under the new Act.[40]

13.36 It is not possible to define all offences by reference to one particular form of conduct (for example, publishing or disclosing the relevant information), as these prohibitions, provisions and orders apply to different types of conduct. Providing that a person commits an offence if they "contravene" the statutory prohibition, statutory provision or order encompasses all types of conduct.

The mental element required to establish liability for breach

13.37 The mental element required to establish liability for a contravention should depend on whether the breach is of a statutory prohibition, statutory provision or order as follows:

- strict liability should apply to offences for breach of statutory prohibitions on publication and disclosure and statutory exclusion and closed court provisions, and
- knowledge of, or recklessness as to, the existence of the order should be required in relation to offences for breach of non-publication, non-disclosure, exclusion and closed court orders (including orders made under the new Act).

Strict liability offences

Recommendation 13.3: Strict liability offences

All offences for breaches of statutory prohibitions on publication and disclosure and statutory exclusion and closed court provisions should provide that the offence is one of strict liability.

13.38 All offences for breach of a statutory prohibition on publication or disclosure, or a statutory exclusion or closed court provision, should attract strict liability.

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40. Recommendation 7.10(1).

13.39 Strict liability offences do not have a mental element. This means a person can be liable if they have committed the physical element of the offence, irrespective of intention or recklessness. However, a person may avoid liability if they can prove they had an honest and reasonable belief in a state of facts which, if those facts existed, would render the act innocent.[41]

13.40 Our draft proposal was that offences for breach of statutory prohibitions on publication and disclosure should provide that a person commits an offence if the person knows of the existence of the prohibition.[42] However, as the ODPP stated, "[t]hat position would be contrary to the principle that ignorance of the law is no excuse".[43]

13.41 The Children's Court queried:

> how the requirement to prove knowledge of the existence of the prohibition to enable an offence to be proven would operate in practice where the prohibition was mandated in every case.[44]

13.42 We agree with these submissions. If these offences required knowledge of the prohibition, then a person would escape liability by arguing they were unaware of the prohibition. This is an undesirable outcome.

13.43 As a result, these offences should attract strict liability. Under this approach, the prosecution would not have to prove that the offender knew of the statutory prohibition or statutory exclusion or closed court provision.

13.44 Recommendation 13.3 is consistent with some existing prohibitions on publication or disclosure that already provide that an offence is one of strict liability.[45] The Bar Association supported continuing to provide that some of these offences attract strict liability.[46]

Offences requiring knowledge or recklessness

Recommendation 13.4: Offences requiring knowledge or recklessness

All offences for breach of a non-publication, non-disclosure, exclusion or closed court order should provide that a person commits an offence if the person knows of, or is reckless as to, the existence of the order.

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41. *CTM v R* [2007] NSWCCA 131 [66]–[76].
42. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 9.3(2)(b).
43. NSW Office of the Director of Public Prosecutions, *Submission CI48*, 3–4.
44. Children's Court of NSW, *Submission CI62*, 6–7; Children's Court of NSW, *Consultation CIC25*.
45. See, eg, *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 45(3), s 45(6); *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 105(5).
46. NSW Bar Association, *Submission CI56* [50].

13.45 All offences for breach of a non-publication, non-disclosure, exclusion or closed court order should provide that a person commits an offence if the person contravening the order knows of, or is reckless as to, the existence of the order. This recommendation also applies to the offence of breaching an order made under the new Act.[47]

13.46 Our draft proposal was that these offences should require knowledge of the order.[48] However, the Police Force observed that proving actual knowledge of an order can be very difficult.[49] The ODPP and the Police Force considered it should be possible to establish liability by recklessness as to the existence of an order.[50] We accept these submissions.

13.47 Recommendation 13.4 is consistent with some existing offences which provide that a person is liable if they act recklessly.[51] It aligns with legislation in Victoria, which provides that it is an offence to contravene certain types of orders if a person knows that the order is in force, or is reckless as to whether the order is in force.[52]

13.48 ARTK contended that recklessness should not be sufficient to attract criminal liability. It argued journalists should not "be put at risk of contempt of court merely for doing their jobs well: a risk no other professional routinely faces".[53]

13.49 However, the offence provision does not capture reasonable conduct by journalists. It is not apparent why a journalist should be protected, any more than anyone else, from the consequences of acting recklessly.

Directors should be personally liable for breaches in certain circumstances

Recommendation 13.5: Directors' liability for breaches

All offences for breaches of statutory prohibitions on publication and disclosure, statutory exclusion and closed court provisions, and non-publication, non-disclosure, exclusion and closed court orders should provide that if a corporation contravenes the offence, each person who is a director of the corporation or who is concerned in the management of the corporation is taken to have committed the same offence, unless the person satisfies the court that:

(a) the person was not in a position to influence the conduct of the corporation in relation to its contravention, or

47. Recommendation 7.10(1).
48. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 9.3(2)(b).
49. NSW Police Force, *Submission CI38*, 1.
50. NSW Office of the Director of Public Prosecutions, *Submission CI48*, 3; NSW Police Force, *Submission CI38*, 1.
51. See, eg, *Court Suppression and Non-publication Orders Act 2010* (NSW) s 16(1); *Crimes (Forensic Procedures) Act 2000* (NSW) s 43(1).
52. *Open Courts Act 2013* (Vic) s 23(1), s 27(1), s 32.
53. Australia's Right to Know, *Submission CI27*, 17.

(b) the person, if in such a position, used all due diligence to prevent the contravention.

13.50 Recommendation 13.5 intends to deter breaches by corporations, by ensuring that a corporation's controlling minds have a personal interest in compliance. It is similar to a provision in the *Protection of the Environment Operations Act 1997* (NSW).[54]

Liability of hosting service providers and internet service providers

13.51 There are special provisions in Commonwealth legislation relating to the liability of Australian hosting service providers (HSPs) and internet service providers (ISPs) under state and territory laws. Under the *Online Safety Act 2021* (Cth) (*Online Safety Act*):

- an Australian HSP is a person who provides a hosting service that involves hosting material in Australia,[55] and
- an ISP is a person who supplies, or proposes to supply, an internet carriage service to the public.[56]

13.52 The *Online Safety Act* provides that if a state law subjects, or would subject, an Australian HSP or ISP to liability for hosting or carrying particular internet content that the host or service provider was not aware of, it has no effect.[57] This could include laws that create liability for hosting or carrying content that breaches a statutory prohibition on publication or disclosure, statutory closed court provision or a non-publication, non-disclosure or closed court order.

13.53 Offences that create liability if an offender is "reckless as to" whether conduct constitutes a breach, and offences that attract strict liability, are likely to fall within laws that create liability for hosting or carrying content that the host or carrier is not aware of. For example, under recommendation 13.3 the offence of publishing the identity of a complainant in prescribed sexual offence proceedings would be a strict liability offence.[58] An Australian HSP or ISP could commit this offence by hosting or sending material that identifies a complainant, even if they do not know the nature of the material. In this case, they would be protected from liability by the *Online Safety Act.*

13.54 The Commonwealth Constitution provides that when a law of a state is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.[59] Therefore, there may be cases where Australian HSPs and ISPs would not be liable for certain offences, where they otherwise would be, by virtue of the *Online Safety Act*.

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54. *Protection of the Environment Operations Act 1997* (NSW) s 169.
55. *Online Safety Act 2021* (Cth) s 5 definition of "Australian hosting service provider".
56. *Online Safety Act 2021* (Cth) s 19(1).
57. *Online Safety Act 2021* (Cth) s 235(1).
58. *Crimes Act 1900* (NSW) s 578A.
59. *Australian Constitution* s 109.

13.55 It is less likely that this issue would arise in relation to offences that require an offender to "know of" the existence of a relevant statutory prohibition, statutory provision or order. These offences would not come within the definition of laws that make a host or carrier liable for hosting or carrying content of which they are not aware.

No other changes to offences

13.56 We do not recommend standardising other elements of statutory offences for breaches of statutory prohibitions, statutory provisions and orders, such as exceptions or maximum penalties.

Exceptions to offences

13.57 Many existing statutory offences contain exceptions. If one of these applies, a person has not committed the offence. Exceptions to offences include if:

- the conduct is an official report of proceedings[60]
- the conduct is for the purposes of complying with law enforcement or legal proceedings, or for providing legal advice[61]
- the conduct is necessary for the administration or enforcement of the statute or any other law[62]
- the conduct is for the purpose of research[63]
- the defendant can prove they had a (lawful) excuse for the conduct,[64] and
- the court gives permission for the conduct to occur.[65]

13.58 It is appropriate for different exceptions to apply to different offences, depending on the circumstances and purpose of the relevant statute.

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60. See, eg, *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 45(4)(a); *Drug and Alcohol Treatment Act 2007* (NSW) s 41(2).
61. See, eg, *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW) s 18(3)(c).
62. 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(3)(g).
63. See, eg, *Mental Health Act 2007* (NSW) s 189(1)(d1); *Jury Act 1977* (NSW) s 68(5).
64. See, eg, *Evidence (Audio and Audio Visual Links) Act 1998* (NSW) s 16(3); *Civil and Administrative Tribunal Act 2013* (NSW) s 72; *Mental Health Act 2007* (NSW) s 189(1)(e).
65. See, eg, *Coroners Act 2009* (NSW) s 76; *Crimes (Appeal and Review) Act 2001* (NSW) s 111(1)–(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).

Maximum penalties for offences

13.59 Our draft proposal was that all statutory offences for breach of prohibitions or orders should have a maximum penalty of no more than:

- for an individual: two years' imprisonment and/or a fine of 100 penalty units ($11,000), and
- for a corporation (where relevant): a fine of 500 penalty units ($55,000).[66]

13.60 However, after further consideration, standardised maximum penalties for all offences are neither necessary nor appropriate. In relation to existing offences of breaching a prohibition or order, most already have a maximum penalty under these limits. Of the few that have higher penalties, these are appropriate, given the nature and context of the conduct which they criminalise.[67]

13.61 knowmore argued that the penalty for the offence of publishing a matter that identifies the complainant in prescribed sexual offence proceedings in s 578A of the *Crimes Act 1900* (NSW) (*Crimes Act*) should be increased.[68] The maximum penalty is currently:

- 50 penalty units ($5,500) or imprisonment for six months, or both (in the case of an individual), or
- 500 penalty units ($55,000) (in the case of a corporation).

13.62 The submission argued that increasing the maximum penalty is "important to adequately reflect the gravity of unlawfully publishing information likely to lead to the identification of a complainant without their consent".[69] However, while there is some force in this submission, we are not persuaded that there is a need to increase the current penalties since it is not apparent that they are inadequate to deter breaches.

13.63 In chapter 7, we recommend that the offence in the new Act should have a maximum penalty of 12 months' imprisonment and/or a fine of 1,000 penalty units ($110,000) (for an individual) or 5,000 penalty units ($550,000) (for a corporation). When a matter is dealt with in the Local Court, the monetary amounts are reduced to 100 penalty units ($11,000) (for an individual) or 500 penalty units ($55,000) (for a corporation).[70]

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66. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 9.1.
67. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 105(2); *Court Suppression and Non-publication Orders Act 2010* (NSW) s 16(1); *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 45(3).
68. knowmore, *Submission CI43*, 22. See also knowmore, *Submission CI10*, 7.
69. knowmore, *Submission CI43*, 22.
70. Recommendation 7.11.

13.64 ARTK argued that offences for breaches should only attract fines, not imprisonment.[71] However, maximum penalties of imprisonment, which are rarely imposed by courts in the exercise of sentencing discretion, play a crucial role in deterring offences.

13.65 Where making a breach punishable in accordance with recommendation 13.1 involves new offences, the maximum penalty for the offence under the new Act provides an appropriate starting point for the maximum penalty for those offences.

The time limit for prosecutions should be extended

Recommendation 13.6: The time limit to bring proceedings for offences for breaches of statutory prohibitions, statutory provisions and orders

All offences for breaches of statutory prohibitions on publication and disclosure, statutory exclusion and closed court provisions, and non-publication, non-disclosure, exclusion and closed court orders, should provide that proceedings must be commenced within two years of the date of the alleged offence.

13.66 Recommendation 13.6 is to provide a standard and longer limitation period for commencing a prosecution for a breach.

13.67 The recommendation is the same as our draft proposal,[72] which was supported in submissions by the Bar Association, Legal Aid and the ODPP.[73]

13.68 Statutory offences for breaches are summary offences.[74] A summary offence is a less serious offence, usually dealt with in the Local Court.

13.69 Generally, proceedings for summary offences must be commenced within six months.[75] However, there are some exceptions. For example, the offence of publishing or broadcasting the name of a child in a way that connects them with criminal proceedings[76] and the offence of publishing a matter that identifies the complainant in prescribed sexual offence proceedings both have a two-year time limit for commencing prosecutions.[77]

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71. Australia's Right to Know, *Submission CI59*, 13, 26. See also Australia's Right to Know, *Submission CI27,* 17, 60.
72. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 9.4.
73. NSW Bar Association, *Submission CI56* [7]; Legal Aid NSW, *Submission CI57*, 24; NSW Office of the Director of Public Prosecutions, *Submission CI17*, 17.
74. See NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Consultation Paper 22 (2020) [5.27].
75. *Criminal Procedure Act 1986* (NSW) s 179(1). Offences with a maximum penalty of two years' imprisonment or less are generally summary offences: *Criminal Procedure Act 1986* (NSW) s 6(1)(c).
76. *Children (Criminal Proceedings) Act 1987* (NSW) s 15A(8).
77. *Crimes Act 1900* (NSW) s 578A(9).

13.70 Further, the time limit for commencing summary proceedings in the Local Court for the offence of contravening an order made under the *CSNPO Act* was recently increased from six months to two years.[78] In explaining this extension, the Attorney General said:

> The current time limit to commence prosecutions under this Act does not reflect the myriad ways information can now be communicated and published and the resulting complexities of discovering or obtaining evidence of the offence. It is particularly difficult and time-consuming for the police to obtain the required evidence when individuals breach these orders via social media platforms, which may have headquarters overseas. This amendment will enable more effective and appropriate prosecutions.[79]

13.71 This reasoning applies to all offences for breaches of statutory prohibitions, statutory provisions and orders. We therefore recommend there should be a consistent time limit of two years for instituting prosecutions.

Responsibility for dealing with breaches should be clarified

Recommendation 13.7: Responsibility for dealing with breaches

The Department of Communities and Justice should form a working group (with an ongoing role) with Police, the Office of the Director of Public Prosecutions, Legal Aid and other relevant agencies to:

(a) improve communication and coordination between agencies responsible for handling complaints about, and investigating and prosecuting, breaches of statutory prohibitions on publication and disclosure, statutory exclusion and closed court provisions, and non-publication, non-disclosure, exclusion and closed court orders, and

(b) monitor the operation of the system.

13.72 Recommendation 13.7 aims to support the development of a more coordinated approach to the investigation and prosecution of breaches through better communication and coordination between the agencies that receive complaints, monitor compliance, and investigate and deal with breaches.

13.73 The effective deterrence and punishment of breaches requires clear systems for handling complaints about potential breaches, and investigating and prosecuting offences. We were informed that responsibility for investigating and prosecuting

78. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 16, s 17(3), amended by *Stronger Communities Legislation Amendment (Crimes) Act 2020* (NSW) sch 1.3.

79. NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 16 September 2020, 3439.

breaches is unclear and spread across different agencies.[80] This can make it difficult for people whose identities are protected to know where and how to report alleged breaches.

13.74 No single agency is responsible for monitoring compliance with statutory prohibitions, statutory provisions and orders, or for taking action in the case of non-compliance. Several organisations carry out some functions in monitoring and dealing with breaches. These include the ODPP, Police Force and various branches of the Department of Communities and Justice.[81]

13.75 The ODPP plays the primary role in cases in which it is involved. It has observed:

> 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 such matters to the attention of the court but should not be responsible for sending out notices requesting that offending material be removed.[82]

13.76 Legal Aid regularly takes action where it suspects a non-publication or non-disclosure order has been breached.[83] Parties to proceedings and their legal representatives may also monitor prohibitions relating to matters in which they are involved.

13.77 Various branches of the Department of Communities and Justice also monitor and enforce statutory prohibitions, statutory provisions and orders:

- Some breaches, particularly those arising from tribunal matters, are referred to and dealt with by the Office of the General Counsel, although these are rare.[84]
- The Crown Solicitor's Office carries out some prosecutions, on instructions from the Department of Communities and Justice.[85]

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80. Children's Court of NSW, *Preliminary Consultation PCIC08*; Mental Health Review Tribunal, *Preliminary Submission PCI23*, 2; Mental Health Review Tribunal, *Preliminary Consultation PCIC10*.
81. See NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Consultation Paper 22 (2020) [5.48]–[5.56].
82. NSW Office of the Director of Public Prosecutions, *Preliminary Submission PCI12*, 9–10.
83. Legal Aid NSW, *Preliminary Submission PCI39*, 9.
84. NSW, Mental Health Review Tribunal, *Preliminary Consultation PCIC10*; NSW Civil and Administrative Tribunal, *Preliminary Consultation PCIC13*; Office of the General Counsel, NSW Department of Communities and Justice, *Preliminary Consultation PCIC15.*

- The Digital, Media and Events unit takes action in some cases.[86]
- The Child Protection Law Unit manages breaches relating to prohibitions on publishing information about care and protection matters.[87]

13.78 It is not always clear which agencies perform which functions.[88] This lack of clarity may mean that people do not report alleged breaches.[89] The ODPP has commented that the current arrangements are "an undesirable state of affairs leading to a low rate of action being taken on breaches".[90] The Children's Court observed that "there needs to be a clearer process … to bring a complaint for breaches".[91] There is a risk that some breaches may be overlooked. Improving coordination and clearly communicating processes for reporting may reduce this risk.

13.79 Some submissions argued that there should be a single agency responsible for enforcement.[92] For example, Courts, Tribunals and Service Delivery argued that an authorised person within the Department of Communities and Justice could be delegated with the authority to notify the ODPP and/or Police Force of breaches.[93]

13.80 Other submissions argued that the Police Force should have a dedicated unit to investigate breaches.[94] The ODPP commented that the police may be more persuasive (compared with other agencies) in requesting that organisations take down material that contravenes a statutory prohibition or order.[95]

13.81 A 2008 report by the Legislative Council Standing Committee on Law and Justice into the prohibition on publishing names of children involved in criminal proceedings

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85. Office of the General Counsel, NSW Department of Communities and Justice, *Preliminary Consultation PCIC15.*
86. Office of the General Counsel, NSW Department of Communities and Justice, *Preliminary Consultation PCIC15.*
87. Child Protection Law Unit, NSW Department of Communities and Justice, *Preliminary Consultation PCIC17.*
88. Children's Court of NSW, *Preliminary Consultation PCIC08*; NSW, Mental Health Review Tribunal, *Preliminary Submission PCI23*, 2; NSW, Mental Health Review Tribunal, *Preliminary Consultation PCIC10.*
89. Children's Court of NSW, *Preliminary Consultation PCIC08*.
90. NSW Office of the Director of Public Prosecutions, *Submission CI17*, 16.
91. Children's Court of NSW, *Submission CI28*, 4.
92. Fighters Against Child Abuse Australia, *Submission CI32,* 15–16; NSW Office of the Director of Public Prosecutions, *Submission CI17*, 16; Children's Court of NSW, *Submission CI28*, 4; NSW Young Lawyers Criminal Law Committee, *Preliminary Submission PCI37*, 6; Roundtable 5, *Consultation CIC09*; Children's Court of NSW, *Consultation CIC11.*
93. Courts, Tribunals and Service Delivery, NSW Department of Communities and Justice, *Submission CI53*, 10.
94. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission CI22*, 1; NSW Office of the Director of Public Prosecutions, *Submission CI17*, 16.
95. NSW Office of the Director of Public Prosecutions, *Submission CI17*, 16.

recommended that an existing office within the Police Force, such as its Office of the General Counsel, be identified as the primary recipient of all complaints relating to breaches of the prohibition.[96]

13.82 However, prohibitions on publication or disclosure and non-publication and non-disclosure orders arise in a diverse range of contexts. The most appropriate agency to investigate and deal with breaches differs, depending on the circumstances. These circumstances may include the gravity of the breach, whether it will be prosecuted as a statutory offence or contempt, the identity of the prosecutor and the court in which the offence is heard. For example, the Police Force may be the appropriate agency to investigate a breach arising from criminal proceedings, while the Department of Communities and Justice might be more appropriate for breaches arising from care and protection proceedings. In some civil proceedings, the party affected by the breach may sometimes be the most appropriate prosecutor for contempt.

13.83 In Victoria, as in NSW, no single body is responsible for monitoring whether people are complying with publication prohibitions.[97] Instead, the responsibility largely lies with interested parties (including victims, the Victorian Office of Public Prosecutions and the courts) to monitor the media and report any breaches to Victoria Police.[98] The Victorian Law Reform Commission found this system of informal monitoring was appropriate, and recommended against establishing a more formal independent monitoring body.[99]

13.84 Similarly, we do not recommend there should be one central agency in NSW responsible for dealing with breaches. However, a working group with an ongoing role, led by the Department of Communities and Justice, would be well placed to explore the complexities of the current arrangements, consult with relevant agencies, and consider options to improve coordination in dealing with breaches.

Register of orders

Recommendation 13.8: A register of orders

(1) There should be an online register of all non-publication, non-disclosure and closed court orders made by a court pursuant to:

(a) the new Act, or

(b) a discretion to make an order under another Act or law.

(2) The new Act should provide that regulations may provide for the following:

(a) who is to administer the register

96. 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.

97. Victorian Law Reform Commission, *Contempt of Court*, Report (2020) [16.49].

98. Victorian Law Reform Commission, *Contempt of Court*, Report (2020) [16.49]–[16.52].

99. Victorian Law Reform Commission, *Contempt of Court*, Report (2020) [16.63]–[16.65].

(b) other types of orders that must be entered on the register

(c) exceptions to when an order must or may be entered on the register

(d) who may access the register

(e) conditions on access to the register (including fees and fee waiver)

(f) how information on the register may be used, and

(g) other features of the register.

13.85 The purpose of recommendation 13.8, in establishing a comprehensive, accessible and searchable register, is to improve awareness of and compliance with non-publication, non-disclosure and closed court orders made by a court under the new Act, or under a discretion to make such orders in other Acts.

13.86 Our recommendation is similar to our draft proposal,[100] except we have removed orders made by tribunals.

Benefits of the register

13.87 A register of orders would promote the objects of the new Act, including promoting public confidence in and understanding of the courts and transparency of decision-making under the Act.[101] It would also align with our broader aim of providing clarity about the effect and operation of exceptions to open justice so as to promote confidence and certainty in the system (chapter 1).

13.88 The concept of a register of orders has been widely supported.[102] Submissions noted that it could:

- strengthen and streamline the current notification system for orders
- help improve knowledge of and compliance with orders
- assist people to be aware of orders in proceedings that are moved to a different court
- help with administration and enforcement of orders

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100. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 9.5.

101. Recommendation 4.2.

102. See, eg, Roundtable 5, *Consultation CIC09*; NSW Council for Civil Liberties, *Submission CI02*, 4; J Johnston, P Keyzer and T Johnston, *Submission CI13*, 5, 6; NSW Office of the Director of Public Prosecutions, *Submission CI17*, 31; Law Society of NSW, *Submission CI19*, 2; UTS Jumbunna Institute for Indigenous Education and Research, Aboriginal Legal Service, and National Justice Project, *Submission CI23* [58]; Australia's Right to Know, *Submission CI27*, 101; Banki Haddock Fiora, *Submission CI29*, 9; Fighters Against Child Abuse Australia NSW, *Submission CI32*, 36; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission CI49*, 3; NSW Bar Association, *Submission CI56* [53]; Legal Aid NSW, *Submission CI57*, 24; Rape and Domestic Violence Services Australia, *Submission CI61* [37]; Children's Court of NSW, *Submission CI62*, 7.

- improve transparency and provide oversight of orders that are ambiguous or difficult to understand, and
- assist people in deciding whether to challenge orders.[103]

13.89 A register of orders would also improve understanding of the number and type of orders made by courts each year. Currently, not all courts record the number of orders that are made and no courts publicly report on orders in their annual reports. This makes it difficult to understand trends (for example, whether the number of orders made is increasing or decreasing). A register would provide a publicly accessible source of non-publication, non-disclosure and closed court orders made, from which data could be analysed.

13.90 As we discuss in chapter 16, some submissions observed that establishing and maintaining a register would require resourcing, including dedicated staff.[104] The benefits of a register justify deploying such resources.

Features of the register

13.91 The register should be created by the new Act, but the detail should be prescribed by regulation.

13.92 The register should only include non-publication, non-disclosure and closed court orders made under the new Act or under discretions to make such orders in subject-specific legislation. We do not consider it is necessary or desirable to include orders made pursuant to requirements to make orders. Those who are interested in a matter where such an order is made are already on notice of the order because legislation requires the order to be made. Requiring entry of those orders on the register would involve a heavy administrative burden.

13.93 Similarly, the register should not include statutory prohibitions on publication or disclosure, as these apply automatically and do not require any positive action by the court.[105] However, when designing the register it may be appropriate to consider expanding the types of orders it contains, for example, to include orders lifting statutory prohibitions.

13.94 The register need not record exclusion orders. These orders only affect proceedings at the time at which they are made and, unlike closed court orders, have no further impact, such as prohibiting disclosure of information.

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103. Legal Aid NSW, *Submission CI24*, 24; NSW Office of the Director of Public Prosecutions, *Submission CI17*, 31; Banki Haddock Fiora, *Submission CI29*, 9–10; Fighters Against Child Abuse Australia, *Submission CI32*, 15; Legal Aid NSW, *Submission CI57*, 24.

104. Supreme Court of NSW, *Submission CI26*, 2; Courts, Tribunals and Service Delivery, NSW Department of Communities and Justice, *Submission CI53*, 7, 9–10.

105. Courts, Tribunals and Service Delivery, NSW Department of Communities and Justice, *Submission CI53*, 10; Children's Court of NSW, *Submission CI62*, 7.

13.95 Submissions suggested there are cases where it would be impossible to record an order on the register without defeating the purpose of the order.[106] In these cases, the order may have to be excluded. However, the administrator of the register should aim to record at least the basic elements of an order, wherever possible. Complete exclusion of an order from the register should be rare. Another option is that some orders on the register could only be accessed on court premises under the supervision of court staff.[107]

13.96 We do not make recommendations about specific aspects of how the register should operate. It is more appropriate for these operational matters to be determined administratively. However, we note that submissions supported the register:

- being publicly accessible
- containing provisions for waiving fees in certain cases
- containing a search component, allowing subscribers to locate orders, and
- containing a notification component, allowing subscribers to record interest in specific proceedings and be notified if an order is made.[108]

No Court Information Commissioner

13.97 Our draft proposal was to establish a Court Information Commissioner who would carry out the following functions:

- monitor and investigate breaches of statutory prohibitions on publication or disclosure and non-publication, non-disclosure, exclusion or closed court orders, including those occurring online
- liaise with publishers and content hosts to remove material that is in breach of prohibitions or orders
- commence proceedings for alleged breaches of prohibitions or orders, in appropriate cases
- produce educational material about the risks and consequences of breaching prohibitions or orders, and

106. Supreme Court of NSW, *Submission CI26*, 2; NSW Bar Association, *Submission CI56* [55]–[56]; Children's Court of NSW, *Submission CI62*, 7.

107. Children's Court of NSW, *Consultation CIC25*.

108. Australia's Right to Know, *Submission CI59*, 27; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission CI49*, 3; T Sourdin, *Submission CI40*, 2; Rape and Domestic Violence Services Australia, *Submission CI61* [37]–[38].

- maintain and update a register of orders and control access to it.[109]

13.98 This proposal received a mixed response. While some submissions supported it,[110] others suggested that it was unnecessary or that there may be difficulties with the Commissioner operating across multiple courts.[111]

13.99 We have concluded that existing agencies can carry out these functions. We address these throughout this report. Specifically:

- in this chapter, we recommend steps to support improved coordination between agencies with responsibility for monitoring, investigating and prosecuting breaches
- in chapter 6, we discuss arrangements for take down orders, such as liaising with publishers and content hosts to remove material,[112] and
- in chapter 16, we discuss education initiatives.

109. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 9.6.

110. NSW Council for Civil Liberties, *Submission CI34*, *1*; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission CI49*, 3; NSW Bar Association, *Submission CI56* [7]*;* Legal Aid NSW, *Submission CI57*, 24*;* Children's Court of NSW, *Submission CI62*, 7.

111. Australia's Right to Know, *Submission CI59*, 27–28; Supreme Court of NSW, *Submission CI55* [22].

112. [6.30]–[6.33].

14. Technology and related issues

In Brief

Technology has provided both opportunities for, and challenges to, open justice. There should be reforms to facilitate remote access to court and tribunal proceedings and enable media recording of proceedings. This chapter also considers issues relating to electronic access to court files and court and tribunal decisions and court lists, as well as live reporting of proceedings on social media.

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14.1 Technology brings both opportunities for, and significant challenges to, open justice. On the one hand, digital innovation can transform engagement with the courts. The internet offers improved opportunities to search court files, peruse court lists, read judgments and watch court proceedings live. Court information can be delivered instantly on websites, through social media and by email. On the other hand, there are challenges in controlling the availability of information in cases where it is necessary to ensure a fair trial, protect vulnerable people or protect the privacy of individuals from unnecessary or unwarranted intrusion.

14.2 Technology has changed access to courts and court records in many ways, as have responses to the COVID-19 pandemic (chapter 1). Some of the responses relevant to

issues covered in this chapter include public health legislation, passed at the start of the pandemic, which amended:

- the *Evidence (Audio and Audio Visual Links) Act 1998* (NSW), to enable increased use of audio visual links (AVL) in court proceedings, including a presumption in favour of AVL for bail appearances and power for courts to direct the use of AVL for hearings and trials,[1] and
- the *Criminal Procedure Act 1986* (NSW), to enable the use of pre-recorded evidence in certain circumstances and facilitate more judge alone trials.[2]

14.3 In November 2020, the Government announced it would allocate $54 million over three years for digital transformation of the courts. This includes digitising court files and moving more than 200,000 court appearances online. Additional funding was announced to install or upgrade AVL in courtrooms.[3] These legislative and funding responses to the COVID-19 pandemic will likely have a lasting impact on the administration of justice.

14.4 Virtual proceedings raise important issues surrounding open justice, in particular, access to the courts.

14.5 In this chapter, we explore ways to ensure open justice is supported, and not adversely affected, by technology.

14.6 This chapter is concerned with the following issues:

- remote access to court proceedings
- recording of court proceedings
- digitisation of court files and court and tribunal decisions
- access to court lists, and
- social media and the possibility of live reporting of proceedings.

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1. *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, 2230.
2. *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, 2230.
3. NSW Government, "NSW Budget 2020–2021: Building and Tech to Aid Recovery and Justice" (Media Release, 17 November 2020).

Remote access to proceedings

14.7 In this section, we consider issues relating to remote access to court and tribunal proceedings including:

- remote access to proceedings by all participants (in other words, the proceedings are conducted entirely online), and
- remote access by some participants or observers to proceedings that are mostly conducted in person.

14.8 Each of these scenarios involves the interaction or observation taking place at the same time. We are not referring to:

- "on the papers" proceedings, where parties submit documents through a digital system at different times, such as committal proceedings which are conducted through an electronic case management system after an accused person's first appearance,[4] or
- the broadcast of certain select proceedings by either live or delayed transmission, such as news media organisations recording judgment remarks for the purposes of a broadcast.[5]

14.9 Remote access by at least some participants has been a feature of proceedings for some time. Courts are used to witnesses giving evidence in remote locations through AVL.[6] It is not unusual for participants to appear by phone or audio visual technology.

Developments during the COVID-19 pandemic

14.10 The COVID-19 pandemic has led to a significant reduction in physical attendance at courts and tribunals and increased use of remote access. The extent to which the measures allowing this will continue in the aftermath of the pandemic is unclear, but we anticipate that it will remain more extensive than pre-pandemic.

14.11 Understandably, open justice has not always been a priority when implementing emergency measures during the pandemic.[7] However, in some cases, courts have enabled proceedings to be viewed by the public where possible in real time.[8]

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4. *Criminal Procedure Act 1986* (NSW) s 57. See also *Criminal Justice and Courts Act 2015* (UK) s 46–50; Her Majesty's Courts and Tribunals Service, *Protocol on Sharing Court Lists, Registers and Documents with the Media* (2020) 2.
5. *Supreme Court Act 1970* (NSW) pt 9A; *District Court Act 1973* (NSW) pt 5.
6. See, eg, *Evidence (Audio and Audio Visual Links) Act 1998* (NSW) s 5B, s 5BB, s 7.
7. T Sourdin, *Submission CI40*, 11.

14.12 Among the changes made since the start of the pandemic the District Court introduced procedures to allow the media to observe particular trials remotely, using the same access methods as the parties.[9]

14.13 Consultations indicated that non-parties have had some difficulty in accessing proceedings remotely. While access links are usually provided to parties, non-parties may need to request links from the court. Whether a link is provided may depend on the type of matter.[10]

14.14 Some journalists noted generally positive experiences of remote access to proceedings, although others said that requirements were not always practical (for example, the court requiring 24 hours' notice before providing an access link).[11] One observed that whether access would be granted at all sometimes depended on the judge or the type of matter.[12]

14.15 Courts elsewhere in Australia have also allowed remote access during the pandemic. The way in which people can access proceedings varies from court to court. While access links are usually provided to parties, the situation for non-parties varies.

14.16 The Federal Court sometimes publishes links to high-profile cases on daily lists.[13] In other cases, non-parties interested in watching proceedings may need to request access details from the court.[14] In the Victorian County Court, judges may allow non-parties to observe the hearing. Access by non-parties appears to be limited to family members, support people for an accused person or complainant, and accredited media representatives.[15] The publicly available information is silent on public access.

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8. See, eg, *Larter v Hazzard (No 3)* [2021] NSWSC 1595 [16]; *Fabcot Pty Ltd v Mosman Municipal Council* [2021] NSWLEC 1665 [148]; *Quirk v Construction, Forestry, Maritime, Mining and Energy Union* [2020] FCA 664; *Barilaro v Shanks-Markovina (No 3)* [2021] FCA 1100 [38].
9. District Court of NSW, *Virtual Court Media User Guide* (2021).
10. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Consultation Paper 22 (2020) [12.10].
11. Sydney Morning Herald, *Preliminary Consultation PCIC06*; 9News, *Preliminary Consultation PCIC09*.
12. Sydney Morning Herald, *Preliminary Consultation PCIC07*.
13. See, eg, Federal Court of Australia, "Public Interest Cases (Online Files)" <www.fedcourt.gov.au/services/access-to-files-and-transcripts/online-files> (retrieved 24 May 2022); See Federal Court of Australia, *Special Measures Information Note: Special Measures in Response to COVID-19 (SMIN-1)* (2020) [9.3].
14. Sydney Morning Herald, *Preliminary Consultation PCI0C6*; NSW Civil and Administrative Tribunal, *Preliminary Consultation PCIC13*.
15. County Court of Victoria, *Criminal Division Hearings: Webex Information Guide* (2 February 2021) [3.2], [3.5], [4.3]. See also County Court of Victoria, "Virtual Hearings and Trials" (26 April 2022) <www.countycourt.vic.gov.au/going-court/virtual-hearings-and-trials> (retrieved 24 May 2022)

Benefits of remote access

14.17 Remote access to proceedings can facilitate open justice.[16] Physical courts are not always accessible or convenient.[17] Technology may offer solutions for people who have previously found it difficult or impossible to attend in person, such as those living in regional or remote locations, or some people with disability.

14.18 The Children's Court observes there is:

> potential for the ongoing use of this technology as a way of improving access to justice for those involved in the proceedings, such as victims and family members who are unable to attend court in person.[18]

14.19 The Mental Health Review Tribunal (MHRT) has, likewise, found remote access to be helpful for family members and students to attend who would "find it hard to join face to face hearings".[19]

14.20 In submissions and consultations, we were informed that remote access can make it easier for journalists to attend and observe proceedings.[20]

Concerns around remote access

14.21 Some concerns around remote access arise where the public and media can no longer access a physical courtroom where open proceedings are held. Limitations on remote access can mean that court operations are conducted in an environment that is not open to public scrutiny. In this way, reducing access to physical courts may have an adverse impact on open justice.[21]

14.22 Even when remote access is available, access to technology is not equal. Members of the public who cannot access proceedings remotely may lose the opportunity to observe some proceedings altogether.

14.23 Further, the transition to remote access requires a level of technology and resources that many courts and tribunals do not presently have.[22] Current remote access arrangements may not be sustainable without funding.[23]

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16. Roundtable 5, *Consultation CIC09*.
17. See, eg, *A Local Authority v Mother* [2020] EWHC 1086 (Fam) [48].
18. Children's Court of NSW, *Submission CI28*, 19.
19. NSW, Mental Health Review Tribunal, *Submission CI33*, 5.
20. Sydney Morning Herald, *Preliminary Consultation PCIC07*; 9News, *Preliminary Consultation PCIC09*; Australia's Right to Know, *Submission CI27*, 92.
21. T Sourdin, *Submission CI40*, 12.
22. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Consultation Paper 22 (2020) [12.13].

Facilitating remote access

Recommendation 14.1: Remote access to proceedings

(1) Where remote access is available to court or tribunal proceedings, courts and tribunals should establish clear processes for access by members of the public, journalists and researchers.

(2) Those processes should not limit a court or tribunal's ability to control or limit access by those who have remote access to proceedings where the proceedings are subject to a statutory exclusion or closed court provision or exclusion or closed court order.

(3) Section 9 of the *Court Security Act 2005* (NSW) should be amended to make clear that it prohibits the recording of court or tribunal proceedings by a person who accesses the proceedings remotely.

(4) People who have remote access to court or tribunal proceedings should, as a condition of access, be required to:

(a) acknowledge the prohibition on recording the proceedings in s 9 of the *Court Security Act 2005* (NSW), and

(b) if they are permitted to attend proceedings from which others are excluded, declare that no other person is attending with them.

14.24 Remote access has the potential to foster and promote community interest in the operation of the courts. Some remote access approaches adopted during the COVID-19 pandemic should, where possible, continue and be further developed, post pandemic.

14.25 Open justice should apply to proceedings with remote access in the same way as it does in proceedings conducted entirely in person. Australia's Right to Know supported this approach.[24]

14.26 As a starting point, remote proceedings should be accessible to everyone. However, courts should retain the ability to control who can and cannot observe the proceedings at any stage (recommendation 14.1(1)–(2)).

14.27 We do not recommend particular approaches to facilitating remote access to proceedings. There will likely be technological solutions and advances that will help align remote access with in person access and manage access in a resource effective way.[25] For example, submissions raised the following possibilities:

- separate channels for different groups, such as parties, the media and the public
- giving courts the ability to disconnect channels at various stages of the proceedings, for example, when an exclusion order is made (this could also mitigate the risk of people recording and transmitting particularly sensitive evidence), and

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23. Courts, Tribunals and Service Delivery, NSW Department of Communities and Justice, *Submission CI53*, 11.
24. Australia's Right to Know, *Submission CI27*, 98.
25. See, eg, NSW Bar Association, *Submission CI56* [67]–[70].

- technological means for preventing some recording and broadcast of live streams.[26]

14.28 Recommendation 14.1 aims to promote remote access to proceedings and address some of the concerns, without specifying particular technological solutions.

Promoting access

14.29 Under recommendation 14.1(1), where remote access is available to proceedings, clear processes should be established for access by members of the public (including students), journalists and researchers.

14.30 This should enhance open justice and aligns with our guiding principle that open justice is fundamental to the integrity of and confidence in the administration of justice (chapter 1). Submissions highlighted the importance of accommodating routine access for particular groups, including the media,[27] supporters and next-of-kin of participants,[28] as well as researchers and students.[29]

14.31 There should be measures to address potential risks associated with remote access to proceedings. In consultations, concerns were raised that courts and tribunals may be unable to control the conduct of observers who access proceedings remotely.[30] Potential risks include unauthorised recording of proceedings and, in cases where a statutory exclusion or closed court provision or exclusion or closed court order applies, unauthorised people watching the proceedings "off screen".[31] The risk of users recording proceedings is of particular concern in the Local Court, where sexual assault and domestic violence matters form a significant portion of its work.[32]

Ensuring court control

14.32 Recommendation 14.1(2) is that courts and tribunals should be able to exercise oversight around who can observe proceedings at different times and, in particular, to control remote access to proceedings which are subject to statutory exclusion or closed court provision or exclusion or closed court order.

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26. M Legg, A Song, L Bennett Moses and R Buckland, *Submission CI46*, 12; NSW Bar Association, *Submission CI56*, [67]–[69].
27. NSW Office of the Director of Public Prosecutions, *Submission CI17*, 29; Australia's Right to Know, *Submission CI27*, 98.
28. NSW Office of the Director of Public Prosecutions, *Submission CI17*, 29.
29. T Sourdin, *Submission CI40*, 1–2; M Legg, A Song, L Bennett Moses and R Buckland, *Submission CI46*, 17; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission CI49*, 3; Rule of Law Education Centre, *Consultation CIC21*.
30. Federal Court of Australia, *Preliminary Consultation PCIC05*; Local Court of NSW, *Preliminary Consultation PCIC12*.
31. Federal Court of Australia, *Preliminary Consultation PCIC05*; Local Court of NSW, *Preliminary Consultation PCIC12*.
32. Local Court of NSW, *Preliminary Consultation PCIC12*.

14.33 For example, an order may be made to exclude the public to assist a vulnerable witness to give evidence. In such a case, the court should be able to restrict remote access by the public to the proceedings.

14.34 Recommendation 14.1(2) aligns with our guiding principle that the power and discretion of judicial officers to control court proceedings should be preserved to the maximum extent possible (chapter 1). Our recommendation differs from our draft proposal, which was that courts and tribunals should be able to control registration for remote access to proceedings.[33]

14.35 Some submissions supported courts being able to control initial access to proceedings.[34] Fighters Against Child Abuse Australia, for example, emphasised the need to confirm that attendees are "real and authentic people with an interest in being there".[35] The MHRT has a practice of requiring those who attend remotely to announce their names.[36] The Aboriginal Legal Service considered control over registration is necessary "to ensure all participants are clearly identifiable so parties can raise objections".[37]

14.36 However, there are practical and resource problems with verifying members of the public. Moreover, it is not a process that is undertaken in physical courtrooms. In a recent Supreme Court matter, the judge observed that it is "an important aspect of open justice" that people are "entitled to come into a court room and watch proceedings without having to identify themselves".[38] Some submissions raised concerns about allowing or requiring courts to control initial access to remote proceedings. Legg and co-authors observed that a verification process:

> contrasts to the spontaneity of access with in-person hearings, where a person can arrive at the court on any given day without needing to plan ahead. There is also the loss of flexibility as observers can no longer join at any time of the day and enter and exit cases as they please. This flexibility is often indispensable as it is not uncommon for observants to join a hearing to then find the hearing needs to be adjourned.[39]

14.37 The Law Society said:

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33. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 11.1(2).
34. NSW Office of the Director of Public Prosecutions, *Submission CI48*, 5.
35. Fighters Against Child Abuse Australia, *Submission CI32*, 35.
36. NSW, Mental Health Review Tribunal, *Submission CI33*, 5.
37. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission CI49*, 3.
38. *Kostov v Commissioner of Police (No 2)* [2020] NSWSC 679 [46].
39. M Legg, A Song, L Bennett Moses and R Buckland, *Submission CI46*, 12.

> The process is an administrative burden which inhibits access to justice, and does not protect the anonymity of the spectator, which would otherwise be afforded in a physical courtroom.[40]

14.38 Requiring members of the public to identify themselves is an unnecessary constraint on open justice that is not required for a physical courtroom and, therefore, should not be imposed as a general requirement on those seeking remote access.

Confirming the ban on recording

14.39 The use of recording devices is prohibited in various courts and tribunals.[41] Whether this prohibition applies when proceedings are conducted remotely may not always be clear.[42] One current practice is to notify people who attend proceedings remotely that they must not record the proceedings.[43]

14.40 Recommendation 14.1(3) is that the prohibition on recording sound and/or images in court premises[44] should make clear that it extends to remote access. This reflects our view that remote access to proceedings should be governed by principles analogous to those that apply to physical access. We discuss our specific recommendations in relation to recording of court proceedings by journalists below (recommendation 14.2).

Acknowledging restrictions

14.41 In many cases where proceedings are conducted remotely or livestreamed, users accept conditions of use, often including that the footage will not be recorded or broadcast.[45]

14.42 Recommendation 14.1(4) would require people who access court proceedings remotely, as a condition of access, to acknowledge the prohibition on recording proceedings and, depending on the category of observer, declare that no unauthorised person is attending the proceedings. Requiring people to acknowledge these restrictions expressly, for example, by using a check box, is intended to increase the likelihood of compliance.

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40. Law Society of NSW, *Submission CI54*, 2.
41. *Court Security Act 2005* (NSW) s 9(1), s 9A(1), s 9B(1), s 4 definition of “court”.
42. See, eg, *Court Security Act 2005* (NSW) s 4 definition of “court premises”.
43. Office of the Sheriff, NSW Department of Communities and Justice, *Consultation CIC20*.
44. *Court Security Act 2005* (NSW) s 9(1).
45. See, eg, NSW Independent Commission Against Corruption, “Live Streaming of Public Inquiries” (2019) <www.icac.nsw.gov.au/investigations/live-streaming-of-public-inquiries> (retrieved 25 May 2022).

Media recording

14.43 Traditionally, notes or records of court proceedings have been made in writing by journalists attending court in person. The technology to make such records by audio recording has existed for decades. However, s 9 of the *Court Security Act 2005* (NSW) (*Court Security Act*) prohibits the use of recording devices by journalists in courts without express permission of a judicial officer.[46]

14.44 In the Supreme Court and District Court, the media may be granted permission to record and broadcast certain "judgment remarks", namely:

- 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.[47]

14.45 There is a presumption in favour of granting permission, subject to certain "exclusionary grounds". These include where broadcast would be likely to reveal the identity of a person who is protected by a statutory prohibition on publication or disclosure or non-publication or non-disclosure order. 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, must not be recorded.[48] This exception appears to envisage the recording being only for the purpose of broadcast and not for the preparation of an accurate report of the proceedings.

Allowing media recording

Recommendation 14.2: Journalists may record proceedings unless the court orders otherwise

Section 9 of the *Court Security Act 2005* (NSW) should be amended to provide:

(1) A journalist may use a recording device to make an audio recording of all or part of the proceedings upon having notified the court of the intention to do so, unless the presiding judicial officer otherwise orders where the needs of justice require it.

(2) The recording may only be used by a journalist to prepare an accurate report of proceedings and may not be used for any other purpose.

(3) The recording may not be disclosed or transmitted for a purpose other than preparing an accurate report of proceedings.

46. *Court Security Act 2005* (NSW) s 9(2)(a).

47. *Supreme Court Act 1970* (NSW) s 127 definition of "judgment remarks"; *District Court Act 1973* (NSW) s 178 definition of "judgment remarks".

48. *Supreme Court Act 1970* (NSW) s 128; *District Court Act 1973* (NSW) s 179.

Journalists should be able to make audio recordings

14.46 Under recommendation 14.2(1) journalists would be able to make audio recordings of all or part of proceedings upon notifying the court of their intention to do so and unless the court orders otherwise (where the needs of justice require it).

14.47 This is intended to facilitate accurate reporting of proceedings. The media have traditionally relied on taking notes by hand or on transcripts of proceedings. However, the cost and time frames associated with producing transcripts, particularly in the lower courts, are unlikely to meet the needs of journalists who produce near contemporaneous reports of proceedings.

14.48 Recommendation 14.2 is limited to recordings for the purpose of preparing an accurate report of proceedings (that is, the recording may not be subsequently broadcast).

14.49 This recommendation is not intended to affect the other provisions that permit the media to record and broadcast certain judgment remarks in the Supreme Court and District Court.[49] These provisions have a different function: to facilitate the broadcast of judgments of interest.

14.50 Recommendation 14.2 is similar to the approach in Victoria, where a representative of a news media organisation may, subject to any direction of the court, make an audio recording of a proceeding for the purpose of preparing a media report.[50] ARTK supported adopting the Victorian approach.[51]

14.51 This recommendation is also similar to that made by the Law Reform Commission (the Commission) in 1984.[52] As part of a review of the recording of court proceedings, the Commission recommended that where proceedings are open to representatives of the media, they should be entitled, as of right, to use audio recorders. This was subject to a number of conditions, which we discuss further below.

14.52 The Commission's view was that journalists and others already have a right to take hand-written notes of proceedings and that, if an audio recorder could be used instead of hand written notes for the purpose of preparing a fair and accurate report, there seemed no reason in principle why:

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49. *Supreme Court Act 1970* (NSW) s 128; *District Court Act 1973* (NSW) s179.
50. *Court Security Act 1980* (Vic) s 4A(3)(a).
51. Australia's Right to Know, *Submission CI27,* 92.
52. NSW Law Reform Commission, *Community Law Reform Program*: *Sound Recording of Proceedings of Courts and Commissions: The Media, Authors and Parties*, Report 39 (1984).

> making hand written notes for a news report should be prima facie lawful while the use of a sound recorder for the same purpose should be prima facie an offence.[53]

14.53 The Commission further considered that:

> the media should have available facilities for presenting news and current events in the best and most efficient way possible, making use of modern technological innovations, including compact unobtrusive sound recorders, provided that the administration of justice in courts is not thereby impeded.[54]

14.54 Such an arrangement would enable more accurate reports of proceedings and the Commission concluded that "[i]ncreased accuracy in the report of proceedings of courts … can only be in the best interests of the public".[55]

14.55 We acknowledge concerns about allowing journalists to record proceedings, including that the recording devices may be a nuisance and a distraction to court proceedings.[56] However, this concern was more relevant in the past when devices required, for example, cables, separate microphones, and the regular changing of cassette tapes.[57] Even in 1984, the Commission observed:

> sound recorders can now be conveniently hand-held, are simple to operate, unobtrusive and may prove less of a distraction than journalists taking hand written notes.[58]

14.56 There are concerns that using recording devices could disturb witnesses and affect the giving of evidence. Such an argument would have greater force in the case of the use of cameras or the broadcast of proceedings. However, recommendation 14.2 is confined to audio recordings. There would be little difference in the effect on witnesses between discreet audio recording, and journalists openly taking notes by hand or on a laptop computer.[59]

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53. NSW Law Reform Commission, *Sound Recording of Proceedings of Courts and Commissions: The Media, Authors and Parties*, Report 39 (1984) [5.12].
54. NSW Law Reform Commission, *Sound Recording of Proceedings of Courts and Commissions: The Media, Authors and Parties*, Report 39 (1984) [5.6].
55. NSW Law Reform Commission, *Sound Recording of Proceedings of Courts and Commissions: The Media, Authors and Parties*, Report 39 (1984) [5.6].
56. See, eg, S Rodrick and others, *Australian Media Law* (Lawbook Co, 6th ed, 2021) [5.600].
57. See, eg, *Stefanovski v Murphy* [1996] 2 VR 442, 462.
58. NSW Law Reform Commission, *Sound Recording of Proceedings of Courts and Commissions: The Media, Authors and Parties*, Report 39 (1984) [5.13].
59. NSW Law Reform Commission, *Sound Recording of Proceedings of Courts and Commissions: The Media, Authors and Parties*, Report 39 (1984) [5.13].

14.57 Concerns have been expressed about recording devices inadvertently picking up privileged or otherwise confidential communications, particularly those between lawyers and their clients.[60] While it has always been possible for individuals to overhear and repeat such communications, audio recording technology might present greater risks, in that it may pick up otherwise inaudible communications and create a permanent record in the hands of someone other than the court.[61]

14.58 It has been suggested that such a risk may inhibit counsel from seeking necessary instructions from their client.[62] However, lawyers have always needed to guard against privileged conversations being overheard in courtrooms. In our view, the risks presented by modern recording technology are no more significant than the existing risks of being overheard in a courtroom.

Journalists should have to notify their intention to record

14.59 Recommendation 14.2(1) is that journalists should only be able to record all or part of proceedings upon having notified the court of the intention to do so. This would enable courts to determine whether to make an order to prevent recording (where the needs of justice require this).

14.60 In order to assist courts in controlling proceedings, it may be desirable to develop administrative systems so that a journalist can notify the court of their presence and their intention to record all or part of the proceedings. However, the notification system should not result in journalists having to seek permission to record in every case, as we note has occurred in the Magistrates' Court of Victoria.

14.61 The Victorian provision, mentioned above, was inserted into the *Court Security Act 1980* (Vic) in 2014.[63] It was intended to create a standing exemption for audio recordings by journalists and lawyers in specified circumstances.[64]

14.62 The exemption is, however, subject to any direction of the court. In practice this has come to mean that journalists may only record proceedings in accordance with the relevant court's policies. For example, in the Victorian Supreme Court and County Court, journalists must be accredited to be able to record proceedings without seeking permission in each instance. Non-accredited journalists, freelance writers, and "citizen journalists" are grouped with members of the public as people who must seek

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60. *Stefanovski v Murphy* [1996] 2 VR 442, 462.
61. See, eg, *Willis v McColl* (unreported, VSC, Ashley J, 12 May 1994) 36.
62. *Nguyen v Magistrates' Court of Victoria* [1994] 1 VR 88, 95; *Willis v McColl* (unreported, VSC, Ashley J, 12 May 1994) 35.
63. *Court Security Act 1980* (Vic) s 4A, as inserted by *Courts Legislation Miscellaneous Amendments Act 2014* (Vic) s 77.
64. Victoria, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 25 June 2014, 2279.

permission from the presiding judge to use electronic equipment in court.[65] Non-accredited journalists may seek permission beforehand from the presiding judge through designated channels.[66]

14.63 In the Magistrates' Court, personal electronic devices may not be used to make audio recordings, although journalists may "use electronic devices to take notes", subject to the presiding officer's approval.[67]

14.64 NSW courts should adopt procedures, according to the requirements of each court, for journalists to provide notice of an intention to record. These procedures could include informal and ongoing notification arrangements.

Courts should be able to make an order preventing recording

14.65 Under recommendation 14.2(1), journalists would not be able to record all or part of proceedings if the presiding judicial officer otherwise orders, where the needs of justice require it. This is intended to ensure courts retain control over the recording of proceedings.

14.66 In the 1984 review, the Commission similarly recommended that it be made clear that the proposed provisions to allow media recording did not prevent a court from stopping recording where it had reasonable grounds to believe that it would constitute a substantial interference with the administration of justice or the exercise of the court's functions.[68]

14.67 This should not place an undue burden on courts to monitor and consider when recording might be inappropriate. The parties' lawyers would assist the court in identifying circumstances where the needs of justice require that journalists not record.

Recordings should be subject to other limitations

14.68 Under recommendation 14.2(2)–(3), to prevent recordings of proceedings being misused, journalists would:

- only be able to use the recording to prepare an accurate report of proceedings, and not for any other purpose, and

65. Supreme Court of Victoria, *Media Policies and Practices 2016* (2018) 8–9; County Court of Victoria, *Media Guidelines* (2018) 2, 4.
66. Supreme Court of Victoria, *Media Policies and Practices 2016* (2018) 9; County Court of Victoria, *Media Guidelines* (2018) 3.
67. Magistrates' Court of Victoria, "Information for the Media" (21 April 2022) <https://www.mcv.vic.gov.au/news-and-resources/information-media> (retrieved 25 May 2022).
68. NSW Law Reform Commission, *Sound Recording of Proceedings of Courts and Commissions: The Media, Authors and Parties*, Report 39 (1984) [5.16].

- not be able to disclose or transmit the recording for any purpose other than preparing an accurate report of proceedings.

14.69 These are similar to the conditions recommended by the Commission in 1984, which included that:

- the recording is used solely for the purposes of reporting the proceedings, except with the leave of the court, and
- the person recording the proceedings must not make it available to any person other than an agent or servant of the media organisation and then only for the purpose of reporting.[69]

14.70 The limitations in recommendation 14.2(2)–(3) address concerns that recordings could be used to brief witnesses who are yet to give evidence. We note the use of audio recorders does not create a new problem, and witnesses could as easily be briefed from memory or from handwritten notes, which might amount to a contempt of court.[70]

14.71 The limitations also address other concerns around the misuse of audio recordings. The types of misuse envisaged include selective editing of, and other tampering with, recordings, and replaying recordings in inappropriate circumstances, including by transmission to potentially wide audiences.[71]

14.72 While the risks of misuse associated with audio recordings are greater than they are with, for example, handwritten notes of proceedings, or recollection, these risks can be mitigated by the limitations we recommend above (such as the restriction on using the recording for a purpose other than preparing an accurate report of proceedings). Contempt of court is also available to punish those who misuse recordings.

14.73 Allowing a journalist to record all or part of proceedings would not affect an obligation to comply with any statutory prohibition on publication or disclosure or non-publication or non-disclosure order, in resulting reports. An express reference to this effect is not required.

Access to court lists

14.74 To facilitate access to court proceedings, people need to know what proceedings will be held and where. This has traditionally been achieved by publishing court lists at the premises where the court sits. The media also has a long standing practice of

69. NSW Law Reform Commission, *Sound Recording of Proceedings of Courts and Commissions: The Media, Authors and Parties*, Report 39 (1984) [5.17].

70. NSW Law Reform Commission, *Sound Recording of Proceedings of Courts and Commissions: The Media, Authors and Parties*, Report 39 (1984) [5.13].

71. *Stefanovski v Murphy* [1996] 2 VR 442, 462–463.

publishing court lists. Such lists can be used to find the time and place of a court appearance, or to find out what is happening in a court on a particular date.

14.75 In recent decades, courts have also made lists available online. The public can search court lists through the online registry website and app. The cases they can search are limited to those listed in the previous seven days, or two weeks in advance.[72]

14.76 Allowing public access to court lists in advance, promotes open justice by providing the public with information about proceedings. However, technology has enabled ready and easy access to a large volume of past court lists on media websites and commercial databases.[73] The continuing availability and searchability of this information has given rise to concerns about protecting the privacy and reputations of people involved in court proceedings where the record of early stages of proceedings (for example, dealing with charges or claims that are later withdrawn or resolved) may be misleading in light of the final outcome.

14.77 Some commentators note that the commercial databases exist in the context of employers increasingly seeking criminal record checks in their recruitment processes, sometimes "with considerable ignorance about rights and obligations relating to criminal checks".[74] The information in these databases is also not protected by the *Criminal Records Act 1991* (NSW), which otherwise aims to limit the effect of a person's conviction for a relatively minor offence if the person "completes a period of crime-free behaviour".[75]

14.78 Legal Aid raised concerns that the republication of court lists on other sites:

> undermines the presumption of innocence of those appearing in criminal courts, and may stigmatise the individual concerned, regardless of the outcome of the proceedings. It may have lifelong consequences for those who are charged with a criminal offence, including those whose matters are withdrawn, dismissed or dealt with without conviction. A prospective employer, for example, can now simply search an individual's name and

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72. Supreme Court of New South Wales, "Court Lists" (5 June 2020) <www.supremecourt.justice.nsw.gov.au/Pages/sco2_courtlists/sco2_courtlists.aspx> (retrieved 25 May 2022).
73. See, eg, Court Data Australia, "Court Data Australia Help: New South Wales" (2022) <court-data-australia.elevio.help/en-gb/articles/42-new-south-wales> (retrieved 25 May 2022).
74. D van den Broek and P Black, "Doing Double Time: Women, Incarceration and Employment Discrimination" (2021) 35 *Work, Employment and Society* 968, 970; G Heydon and B Naylor, "Criminal Record Checking and Employment: The Importance of Policy and Proximity" (2018) 51 *Australian and New Zealand Journal of Criminology* 372, 373.
75. *Criminal Records Act 1991* (NSW) s 3(1).

readily ascertain that they have appeared as a defendant in criminal proceedings.[76]

14.79 One way to address these issues would be to provide more accurate information about past proceedings,[77] so that, for example, readers can find whether a person was convicted or acquitted of the charges against them. For example, Federal Law Search on the Commonwealth Courts Portal provides selected information on cases filed in the Federal Court and the general federal law jurisdiction of the Federal Circuit and Family Court. The information includes the current status of the case and the results of concluded cases. The database is continually updated and includes all cases that have commenced since 1 January 1984. However, matters where a pseudonym has been assigned to a party are not searchable.[78]

14.80 We do not make any recommendations about court lists. While the publication of court lists has some relevance to the review, in that it can facilitate open justice, the issues arising from access to court lists are beyond the review's scope.

Access to electronic court records

14.81 In chapters 4 and 5, we outline the framework for access to records on the court file. In this section, we consider access to electronic court records.

14.82 There has been a move towards the production of court records in digital form. In many cases, parties can file originating documents, applications, notices, submissions and exhibits online through the Online Registry.

14.83 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.

14.84 The Online Registry 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

76. Legal Aid NSW, *Submission CI24*, 14.
77. Feminist Legal Clinic Inc, *Submission CI16*, 1.
78. Australia, Commonwealth Courts Portal, "Federal Law Search" <https://www.comcourts.gov.au/public/esearch> (retrieved 25 May 2022).

- listing details, and
- a list of subpoenaed items, exhibits and other items in evidence.[79]

14.85 Despite these developments, courts still rely significantly on hard copy files.[80] In relation to non-party access to court records, considerable reliance is still placed on physical attendance at registry offices to access or obtain copies of records.

14.86 In the consultation paper, we considered whether arrangements should be made for electronic access to court records.[81] Several jurisdictions within Australia and overseas now provide some level of electronic access.[82] For example, a person can search for selected information on cases filed in the Federal Court and the general federal law jurisdiction of the Federal Circuit and Family Court through the Commonwealth Courts Portal. The type of information includes the text of orders made by the court (where available).[83] However, factors that might make this approach possible in a Federal Court context and not possible, for example, in NSW courts include:

- there is greater use of electronic court records in the Federal Court,[84] and
- members of the public are entitled to access certain records in the Federal Court,[85] whereas in NSW, they must apply for leave of the relevant court to access any record.[86]

14.87 The access framework would largely preserve this position in relation to members of the public. The public would be entitled to access records prescribed in court rules as of

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79. NSW Online Registry: Courts and Tribunals, "Legal Professionals: What you can do in the Online Registry" <https://onlineregistry.lawlink.nsw.gov.au/content/legal-professionals> (retrieved 25 May 2022).
80. Supreme Court of NSW, *Consultation CIC22.*
81. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Consultation Paper 22 (2020) [12.26]–[12.43] question 12.2.
82. See, eg, High Court of Australia, "Digital Lodgment System Information" (2020) <www.hcourt.gov.au/digital-lodgment-system/information> (retrieved 25 May 2022); United States Courts, "What can we Help you Accomplish?" *PACER: Public Access to Court Electronic Records* <pacer.uscourts.gov/> (retrieved 25 May 2022).
83. Federal Court of Australia, *Access to Documents and Transcripts Practice Note (GPN-ACCS)* (2016) [3.3]; Australia, Commonwealth Courts Portal, "Federal Law Search" <https://www.comcourts.gov.au/public/esearch> (retrieved 25 May 2022).
84. Supreme Court of NSW, *Consultation CIC22.*
85. *Federal Court Rules 2011* (Cth) r 2.32(2).
86. 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).

right, but would have to seek leave of the court to access any other record. By contrast, journalists and researchers would be entitled to access a range of records as of right.[87]

14.88 We do not make any recommendations for establishing an online portal for access to court records. However, if such a portal is developed in future, it could be designed to reflect the arrangements under the recommended access framework. For example, the recommended access framework would require non-parties (including journalists and researchers) to seek leave of the court to obtain copies of court records.[88] Access to a portal containing digital court records could be available only to those applicants who have been granted leave to obtain copies of court records.

Public availability of court decisions

14.89 Public availability of judgments and decisions is an integral part of open justice.[89] It enables the public to understand the reasons for decisions, ensures transparency and accountability of decision-makers, and builds confidence in the consistency and fairness of decision-making.[90] Some submissions supported greater availability of judgments and decisions made by courts.[91]

14.90 The approach to publishing judgments and decisions varies across different courts and tribunals due to differences in the volume and nature of matters they deal with, which we outline below. The current approach for courts is appropriate and we do not recommend any changes. We discuss the approach to publishing tribunal decisions in chapter 15.

Supreme Court and appellate courts

14.91 Digital versions of decisions by the Supreme Court (including the Court of Appeal and Court of Criminal Appeal) are published on NSW Caselaw. Some decisions are not published, such as minor decisions in proceedings that are continuing, rulings on evidence in a criminal trial, or decisions in uncontested adoption matters that do not involve questions of principle.[92]

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87. Recommendation 5.1–5.2.
88. Recommendation 5.7(2).
89. Children's Court of NSW, *Submission CI28*, 8.
90. See, eg, Tenants' Union of NSW, *Submission CI11,* 2.
91. See, eg, Tenants' Union of NSW, *Submission CI11,* 5; UTS Faculty of Law, *Preliminary Submission PCI25*, 18–19; knowmore, *SubmissionCI10*, 12; L Steele, *Submission CI18*, 7; Banki Haddock Fiora, *Submission CI29*, 2; Australasian Legal Information Institute, *Submission CI20*, 3; Australia's Right to Know, *Submission CI27*, 63; NSW Office of the Director of Public Prosecutions, *Submission CI17*, 20.
92. Supreme Court of NSW, *Submission CI26*, 1.

District Court and Local Court

14.92 Only "selected written judgments" from the Local Court are published on NSW Caselaw, as the majority of judgments are delivered orally.[93] The District Court publishes only selected decisions.

14.93 The Office of the Director of Public Prosecutions (ODPP) said that "greater publication of judgments" in the Local and District Courts "would inevitably serve the interests of open justice".[94]

14.94 We do not recommend changes to the Local and District Courts' approaches to publishing decisions. There are clear and practical reasons why these courts take a different approach to publication than that of higher courts. These include that:

- lower courts deal with a greater volume of matters[95]
- Local Court magistrates generally deliver ex tempore reasons (that is, oral reasons given immediately after the hearing of the matter),[96] and
- Local Court magistrates do not have the level of administrative support that is available to the higher courts.[97]

14.95 Further, lower court judgments do not have the same precedential value as judgments of higher courts. Higher court judgments contain statements of legal principle, whereas lower courts often restate these principles and apply them to the facts as relevant in the case before them. In practice, the Local Court aims to publish judgments which have precedential value or address a novel issue.[98] This is appropriate.

Children's Court

14.96 Like the Local Court, the Children's Court often gives ex tempore judgments. This is to ensure cases are resolved quickly,[99] which is important for cases involving the welfare and protection of children.

14.97 Key decisions of the Children's Court are published on NSW CaseLaw and through a bulletin on the Court's website (referred to as Children's Law News). The bulletin highlights both Children's Court decisions and those of other relevant jurisdictions. The

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93. Local Court of NSW, *Annual Review 2019* (2020) 31.
94. NSW Office of the Director of Public Prosecutions, *Submission CI17*, 20.
95. Local Court of NSW, *Submission CI25*, 3.
96. Local Court of NSW, *Submission CI25*, 3.
97. Local Court of NSW, *Submission CI25*, 3.
98. Local Court of NSW, *Submission CI25*, 4.
99. Children's Court of NSW, *Submission CI28*, 8.

editorial committee for the bulletin can request a judicial officer to publish an unpublished decision where the committee considers it has educative value.[100]

14.98 Legal Aid supports increased availability of Children's Court decisions, in an online, de-identified and searchable format.[101]

14.99 The Children's Court approach to publishing decisions is appropriate and we do not recommend any changes.

Regulating transmission of information by journalists

14.100 Technology has enabled information about court proceedings to be shared easily and instantly. 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 instantly.

14.101 On the one hand, transmitting information about court proceedings instantaneously can enhance open justice. It enables people who cannot attend court to receive information about proceedings in real time. Reaction and debate in real time may also improve education and public awareness of the work of the courts.[102]

14.102 On the other hand, the ease of transmitting information from court proceedings brings challenges in controlling what the public knows and sees of these proceedings. For example, information tweeted from the court may later become subject to a non-publication or non-disclosure order, but the information cannot be retracted if retweeted or shared more widely.

Law and practice in NSW

14.103 The *Court Security Act* regulates the use of technology in most courts and tribunals.[103] Many courts issue guidance on using technology and social media in court premises.[104]

14.104 The *Court Security Act* prohibits the unauthorised use of any device to transmit information that forms part of court proceedings, from the place where the court is

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100. Children's Court of NSW, *Submission CI28*, 8–9.

101. Legal Aid NSW, *Submission CI24*, 18.

102. C Paver, "The Courts v Twitter: The Future of Live Court Reporting in NSW" (2013) 32 *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(4) *Communications Law* 183, 188.

103. See *Court Security Act 2005* (NSW) s 4 definition of "court".

104. 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 25 May 2022).

sitting.[105] The use of a device to transmit information not related to the proceedings is not prohibited.[106] The wording of the prohibition suggests that anyone can transmit (otherwise unrestricted) information from the proceedings from a location outside the place where the court is sitting, including from another location on court premises.

14.105 There are several exceptions to the prohibition, including for journalists, so long as they are transmitting "for the purposes of a media report on the proceedings concerned".[107] This means a journalist can transmit (including via social media) any information about proceedings from the courtroom in which they are being heard, at the time they are being heard.

14.106 The prohibition in the *Court Security Act* was introduced in 2013 and was aimed in particular at preventing transmissions from the courtroom to witnesses who had not yet given evidence.[108] The media were exempted under regulations, on the grounds that it was important to preserve open justice.[109]

Law and practice in other jurisdictions

14.107 Regulation of social media use in court by journalists or the public is not consistent across jurisdictions.

14.108 Most Queensland courts have policies that generally permit "real-time text-based communications and social media" use by journalists, provided it does not interrupt proceedings. The policies remind publishers that they must comply with laws on contempt, suppression, and non-publication.[110]

14.109 In England and Wales, journalists can tweet from court without permission.[111]

14.110 Other jurisdictions place stricter limits on the use of social media in court.

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105. *Court Security Act 2005* (NSW) s 9A(1).
106. *Court Security Act 2005* (NSW) s 9A(2)(a).
107. *Court Security Regulation 2021* (NSW) cl 6(a).
108. *Court Security Act 2005* (NSW) s 9A, inserted by *Courts and Other Legislation Further Amendment Act 2013* (NSW) sch 1 item 1.8[1]; NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 21 November 2012, 17244.
109. NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 21 November 2012, 17244.
110. Supreme Court of Queensland, *Photography and Electronic Devices in Court Buildings*, Amended Practice Direction No 8 of 2014 (2021) [9]–[10]; District Court of Queensland, *Electronic Devices in Courtrooms*, Amended Practice Direction No 10 of 2014 (2018) [8]–[9]; Magistrates Court of Queensland, *Photography and Electronic Devices in Courtrooms*, Practice Direction No 1 of 2014 (amended) (2021) [8]–[9].
111. 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].

14.111 For example, in South Australia, communications during proceedings are not permitted. An exception allows journalists to 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.[112]

14.112 In the Victorian County Court, journalists must identify themselves before using electronic devices "for note taking or publishing purposes".[113] 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.[114]

No changes to the media exception

14.113 We do not recommend changes to the provisions about journalists transmitting information about court proceedings.

14.114 Our draft proposal was to amend the *Court Security Regulation 2016* (NSW)[115] so that the exception allowing the media to transmit information from a courtroom would be subject to a 30 minute delay, or subject to the court deciding not to make a non-publication or non-disclosure order.[116] The proposal was based partly on the South Australian provision, discussed above, which appears to be aimed at broader concerns of reducing the risk of publishing information that is suppressed or not admitted in evidence.

14.115 There was some support for such a proposal in consultations.[117] However, ARTK observed that there have been no particular problems with the existing provisions.[118]

14.116 The ODPP said that, if a delay is factored in, there will be complications, for example, matters may adjourn for instructions when unexpected issues arise.[119] Legal Aid also suggested that it should be made clear that the 30-minute time lag excludes time occupied by adjournments.[120]

14.117 On balance, we do not recommend imposing further limits on the ability of journalists to transmit court information from a courtroom. Implementing or enforcing such a restriction could prove difficult in practice. The provision allowing journalists to transmit

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112. See, eg, *Supreme Court Criminal Rules 2014* (SA) r 12.
113. County Court of Victoria, *County Court of Victoria Media Guidelines* (2018) 4.
114. Supreme Court of Victoria, *Media Policies and Practices 2016* (2018) 8.
115. *Court Security Regulation 2016* (NSW), repealed and replaced by *Court Security Regulation 2021* (NSW).
116. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication,* Draft Proposals (2021) proposal 11.2.
117. Roundtable 5, *Consultation CIC09*.
118. Australia's Right to Know, *Submission CI27*, 99.
119. NSW Office of the Director of Public Prosecutions, *Submission CI48*, 6.
120. Legal Aid NSW, *Submission CI57*, 29.

information is an exception to the prohibition on transmitting from the location of the proceedings. If the regulation was amended, so as to impose a 30-minute delay before journalists can transmit information, it would only apply to transmissions from the courtroom. It would not prevent a journalist from leaving the courtroom and tweeting from outside – just as they have always been able to leave and make a report by telephone. For the draft proposal to operate effectively, it would be necessary to prohibit reporting court information for 30 minutes from any place by any means.

14.118 We do not consider any further restrictions are necessary or appropriate, given that the original prohibition was intended to prevent the tainting of witnesses' evidence. Further, the media exception was intended to facilitate open justice. Imposing time limits on the media's ability to transmit information from proceedings, or extending the prohibition further, would undermine this intention.

15. Tribunals and specialised courts

In Brief

This chapter explains why the Drug Court, the coronial jurisdiction, and tribunals are generally excluded from the recommendations in this report. The chapter also outlines specific recommendations with respect to the NSW Civil and Administrative Tribunal and the Mental Health Review Tribunal.

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15.1 In this chapter, we explain our approach and recommendations relevant to the Drug Court, the coronial jurisdiction, the Personal Injury Commission (PIC), the Industrial Relations Commission (IRC), the NSW Civil and Administrative Tribunal (NCAT) and the Mental Health Review Tribunal (MHRT).

15.2 We exclude the Drug Court, the coronial jurisdiction, the PIC and the IRC from all recommendations in this report, due to their unique and specialised nature.

15.3 We exclude NCAT and the MHRT from:

- the new Act (chapters 4–7), which would set out a legislative framework for access to records on the court file and general powers to make orders, and would replace the uncommenced *Court Information Act 2010* (NSW) (*Court Information Act*) and *Court Suppression and Non-publication Orders Act 2010* (NSW),[1] and

- recommendations about dealing with breaches of statutory prohibitions on publication and disclosure, statutory exclusion and closed court orders and non-publication, non-disclosure, exclusion and closed court orders (chapter 13). However, we make some recommendations in this chapter that are specific to these two tribunals.

The new Act should not apply to the Drug Court and the coronial jurisdiction

The Drug Court

15.4 The Drug Court is a specialist court that provides an alternative to prison for eligible participants with drug dependencies who have committed certain crimes. It takes referrals from prescribed Local Courts and District Courts for offenders to undertake a Drug Court program addressing drug dependency, rehabilitation and reintegration of the person into the community.[2]

15.5 The Drug Court operates under the *Drug Court Act 1998* (NSW) (*Drug Court Act*) which provides, in respect of its criminal jurisdiction, that:

- the Drug Court has the criminal jurisdiction of the Local Court and the District Court, and any other functions vested in the Court by any Act,[3] and

- for the purpose of exercising this jurisdiction, the Drug Court has all of the functions of the Local Court and District Court that are exercisable in their criminal jurisdictions.[4]

15.6 In relation to sentencing, the *Drug Court Act* provides that:

- proceedings before the Drug Court are to be conducted in accordance with the directions of the presiding judge, and with as little formality and technicality, and with

1. Recommendation 4.1.
2. *Drug Court Act 1998* (NSW) s 3(1), s 6(1), s 7(1)(b); *Drug Court Regulation 2020* (NSW) cl 6.
3. *Drug Court Act 1998* (NSW) s 24(1).
4. *Drug Court Act 1998* (NSW) s 24(2).

as much expedition, as the legislation and the proper consideration of matters before the Court permits,[5] and

- the Drug Court is not bound by the rules of evidence, but may inform itself on any matter in such a manner as it considers appropriate.[6]

15.7 The *Drug Court Act* does not include any specific provisions relating to open justice.

15.8 The Drug Court has issued a practice direction titled *Non-Publication Order*. It states:

- Members of the public are welcome to visit and watch the proceedings.
- No information that may tend to identify a participant or associated person is to be recorded or published by any person. This prohibition includes the naming of a participant or a person associated with a participant (such as a family member, friend or employer), the publication of a photograph of a participant or associated person, and the publication of any other information which may tend to identify a participant or associated person.
- No media representative is to communicate with a participant or associated person within the precincts of the Court.
- If special circumstances are shown, exceptions are available after an application in writing to the registrar.[7]

15.9 The practice direction indicates that the reasons for the orders are to promote the rehabilitative prospects of Drug Court participants.[8]

15.10 It is not clear whether the *CSNPO Act* applies, or the uncommenced *Court Information Act* would have applied, to the Drug Court.

15.11 The second reading speech for the Court Information Bill 2010 (NSW) suggests that the intention may have been to include the Drug Court:

> "Courts" are defined in clause 4 of the bill in such a way as to include all courts in New South Wales. This definition encompasses any sub-jurisdiction within New South Wales courts such as the Drug Court, which is a part of the District Court.[9]

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5. *Drug Court Act 1998* (NSW) s 26(2).
6. *Drug Court Act 1998* (NSW) s 26(3).
7. Drug Court of NSW, *Practice Direction: Non-Publication Order* (20 December 2011).
8. Drug Court of NSW, *Practice Direction: Non-Publication Order* (20 December 2011) Note.
9. NSW, *Parliamentary Debates*, Legislative Assembly, Agreement in Principle Speech, 19 March 2010, 21775.

15.12 The second reading speech for the Court Suppression and Non-publication Orders Bill 2010 (NSW) does not include the same statement. However, it states that the definition of "court" in that Bill is "consistent with the definition in the Court Information Act 2010".[10] We have not identified any relevant case law that addresses this issue.

15.13 The new Act is not appropriate for the specialised nature of the Drug Court.

15.14 Consultations indicated that Drug Court proceedings are unique in nature, separate and distinct from proceedings in other criminal jurisdictions. A more nuanced approach is required, given its specialist therapeutic jurisdiction.[11]

15.15 For similar reasons, we have also excluded the *Drug and Alcohol Treatment Act 2007* (NSW) from our recommendations (chapter 1 and appendix B).

15.16 However, should any future reform of the approach to open justice in the Drug Court be contemplated, it may be appropriate for the Government to consider the guiding principles, aims and recommendations in this report.

The coronial jurisdiction

15.17 Coroners investigate and make findings about sudden, violent, suspicious, unnatural or unexpected deaths or suspected deaths (in the case of missing persons), and fires and explosions.[12]

15.18 In Sydney, the state and senior coroners are generally located at the State Coroners Court in Lidcombe. Every Local Court magistrate in NSW is also a coroner and may conduct proceedings in various rural and regional locations throughout NSW. For clarity, we refer to this network of coroners as "the coronial jurisdiction" rather than "the Coroners Court".

15.19 Proceedings in the coronial jurisdiction are governed by the *Coroners Act 2009* (NSW) (*Coroners Act*). The *Coroners Act* provides that any hearing conducted in coronial proceedings is to be open to the public,[13] except where a coroner:

- hears proceedings in a place 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 so,[14] or

10. NSW, *Parliamentary Debates*, Legislative Assembly, Agreement in Principle Speech, 29 October 2010, 27197.
11. Drug Court of NSW, *Consultation CIC31*.
12. *Coroners Act 2009* (NSW) s 3, s 6, s 17.
13. *Coroners Act 2009* (NSW) s 47(1).
14. *Coroners Act 2009* (NSW) s 47(2).

- is of the opinion that it would be in the public interest to exclude all or some people from the proceedings.[15]

15.20 The *Coroners Act* sets out certain matters a coroner can consider "in forming an opinion as to the public interest" when excluding people from coronial proceedings. Matters include that proceedings should be open to the public, the likelihood a witness may be influenced by other evidence, national security, and the personal security of the public or an individual.[16]

15.21 Under the *Coroners Act*, a coroner may make a non-publication order in relation to:

- any evidence given in the coronial proceedings[17]
- any submissions made concerning whether a known person may have committed an offence,[18] and
- any report of the proceedings (or part of the proceedings) or any matter that identifies the deceased, or their relatives, where it appears to a coroner that a death or suspected death is self-inflicted.[19]

15.22 In addition, the *Coroners Act* includes statutory prohibitions on publishing:

- any report of proceedings if a finding is made in an inquest to the effect that the death of a person was self-inflicted, unless the coroner makes an order permitting the publication of the report[20]
- any question asked of a witness that the coroner has forbidden or disallowed[21]
- any warning given by a coroner to a witness that they are not compelled to answer a question[22]
- any objection made by a witness to giving evidence on the ground that it may tend to prove that they have committed an offence,[23] and
- in relation to proceedings involving an indictable offence, any submissions made by or on behalf of a person appearing or being represented in the proceedings or by a

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15. *Coroners Act 2009* (NSW) s 74(1)(a).
16. *Coroners Act 2009* (NSW) s 74(2).
17. *Coroners Act 2009* (NSW) s 74(1)(b).
18. *Coroners Act 2009* (NSW) s 74(1)(c).
19. *Coroners Act 2009* (NSW) s 75(1)–(2).
20. *Coroners Act 2009* (NSW) s 75(5).
21. *Coroners Act 2009* (NSW) s 76(a).
22. *Coroners Act 2009* (NSW) s 76(b).
23. *Coroners Act 2009* (NSW) s 76(c).

person assisting the coroner, or any comment made by the coroner, concerning whether an inquest or inquiry should be suspended.[24]

15.23 The *Coroners Act* also governs access to a "coroner's file".[25] The "coroner's file" means the documents (including the depositions of witnesses, transcripts and written findings) that form part of the file kept by a coroner in respect of a death, suspected death, fire or explosion.[26]

15.24 In determining whether to grant access to a coroner's file, a coroner must consider several factors, including the principle of open justice.[27]

15.25 The *Coroners Act* appears to be the only legislation dealing with open justice that is applicable to the coronial jurisdiction. For the reasons explained above in relation to the Drug Court, it is not clear whether the *CSNPO Act* applies, or the uncommenced *Court Information Act* would have applied, in the coronial jurisdiction. The words "coroner", "Coroners Court" or "coronial jurisdiction" do not appear in the definition of "court" in either Act.

15.26 Case law in the Supreme Court suggests a lack of clarity about the sources of power for the coronial jurisdiction to make suppression and non-publication orders. One case referred to the appeal provision in s 14 of the *CSNPO Act* when dealing with an application relating to orders made by a coroner, and making further orders restraining access to, and publication of, certain evidence in a coronial proceeding.[28] Conversely, the Court in another case concluded that the *CSNPO Act* does not operate in the coronial jurisdiction, and that the *Coroners Act* applies.[29]

15.27 The new Act is not appropriate for the coronial jurisdiction as it is specialised and a coroner's role is "both judicial and investigative".[30] The *Coroners Act* provides that a coroner is not bound to observe the rules of procedure and evidence that are applicable to proceedings before a court of law.[31]

15.28 The Coroners Court indicated that the coronial jurisdiction should be dealt with exclusively under the *Coroners Act* and its powers should not be consolidated into the

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24. *Coroners Act 2009* (NSW) s 76(d), s 78.
25. *Coroners Act 2009* (NSW) s 65.
26. *Coroners Act 2009* (NSW) s 65(7).
27. *Coroners Act 2009* (NSW) s 65(3)(a).
28. *Bissett v Deputy State Coroner* [2011] NSWSC 1182, 83 NSWLR 144 [14], [21]–[24], [28].
29. *Commissioner of NSW Police v Deputy State Coroner for NSW* [2021] NSWSC 398 [23]; See also *Rich v AG (NSW) (No 2)* [2013] NSWSC 891 [13].
30. Judicial Commission of NSW, *Local Court Bench Book* [44-000] (retrieved 25 May 2022).
31. *Coroners Act 2009* (NSW) s 58(1).

CSNPO Act. Proceedings in the Coroners Court are non-adversarial and as informal as procedural fairness allows.[32]

15.29 Legal Aid observed that the unique features of the coronial jurisdiction, such as avoiding re-traumatising families and protecting sensitive material, or allowing witnesses to sit in court before giving evidence, are aspects which differentiate the Coroners Court from other forums.[33]

15.30 Conversely, Australia's Right to Know (ARTK) submitted that the coronial jurisdiction should be prescribed as a court for the *CSNPO Act*, and s 74 of the *Coroners Act* should be repealed.[34]

15.31 In Victoria, the Coroners Court is expressly included in the *Open Courts Act 2013* (Vic) (*Open Courts Act*).[35] However, the *Open Courts Act* does not expand the powers available to the Coroners Court of Victoria; it merely consolidates and preserves the existing, more limited, powers and grounds to make orders that were previously contained in the *Coroners Act 2008* (Vic).[36]

15.32 We agree with Legal Aid that the provisions of the *Coroners Act*, which apply a test of "public interest", appear to work well in the circumstances of this jurisdiction.[37]

15.33 We do not make any recommendations for reform in relation to the *Coroners Act*, and we have excluded it from this review (chapter 1 and appendix B).

15.34 The *Coroners Act* is currently the subject of a statutory review by the Department of Communities and Justice, which could have regard to the guiding principles, aims and recommendations contained in this report.

The new Act should not apply to tribunals

Legislation applicable to NCAT

15.35 NCAT is established and governed by the *Civil and Administrative Tribunal Act 2013* (NSW) (*NCAT Act*). NCAT hears a broad range of civil and administrative matters including housing, tenancy and property disputes, and consumer and business disputes, guardianship and financial management proceedings, professional discipline

32. Coroners Court of NSW, *Consultation CIC18.*
33. Legal Aid NSW, *Submission CI24*, 9.
34. Australia's Right to Know, *Submission CI27*, 42.
35. *Open Courts Act 2013* (Vic) s 3 definition of "court or tribunal", s 18(2), s 30(3).
36. Victoria, *Parliamentary Debates,* Legislative Assembly, Second Reading Speech, 27 June 2013, 2417, 2418; see also Legal Aid NSW, *Submission CI24*, 9.
37. Legal Aid NSW, *Preliminary Submission PCI39*, 6.

matters, anti-discrimination complaints and administrative review of Government decisions.

15.36 More than 170 other Acts and subordinate legislation confer jurisdiction on NCAT, which has four Divisions – the Administrative and Equal Opportunity Division, the Consumer and Commercial Division, the Guardianship Division and the Occupational Division – as well as an Appeal Panel.[38] NCAT also has an enforcement jurisdiction in relation to false or misleading statements, contravention of certain orders, contempt of the tribunal, contravention of a civil penalty provision of the *NCAT Act*, offences under the Act and recovery of amounts ordered to be paid.[39]

15.37 The *NCAT Act* includes a set of objects, some of which are relevant to open justice principles, including:

> (f) to ensure that the Tribunal is accountable and has processes that are open and transparent, and
>
> (g) to promote public confidence in tribunal decision-making in the State and in the conduct of tribunal members.[40]

15.38 The guiding principle for NCAT is to facilitate the just, quick and cheap resolution of the real issues in the proceedings.[41] NCAT aims to apply this principle when exercising any power given to it or interpreting any provision of the Act.[42]

15.39 NCAT:

- may observe its own procedure in relation to any matter not already provided for in the *NCAT Act* or the procedural rules
- is not bound by the rules of evidence (except in its enforcement jurisdiction), and it may inquire and inform itself as it thinks fit (subject to natural justice), and
- is to act with as little formality as the circumstances of the case permit.[43]

15.40 The *NCAT Act* includes some exceptions to open justice. Section 49 of the Act provides that a hearing at NCAT is to be open to the public unless the tribunal orders otherwise. NCAT may order that a hearing be conducted wholly or partly in private due to the confidential nature of any evidence or matter, or for any other reason.

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38. NSW Civil and Administrative Tribunal, *NCAT Annual Report 2020–2021*(2021) 8.
39. *Civil and Administrative Tribunal Act 2013* (NSW) s 28(2)(d), s 33, pt 5.
40. *Civil and Administrative Tribunal Act 2013* (NSW) s 3.
41. *Civil and Administrative Tribunal Act 2013* (NSW) s 36(1).
42. *Civil and Administrative Tribunal Act 2013* (NSW) s 36(2).
43. *Civil and Administrative Tribunal Act 2013* (NSW) s 38(1)–(4).

15.41 Section 64 of the *NCAT Act* includes a number of discretions to make non-publication and non-disclosure orders. Section 65 includes a statutory prohibition on publishing the names of people involved in certain proceedings.

15.42 Rule 42 of the *Civil and Administrative Tribunal Rules 2014* (NSW) governs access to documents in NCAT proceedings. Parties to proceedings are entitled to inspect documents in the registry.[44] Following the end of proceedings, a registrar may allow non-parties (such as members of the public and journalists) to access "public access documents" (including statements, affidavits and documents admitted in public proceedings).[45] Conditions may be placed on access.[46]

Legislation applicable to the MHRT

15.43 The MHRT is a specialist tribunal established and governed by the *Mental Health Act 2007* (NSW) (*Mental Health Act*). It exercises two jurisdictions:

- Under the *Mental Health Act*, the MHRT can make orders requiring a person to receive involuntary mental health treatment and it can also conduct reviews for long-term voluntary patients.[47]
- Under the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW) (*Forensic Provisions Act*), the MHRT can make orders in relation to the treatment, care, detention and release of forensic patients, as well as overseeing the delivery of compulsory mental health care to correctional patients.[48]

15.44 A forensic patient is a person who has been:

- found unfit to be tried for a criminal offence and who is detained in a mental health facility, correctional centre, detention centre or other place
- nominated a limiting term (the maximum period for which the person may be detained) and who is detained or who has been released from custody subject to conditions, or
- the subject of a special verdict of a criminal act proven but found not criminally responsible and who is detained or who has been released from custody subject to conditions.[49]

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44. *Civil and Administrative Tribunal Rules 2014* (NSW) r 42(1).
45. *Civil and Administrative Tribunal Rules 2014* (NSW) r 42(2), r 42(8).
46. *Civil and Administrative Tribunal Rules 2014* (NSW) r 42(4).
47. NSW, Mental Health Review Tribunal, *Preliminary Submission PCI23*, 1.
48. NSW, Mental Health Review Tribunal, *Preliminary Submission PCI23*, 1.
49. *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW) s 72(1).

15.45 A correctional patient is a person who has been transferred from a correctional centre or detention centre to a mental health facility while either serving a sentence of imprisonment, on remand, or subject to a high-risk offender detention order.[50]

15.46 The objects of the *Mental Health Act* include providing for the care, treatment and recovery of people who are mentally ill or mentally disordered.[51]

15.47 The objects of the *Forensic Provisions Act* include the care, treatment and control of people subject to criminal proceedings with a mental health or cognitive impairment, ensuring victim and public safety.[52]

15.48 Section 151(1) of the *Mental Health Act* provides that proceedings are conducted with as little formality and technicality, and with as much expedition, as practicable.

15.49 The MHRT is not bound by the rules of evidence but may inform itself of any matter it thinks appropriate.[53]

15.50 Proceedings of the MHRT are generally to be open to the public.[54]

15.51 However, s 151(4) of the *Mental Health Act* provides that, if satisfied that it is desirable to do so for the welfare of a person who has a matter before the MHRT or for any other reason, the MHRT may make:

> (a) an order that the hearing be conducted wholly or partly in private,
>
> (b) an order prohibiting or restricting the publication or broadcasting of any report of proceedings before the Tribunal,
>
> (c) an order prohibiting or restricting the publication of evidence given before the Tribunal, whether in public or in private, or of matters contained in documents lodged with the Tribunal or received in evidence before the Tribunal,
>
> (d) an order prohibiting or restricting the disclosure to some or all of the parties to the proceedings of evidence given before the Tribunal, or of the contents of a document lodged with the Tribunal or received in evidence by the Tribunal, in relation to proceedings.

15.52 Section 162 of the *Mental Health Act* prohibits publishing the name of certain people involved in any proceedings under the *Mental Health Act* or the *Forensic Provisions Act*.

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50. *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW) s 73.
51. *Mental Health Act 2007* (NSW) s 3(a).
52. *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW) s 69(b).
53. *Mental Health Act 2007* (NSW) s 151(2).
54. *Mental Health Act 2007* (NSW) s 151(3).

15.53 If a court has made an order not to disclose the whole or part of a victim impact statement received in forensic proceedings in relation to an accused person:

- the court must provide a copy of the victim impact statement to the MHRT,[55] and
- the MHRT must not disclose the contents of the victim impact statement except as permitted by the court order.[56]

The new Act should not apply to NCAT and the MHRT

15.54 ARTK submitted that the *CSNPO Act* should apply to NCAT, so that NCAT would have to apply the necessity test when making a suppression or non-publication order. ARTK argued that this may increase transparency and accountability in this jurisdiction.[57] In chapter 6 we recommend that the necessity test is included in the new Act for all grounds and for all types of orders.

15.55 In addition, ARTK raised concerns that access to documents in NCAT is prohibited until proceedings have concluded and that this should be rectified to be consistent with the approach of the courts.[58]

15.56 Legal Aid submitted that inconsistences may arise by excluding tribunals from powers to make orders in the new Act. For example, tribunal proceedings for a person's Working with Children Check may use protected information from criminal proceedings. Similar issues may arise in tenancy proceedings where domestic violence is a factor. Consideration should be given as to how protections can carry over to tribunal proceedings to avoid inconsistences and inadvertent revelation of people's identities.[59]

15.57 However, we do not consider that the new Act should apply to tribunals, for the following reasons.

Tribunals are different in nature to courts

15.58 The principle of open justice is one that has its origins and most rigorous application in the context of the administration of justice by judges exercising judicial power. It is "so fundamental an axiom of Australian law, as to be of constitutional significance".[60]

15.59 Open justice has been recognised as central to the constitutional granting of judicial power and the "authentic hall-mark" that distinguishes the exercise of judicial power from executive or administrative power.[61]

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55. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30N(4).
56. *Crimes (Sentencing Procedure) Regulation 2017* (NSW) cl 12D.
57. Australia's Right to Know, *Submission CI27*, 45.
58. Australia's Right to Know, *Submission CI59*, 3.
59. Legal Aid NSW, *Submission CI57*, 20.
60. J J Spigelman, "Seen to be Done: The Principle of Open Justice: Part I" (2000) 74 *Australian Law Journal* 290, 293.

15.60 There is a constitutional requirement that courts exercise only judicial power, and tribunals exercise administrative powers.[62] However this generally applies only to Commonwealth courts and tribunals, not state courts and tribunals.[63] The one exception is that, due to the operation of Chapter III of the Australian Constitution and s 39 of the *Judiciary Act 1903* (Cth), only a state "court of record" can exercise judicial power conferred by Commonwealth legislation.[64]

15.61 The principle of open justice is therefore of reduced applicability to tribunals as distinct from courts exercising judicial power. Tribunals generally exercise administrative power, not judicial power, and for that reason the principle of open justice does not apply with the same force to proceedings in tribunals.

15.62 However, we recognise that the line between court and tribunal powers is not absolute in NSW. NSW tribunals therefore can, and do, exercise some judicial powers under NSW legislation.

15.63 In addition to sometimes exercising judicial power, NCAT and the MHRT have some similarities to courts, including:

- members include current and former judges
- rules of evidence must be applied in some matters, and
- there is an enforcement jurisdiction.

15.64 It is difficult to distinguish tribunals from courts based on their procedures or the matters they hear.[65] Depending on the particular proceedings, the MHRT may be described as exercising judicial power or at least being "quasi-judicial" in nature.[66]

15.65 Unlike Victoria and South Australia, the other Australian states and territories that have provisions dealing with exceptions to open justice that apply generally do not expressly

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61. *McPherson v McPherson* [1936] AC 177, 200, cited in *Russell v Russell* (1976) 134 CLR 495, 520. See also *John Fairfax Publications Pty Ltd v AG (NSW)* [2000] NSWCA 198 [52]–[54].
62. *R v Kirby; Ex parte Boilermakers' Society of Australia* (*Boilermakers' Case*) (1956) 94 CLR 254. See generally G Hill, "State Administrative Tribunals and the Constitutional Definition of 'Court'" (2006) 13 *Australian Journal of Administrative Law* 103, 103.
63. See, eg, *Kable v DPP (NSW)* (1996) 189 CLR 51, 94 (Toohey J), 109–110 (McHugh J), 67 (Brennan CJ), 77 (Dawson J), 103–104 (Gaudron J); *K-Generation Pty Ltd v Liquor Licensing Court* [2009] HCA 4, 237 CLR 501 [153].
64. For example, the NSW Court of Appeal found that NCAT was not a "court of a State" in *AG (NSW) v Gatsby* [2018] NSWCA 254, 99 NSWLR 1 [190] (Bathurst CJ), [201]–[204] (McColl JA), [228] (Basten JA), [279] (Leeming JA).
65. See generally R Creyke, "Administrative Tribunals" in M Groves (ed) *Australian Administrative Law Fundamentals, Principles and Doctrines* (Cambridge University Press, 2012) 77, 79.
66. NSW, Mental Health Review Tribunal, "The Tribunal" (9 August 2021)<https://www.mhrt.nsw.gov.au/the-tribunal/> (retrieved 25 May 2022).

include tribunals.[67] We have been unable to locate any policy rationale for the inclusion of the Victorian Civil and Administrative Tribunal in the *Open Courts Act*.

Tribunal legislation has been designed to take a more flexible approach

15.66 The tests for making non-publication and non-disclosure orders contained within the *NCAT Act* and *Mental Health Act* are significantly different from the test based on necessity (chapter 6).

15.67 To make an order under s 64(1) of the *NCAT Act*, NCAT must be "satisfied that it is desirable to do so by reason of the confidential nature of any evidence or matter or for any other reason". The test for making an order under s 151(4) of the *Mental Health Act* is that the MHRT is "satisfied that it is desirable to do so for the welfare of a person who has a matter before the Tribunal or for any other reason". These are lower threshold tests than the necessity test.

15.68 It is appropriate that the tests that apply to orders made by NCAT or the MHRT are more flexible than those applicable for courts.

15.69 The NCAT appeal panel has observed that s 49(1) of the *NCAT Act* (which provides that hearings are to be open to the public) reflects the principle of open justice that applies to all judicial and quasi-judicial proceedings.[68]

15.70 However, the appeal panel did not consider that the common law tests concerning open justice should be applied to NCAT. The panel identified that the terms of the *NCAT Act* mean that in making suppression orders, NCAT is "less constrained than the position at common law".[69]

15.71 In a recent case, the Court of Appeal observed that the important role of public and professional scrutiny of curial or judicial proceedings explains the differences between the test in the *NCAT Act* and the necessity test in the *CSNPO Act*.[70]

15.72 In relation to the MHRT, proceedings are specialised and tailored to the therapeutic and rehabilitative needs of people with mental health and cognitive impairments.[71]

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67. See, eg, *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 110; *Evidence Act 1939* (NT) s 4(1) definition of "court", s 57; *Evidence (National Uniform Legislation) Act* (NT) dictionary pt 1 definition of "court"; *Evidence Act 2001* (Tas) s 194J, s 3 definition of "Tasmanian court". But see *Open Court Act 2013* (Vic) s 3 definition of "court or tribunal"; *Evidence Act 1929* (SA) s 69, s 4 definition of "court".
68. *CYL v YZA* [2017] NSWCATAP 105 [96], citing *Russell v Russell* (1976) 134 CLR 495, 520 (Gibbs J).
69. *CYL v YZA* [2017] NSWCATAP 105 [102].
70. *DRJ v Commissioner of Victims Rights* [2020] NSWCA 136 [27].
71. NSW, Mental Health Review Tribunal, *Consultation CIC10*.

Including NCAT and the MHRT in the new Act creates procedural complexity

15.73 Many of our recommended provisions in the new Act relate to procedures (chapters 5 and 7). While these procedures may be appropriate for courts, applying them to tribunals may be inappropriate given the informal nature of tribunals, particularly for self-represented parties.

15.74 Additionally, introducing procedural complexity would be incompatible with NCAT's overriding principle to facilitate the just, quick and cheap resolution of proceedings.[72]

15.75 The MHRT identified that it receives few access requests from the public or the media.[73] It occasionally receives requests from researchers and takes an informal approach to these, which appears to work well in practice.[74]

The new Act should not apply to the PIC and the IRC

15.76 The PIC, formerly known as the Workers Compensation Commission, resolves disputes between people injured in motor accidents and workplaces, and employers and insurers.

15.77 The IRC resolves industrial disputes and unfair dismissal claims, fixes wage rates, and sets terms and conditions of employment by making industrial awards and approving enterprise agreements.

15.78 Both the PIC and the IRC are independent statutory tribunals. Due to the unique nature of their jurisdictions, and for reasons similar to those outlined above in respect of NCAT and the MHRT, the new Act should not apply to these tribunals.

Uniform terminology for NCAT and the MHRT

Recommendation 15.1: Uniform terminology in the *Civil and Administrative Tribunal Act* and the *Mental Health Act*

Section 4, s 49, s 64 and s 65 of the *Civil and Administrative Tribunal Act 2013* (NSW), and s 151 and s 162 of the *Mental Health Act 2007* (NSW) should, where relevant:

(a) adopt the term "publish" and define it in the same way as in recommendation 3.2

(b) define "disclose" in the same way as in recommendation 3.2

(c) adopt the term "information tending to identify" a person and define it in the same way as in recommendation 3.3

(d) define "official report of proceedings" in the same way as in recommendation 3.6

(e) provide that a non-publication order or non-disclosure order, or order to lift a statutory prohibition, may include a requirement to use a pseudonym

72. *Civil and Administrative Tribunal Act 2013* (NSW) s 36(1).

73. NSW, Mental Health Review Tribunal, *Consultation CIC10.*

74. NSW, Mental Health Review Tribunal, *Submission CI33*, 4.

(f) provide that the tribunal may make an exclusion order or a closed court order in the proceedings to which the provisions currently apply, and

(g) define "exclusion order" and "closed court order" in the same way as recommendation 3.1.

15.79 Currently:

- section 65 of the *NCAT Act* and s 162 of the *Mental Health Act* provide that a person must not "publish or broadcast" the name of certain people, and
- section 64(1) of the *NCAT Act* and s 151(4) of the *Mental Health Act* allow the tribunal to make orders prohibiting or restricting the "publication", "publication or broadcast" or "disclosure", of certain information.

15.80 These terms are not defined. Recommendation 15.1(a)–(b) is to, where relevant, replace these terms with our recommended definitions of "publish" and "disclose" in chapter 3. This should provide greater clarity about what actions are prohibited or restricted by the prohibition or order.

15.81 Currently, s 64(4) and s 65(4) of the *NCAT Act* and s 162(3) of the *Mental Health Act,* provide 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".

15.82 Recommendation 15.1(c) is to replace the term "name" with "information tending to identify" a person, which we recommend in chapter 3. This should improve understanding of what might lead to the identification of a person and achieve consistency with other legislation. The current definitions of "name" contained in these provisions should be omitted.

15.83 Section 65(3) of the *NCAT Act* and s 162(2) of the *Mental Health Act* provide an exception to the prohibition on publishing the name of certain people for an official report of proceedings. The term official report of proceedings is not defined.

15.84 Recommendation 15.1(d) is that these provisions should adopt the definition of "official report of proceedings" we recommend in chapter 3 (that is, as a report of proceedings intended primarily for use in a law report or approved by the tribunal).

15.85 For the avoidance of any doubt:

- the discretions to make non-publication and non-disclosure orders in s 64(1) of the *NCAT Act* and s 151(4) of the *Mental Health Act* should be amended to note expressly that the order can include a requirement to use a pseudonym, and
- when the tribunal grants leave to lift the statutory prohibition on publication in s 65 of the *NCAT Act* or s 162 of the *Mental Health Act*, the order may still require the use of a pseudonym (recommendation 15.1(e)).

15.86 Although there is no express reference to the power to make a pseudonym order, NCAT commonly uses pseudonyms when publishing decisions subject to an order made under s 64(1) of the *NCAT Act* or where the statutory prohibition in s 65 applies.

15.87 Under s 49(1) of the *NCAT Act* and s 151(3) of the *Mental Health Act,* hearings are to be open to the public, unless the tribunal orders otherwise. NCAT may order that a hearing be conducted wholly or partly in private "if it 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".[75]

15.88 The MHRT may make such an order if satisfied that it is desirable to do so for the welfare of a person who has a matter before the MHRT or for any other reason.[76] Such orders can be made on the tribunal's own motion or on the application of a party.[77]

15.89 Recommendation 15.1(f) is that the discretion to hold proceedings wholly or partially in private should be replaced with a discretion to make an "exclusion order" or "closed court order" (with modified language to reflect the definition is being used in respect of a tribunal, not a court) (chapter 3). This would give both tribunals the flexibility to make the type of order that is most appropriate in the circumstances. For example, where there is a need to preserve the confidentiality of the particular proceedings, a tribunal may elect to make a closed court order rather than an exclusion order.

Recommendations specific to NCAT

The statutory prohibition on publication

15.90 Section 65 of the *NCAT Act* prohibits the publication or broadcast of the name of a person involved in proceedings in the Guardianship Division of NCAT and people involved in proceedings relating to a decision made under community welfare legislation.

15.91 The Guardianship Division exercises a protective jurisdiction under the *Guardianship Act 1987* (NSW). It determines applications for the appointment of guardians or financial managers for people with disability. It can also review enduring guardianship appointments and enduring powers of attorney, provide consent to medical or dental treatment, and approve clinical trials.[78]

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75. *Civil and Administrative Tribunal Act 2013* (NSW) s 49(2).
76. *Mental Health Act 2007* (NSW) s 151(4)(a).
77. *Civil and Administrative Tribunal Act 2013* (NSW) s 49(2); *Mental Health Act 2007* (NSW) s 151(4).
78. NSW Civil and Administrative Tribunal, *Role of the Guardianship Division,* Fact Sheet (November 2021) 1.

15.92 NCAT's Administrative and Equal Opportunity Division can review certain decisions made under community welfare legislation.[79] These include, for example, decisions about financial assistance for people with disability made under the *Disability Inclusion Act 2014* (NSW).[80]

15.93 Guardianship and community welfare proceedings may involve deeply personal issues, relating to a person's mental health or decision-making capacity.[81] Exceptions to open justice are appropriate to protect the identity of people involved in such proceedings.[82]

15.94 Legislation elsewhere in Australia has similar prohibitions.[83]

Application to information that would connect a person with the proceedings

Recommendation 15.2: Application of s 65 of the *Civil and Administrative Tribunal Act* to information that would connect a person to the proceedings

Section 65 of the *Civil and Administrative Tribunal Act 2013* (NSW) should apply to the publication of information tending to identify a person involved in proceedings in the Guardianship Division, or proceedings for a decision for the purposes of community welfare legislation, in a way that connects the person with the proceedings.

15.95 Section 65 of the *NCAT Act* prohibits the publication or broadcast of the name of any person who appears as a witness, to whom the proceedings relate or who is mentioned or is otherwise involved in, guardianship or community welfare proceedings.

15.96 Recommendation 15.2 is that s 65 of the *NCAT Act* should clarify that the prohibition applies to information tending to identify a person in a way that connects the person with the proceedings. This is similar to legislation that automatically prohibits publication of the identity of a child in a way that connects them with criminal proceedings (as a defendant, witness, victim or if they are otherwise mentioned in the proceedings) (chapter 9).[84]

15.97 ARTK observed that the list of people covered by the statutory prohibition in s 65 of the *NCAT Act*, at least with respect to Guardianship Division proceedings, applies to a wider range of people who may be involved in the proceedings. ARTK supported

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79. See *Community Services (Complaints, Reviews and Monitoring) Act 1993* (NSW) s 28.
80. See *Disability Inclusion Act 2014* (NSW) s 35.
81. See, eg, NSW Law Reform Commission, *Safeguards and Procedures*, Review of the Guardianship Act 1987, Question Paper 4 (2017) [8.58].
82. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Consultation Paper 22 (2020) [3.23], [3.26].
83. See, eg, *Guardianship of Adults Act 2016* (NT) s 80(2); *Guardianship and Administration Act 1993* (SA) s 81(3); *Tasmanian Civil and Administrative Tribunal Act 2020* (Tas) s 81(3); *Guardianship and Administration Act 1990* (WA) sch 1 cl 12; *Victorian Civil and Administrative Tribunal Act 1998* (Vic) sch 1 cl 37(1).
84. *Children (Criminal Proceedings) Act 1987* (NSW) s 15A(1).

amending s 65 so that it only protects the identity of the person to whom the guardianship proceedings directly relate.[85]

15.98 Given the sensitive and personal nature of the proceedings, and the need to ensure that family members and professionals are not discouraged from making applications or participating in hearings, we do not consider that the scope of the statutory prohibition should be narrowed. Limiting the prohibition to information that identifies a person in a way that would connect them with the proceedings provides sufficient clarification and definition.

Considerations before granting leave for a publication

Recommendation 15.3: Considerations before granting leave for publication under s 65 of the *Civil and Administrative Tribunal Act*

Section 65 of the *Civil and Administrative Tribunal Act 2013* (NSW) should provide that, in deciding whether to grant leave for the publication of the identity of a person involved in proceedings, the Tribunal must take into account:

(a) the views of the person, considered in light of the person's decision-making ability

(b) the views of any other person who is protected by the prohibition and who may be identified by the publication (if these views are known or ascertainable), and

(c) any other factor that the Tribunal considers relevant.

15.99 Section 65(2) of the *NCAT Act* provides that NCAT may grant "consent" for the publication or broadcast of a person's name. The statutory prohibition protects the identity of anyone who appears or is mentioned in proceedings, for example, witnesses.

15.100 We recommend shifting the language from "consent" to "leave", consistent with the language we have adopted in relation to lifting mechanisms for statutory prohibitions in other legislation (chapters 8–12).

15.101 Currently, there is no guidance in the provision about the factors NCAT should consider in granting leave.

15.102 Recommendation 15.3(a) is that NCAT be required to consider the views of the person, who may be person who is the subject of the proceedings, in light of the person's decision-making ability. This is intended to ensure the person has some autonomy and a voice in the process, recognising that they may have the ability to express a view about the publication of their identity.

15.103 Recommendation 15.3(b) is that NCAT should also consider the views of others who are protected by the prohibition and who may be identified by the publication. This is because the prohibition can apply to a range of people involved in proceedings.

85. Australia's Right to Know, *Submission CI27*, 28.

15.104 Under recommendation 15.3(c), NCAT would also be able to consider any other factor it considers relevant. This is to ensure that the recommended provision is not interpreted to mean that the views of the people protected by the prohibition are the only relevant consideration.

No lifting mechanism by consent

15.105 In chapters 8–12 in this report, we make recommendations to enable a person who is protected by a statutory prohibition to consent to publication of their identity, subject to limitations.

15.106 In the consultation paper, we observed that current NCAT legislation does not enable a person to consent to publication, and that this might be due to issues such as the capacity of the person who is the subject of proceedings.[86]

15.107 Consultations indicated that NCAT rarely receives applications to lift the prohibition under s 65 of the *NCAT Act* given the nature of the cases and capacity concerns.[87]

15.108 Further complexities may arise where it is unclear who would have the authority to consent to the publication on the person's behalf, in circumstances where a guardian or financial manager has been appointed. The person seeking to publish may also need to obtain consent from every person who is protected by the prohibition, which may apply to a broad range of people involved in proceedings.

15.109 Introducing a consent-based lifting mechanism may dilute the protection provided by s 65 of the *NCAT Act*. It is preferable to rely on the existing mechanism, as amended in line with recommendation 15.3, so that NCAT may grant leave to lift the prohibition, subject to the consideration of the views of people protected by the prohibition.

Do not extend to related proceedings

15.110 Section 65 of the *NCAT Act* prohibits the publication of the identity of a person in guardianship or community welfare proceedings, but this does not apply to related proceedings in the Supreme Court.[88]

15.111 We do not recommend that the prohibition on publishing the identity of a person in NCAT proceedings should automatically apply to related proceedings in other courts.

15.112 In the consultation paper, we asked whether statutory prohibitions that protect the identities of people involved in proceedings should apply in appellate and other related proceedings.[89]

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86. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Consultation Paper 22 (2020) [3.80]–[3.82].

87. NSW Civil and Administrative Tribunal, *Consultation CIC15*.

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

15.113 Legal Aid submitted that prohibitions for vulnerable people should extend to appeals because a substantial amount of material that was previously before the tribunal is admitted in the court proceedings.[90]

15.114 However, unlike proceedings in the MHRT (discussed below), we did not receive submissions or identify case law indicating that there was an inconsistent approach to protecting the identities of people in proceedings before NCAT and in related proceedings in the Supreme Court.

15.115 The general powers to make a non-publication order in the new Act in chapter 6, would provide sufficient grounds for a court, in appropriate cases, to make an order in relation to matters previously dealt with by NCAT.

Discretions to make non-publication and non-disclosure orders

15.116 Under s 64(1) of the *NCAT Act*, NCAT may make the following types of orders:

- An order prohibiting or restricting the disclosure of the name of any person. We classify this as a discretion to make a non-disclosure order (chapter 3).
- An order prohibiting or restricting the publication or broadcast of any report of proceedings. We classify this as a discretion to make a non-publication order (chapter 3).
- An order prohibiting or restricting the publication of evidence, whether in public or in private, or of matters contained in documents lodged with or received in evidence by NCAT. We classify this as a discretion to make a non-publication order (chapter 3).
- An order prohibiting or restricting the disclosure to some or all of the parties to the proceedings of evidence given before NCAT, or of the contents of a document lodged or received in evidence by NCAT, in relation to the proceedings. We classify this as a discretion to make a non-disclosure order (chapter 3).

15.117 NCAT may make such orders if satisfied that it is desirable to do so by reason of the confidential nature of any evidence or matter or for any other reason. Orders may be made on application by a party or of NCAT's own motion.[91]

15.118 NCAT cannot make an order under s 64(1) of the *NCAT Act* that is inconsistent with the statutory prohibition on publication contained in s 65, discussed above.[92]

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89. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Consultation Paper 22 (2020) question 3.6.
90. Legal Aid NSW, *Submission CI24*, 8.
91. *Civil and Administrative Tribunal Act 2013* (NSW) s 64(1).
92. *Civil and Administrative Tribunal Act 2013* (NSW) s 64(2).

15.119 Section 64(3) of the *NCAT Act* provides that NCAT may vary or revoke an order. Decisions to prohibit or restrict the publication or disclosure of matters are regarded as interlocutory decisions.[93] These decisions may be subject to internal appeal (with the leave of the Appeal Panel).[94]

Duration of orders

Recommendation 15.4: Duration of non-publication and non-disclosure orders made under s 64 of the *Civil and Administrative Tribunal Act*

Section 64 of the *Civil and Administrative Tribunal Act 2013* (NSW) should provide:

(1) A non-publication or non-disclosure order must specify the period for which the order operates.

(2) The Tribunal, in deciding the period for which an order is to operate, must ensure that the order operates for no longer than is reasonably necessary to achieve the purpose for which the order is made.

(3) The period for which an order operates is to be determined by reference to:

(a) a fixed or ascertainable period, or

(b) the occurrence of a specified future event.

(4) An order may be specified to operate indefinitely in exceptional circumstances or where it is not reasonably practicable to specify a duration.

15.120 In some matters, NCAT may decide to make a non-publication or non-disclosure order under s 64(1) to protect evidence or other information, in addition to the statutory prohibition on publishing a person's identity.

15.121 Our draft proposal was that s 64 of the *NCAT Act* should require orders to specify their duration to prevent them from operating indefinitely.[95]

15.122 NCAT opposed the proposal for the following reasons:

- the rationale for the proposal appears applicable to courts where jury trials are undertaken, to suppress publicity that may prejudice the right to a fair trial
- the necessity of an order continuing past the final decision in proceedings would generally be considered by NCAT at the conclusion of proceedings
- if a party or third party wants the order to be lifted, there is a process for applications to be made to give effect to this

93 *Civil and Administrative Tribunal Act 2013* (NSW) s 4(1) definition of "interlocutory decision".

94. *Civil and Administrative Tribunal Act 2013* (NSW) s 80(2)(a).

95. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 6.9.

- there are resource concerns in relation to this proposal, including that if orders were all time-limited, either NCAT would have to introduce a system to keep remaking orders or parties would have to remember to reapply
- it may require NCAT to conduct an additional separate hearing and take submissions from parties in relation to each order, and
- the types of matters NCAT deals with generally have orders that need to be in place indefinitely, for example, where the order is to protect a vulnerable party or witness, such as in guardianship, child welfare and occupational disciplinary matters involving victims.[96]

15.123 In response to these concerns, we recommend the same duration provision should be included in legislation relating to NCAT, as we recommend for the MHRT (recommendation 15.9), the new Act,[97] and in some provisions in subject-specific legislation that contain discretions to make non-publication and non-disclosure orders (chapters 8 and 11–12). The new Act and the discretions in subject-specific legislation apply in civil contexts similar to the jurisdiction of NCAT.

15.124 Recommendation 15.4 includes a requirement to specify the duration of a non-publication or non-disclosure order. It is intended to provide greater certainty and to prevent orders from operating for longer than necessary.

15.125 We acknowledge that a requirement for an order to specify a duration could:

- require a system to record and monitor the duration of orders made under s 64(1) of the *NCAT Act*, and
- mean that parties could have to make submissions on the issue of duration

both of which may have resource implications.

15.126 However, unless NCAT is required to specify duration in the order itself the intended duration of an order may be unclear to parties, third parties and NCAT itself when it deals with a subsequent application to vary or revoke the order.

15.127 We note there is provision to vary or revoke an order under s 64(3) of the *NCAT Act,* which may provide a safeguard to indefinite orders. Below, we discuss how NCAT may provide rules and further guidance to parties to ensure that it is clear that an order may be reviewed.

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96. NSW Civil and Administrative Tribunal, *Submission CI36*, 1; NSW Civil and Administrative Tribunal, *Consultation CIC30*.

97. Recommendation 6.9.

15.128 Consistent with our standard approach to duration, under recommendation 15.4(4), orders of indefinite duration could only be made in exceptional circumstances or where it not reasonably practicable to specify a duration. Tribunals should be encouraged to consider making time-limited orders in the majority of cases, particularly as part of the final decision in proceedings. This reflects our guiding principle that any exception to open justice should be to the minimal extent necessary (chapter 1).

Rules regarding procedures for reviews and appeals

15.129 The *NCAT Act* contains an avenue for:

- review of non-publication or non-disclosure orders made under s 64(1) of the Act,[98] and
- internal appeal of decisions regarding the prohibition or restriction of the publication, broadcast or disclosure of matters.[99]

15.130 Section 25 of the *NCAT Act* provides that the Rule Committee may make rules with respect to any practice and procedure to be followed in NCAT proceedings. NCAT noted that the Rule Committee will review the rules to see what can be aligned to fit the NCAT context once any legislation arising from this report is enacted for the courts.[100]

15.131 We agree with this approach. To avoid any doubt, the Rule Committee should consider making rules with respect to:

- reviews and appeals of non-publication and non-disclosure orders, including the standing provisions, and
- the recommended lifting mechanism for NCAT to grant leave for a publication (recommendation 15.3).

15.132 We do not make recommendations about the content of such rules. Given that NCAT has specialised jurisdictions and operates differently from courts, it is important that it has flexibility to establish its own procedures.

Dealing with breaches

Recommendation 15.5: Offence and contempt provisions in the *Civil and Administrative Tribunal Act*

Section 64, s 65 and s 72 of the *Civil and Administrative Tribunal Act 2013* (NSW) should provide:

(1) A person commits an offence if the person:

98. *Civil and Administrative Tribunal Act 2013* (NSW) s 64(3).
99. *Civil and Administrative Tribunal Act 2013* (NSW) s 4(1) definition of "interlocutory decision" (b), s 80(2)(a).
100. NSW Civil and Administrative Tribunal, *Submission CI36*, 1.

(a) contravenes the statutory prohibition in s 65 of the Act, or

(b) contravenes an order made under s 64(1) of the Act and knows of, or is reckless as to, the existence of an order.

(2) If a corporation commits the offence of breaching the statutory prohibition in s 65 of the Act or an order made under s 64(1) of the Act, each person who is a director of the corporation or who is concerned in the management of the corporation is taken to have committed the same offence, unless the person satisfies the Tribunal that:

(a) the person was not in a position to influence the conduct of the corporation in relation to its contravention, or

(b) the person, if in such a position, used all due diligence to prevent the contravention.

(3) Proceedings for an offence of breaching the statutory prohibition in s 65 of the Act or an order made under s 64(1) of the Act must be commenced within two years of the date of the alleged offence.

15.133 Section 33 of the *NCAT Act* outlines the enforcement jurisdiction of NCAT, which includes both the functions of the tribunal:

- when dealing with an alleged or apparent contempt of the tribunal, and
- when dealing with an application (under s 77) for a contravention of a civil penalty provision under the *NCAT Act*.

Proceedings for an offence under the *NCAT Act* are to be dealt summarily before the Local Court, within 12 months of the date of the alleged offence.[101]

15.134 Section 65 of the *NCAT Act* contains an offence for breaching the statutory prohibition on publication, which has a maximum penalty of 50 penalty units ($5,500) or 12 months' imprisonment or both (in the case of an individual) or 100 penalty units ($11,000) (in the case of a corporation).

15.135 Section 64 of the Act does not contain its own penalty provision. Instead, s 72 (which is a civil penalty provision) provides that a person must not contravene an order of NCAT without lawful excuse. This also attracts a penalty of 50 penalty units ($5,500) or 12 months' imprisonment or both (for an individual) or 100 penalty units ($11,000) (for a corporation).

15.136 Section 73 of the *NCAT Act* provides that NCAT has the same powers as the District Court in relation to contempt. A person acts in contempt of NCAT where that conduct would constitute contempt of court, and they do not have a reasonable excuse for doing so. Accordingly, NCAT may punish contempt of NCAT by:

- a fine not exceeding 20 penalty units ($2,200), or
- imprisonment for a period not exceeding 28 days.[102]

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101. *Civil and Administrative Tribunal Act 2013* (NSW) s 76.

15.137 Section 74 of the *NCAT Act* provides that a person cannot be punished twice for conduct that constitutes both a contempt and either:

- a contravention of a civil penalty provision, or
- an offence.

15.138 Consistent with our recommendations in relation to courts in chapter 13, recommendation 15.5 is that:

- the offence of contravention of an order made under s 64(1) of the *NCAT Act* should provide that a person commits an offence if the person contravenes the order and knows of or is reckless as to the existence of the order
- the offence of contravention of the statutory prohibition in s 65 of the Act should be one of strict liability
- both penalty provisions in the *NCAT Act* should provide for personal liability of company directors to deter breaches further, such as those committed by media corporations, and
- a two-year time limit for prosecutions should apply, to allow sufficient time for evidence to be collected to support enforcement.

15.139 Our draft proposals included that all statutory offences for breaching a prohibition on publication or disclosure or a non-publication or non-disclosure order should have a maximum penalty of no more than:

- for an individual: two years' imprisonment and/or a fine of 100 penalty units ($11,000), and
- for a corporation: a fine of 500 penalty units ($55,000).[103]

15.140 After further consideration, we do not recommend this in relation to NCAT. The *NCAT Act* provisions for breaching a prohibition on publication, or a non-publication or non-disclosure order, already contain maximum penalties under these limits.

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102. *District Court Act 1973* (NSW) s 199(7).

103. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 4.11(2).

Recommendations specific to the MHRT

The statutory prohibition on publication

15.141 Section 162 of the *Mental Health Act* prohibits publication of information that would identify a person involved in proceedings before the MHRT. This prohibition recognises that "intensely personal information" may be discussed in the proceedings, and that people with mental health issues experience ongoing stigma.[104]

15.142 The statutory prohibition under the *Mental Health Act* applies to the name of any person:

- to whom proceedings before the MHRT relate
- who appears as a witness before the MHRT in any proceedings, or
- who is mentioned or otherwise involved in any proceedings under the *Mental Health Act* or the *Forensic Provisions Act*.[105]

15.143 Section 162(1) provides that the prohibition applies "before or after" the hearing is completed. In other words, the prohibition operates indefinitely.

15.144 The MHRT's practice direction on publishing names states:

- The prohibition ensures that all participants in MHRT hearings can talk freely without concern that their identity or details may be published.
- This in turn encourages involvement in the hearing and open sharing of information.
- Hearings often discuss in detail a person's personal and health information.
- Victims and the harm suffered may also be discussed.
- If all information is public, a person who lives with a mental illness may experience humiliation or disadvantage in their work or social life.
- If details about a patient's leave or release plans were public, it may affect the person's ability to rejoin the community safely.[106]

15.145 In one case, the MHRT outlined key reasons for protecting information that would identify a person as being involved in MHRT proceedings, including that:

- confidentiality encourages frankness which is crucial to the public health process

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104. NSW, Mental Health Review Tribunal, *Preliminary Submission PCI23*, 1.
105. *Mental Health Act 2007* (NSW) s 162(1).
106. NSW, Mental Health Review Tribunal, *Practice Direction: Publication of Names*, 29 August 2018, 1.

- treatment for forensic patients "is a refined and delicate therapeutic process" and it is "different from the process of sentencing which requires the public assessment by a judicial officer in open court of legislative and common law factors", and

- treatment and rehabilitation takes place within a mental health facility, and "publicity may detrimentally affect that environment" and "impact on the progress of that particular patient and other patients".[107]

15.146 The MHRT and Legal Aid expressly supported the statutory prohibition in the *Mental Health Act*.[108] There are similar statutory prohibitions elsewhere in Australia.[109]

Application to information that would connect a person with the proceedings

Recommendation 15.6: Application of s 162 of the *Mental Health Act* to information that would connect a person to the proceedings

Section 162 of the *Mental Health Act 2007* (NSW) should apply to the publication of information tending to identify a person involved in proceedings before the Mental Health Review Tribunal in a way that connects the person with the proceedings.

15.147 Recommendation 15.6 clarifies that s 162 of the *Mental Health Act* should only apply to information that would identify a person as connected to the MHRT proceedings. This is similar to the prohibition in Tasmania, which applies to information that would identify a person as a patient.[110]

15.148 The statutory prohibition in the *Mental Health Act* protects the identity of a person involved in the MHRT proceedings as a forensic patient, as well as an involuntary patient.[111]

15.149 The MHRT indicated that there is confusion about the information covered by the statutory prohibition, for example, some victims of forensic patients have felt that they cannot share their experiences of an offence without breaching the prohibition.[112]

15.150 Recommendation 15.6 is to clarify that the statutory prohibition does not, for example, prohibit:

- a victim of a forensic patient from discussing their experiences of the relevant offence (prior to the MHRT proceedings)

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107. *Mr Turner* [2019] NSWMHRT 4 [22]–[24].
108. NSW, Mental Health Review Tribunal, *Submission CI06*, 1; Legal Aid NSW, *Submission CI24*, 3.
109. 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.
110. See *Mental Health Act 2013* (Tas) s 133.
111. NSW, Mental Health Review Tribunal, *Consultation CI10.*
112. NSW, Mental Health Review Tribunal, *Preliminary Submission PCI23*, 3.

- a forensic patient's pathway through the courts, before they reach the MHRT, from being discussed in public judgments,[113] or
- a person from identifying themselves as someone who lives with a mental illness, whether hospitalised or the subject of a special verdict of criminal act proven but not found criminally responsible.[114]

15.151 Legal Aid supported this approach as it would allow patients and their families to discuss their mental health more broadly.[115]

The scope of the statutory prohibition should not be limited further

15.152 Recommendation 15.6 is to clarify the application of the statutory prohibition without reducing the level of protection provided by the prohibition.

15.153 Legal Aid said that the application of the prohibition to various people involved in MHRT proceedings "seems unnecessarily broad and confuses the purpose of the prohibition". It said that most witnesses in proceedings are medical professionals and it is unclear why their identity is protected.[116] Other jurisdictions have a narrower approach and only protect the person who is the subject of the proceedings.[117]

15.154 The MHRT observed that it may be necessary to protect medical professionals from stalking or harassment by current or former patients.[118] In addition, protecting the privacy of all participants may ensure sensitive information is exchanged freely in proceedings.[119]

15.155 As in NSW, legislation in Western Australia protects the identities of people involved in mental health proceedings other than the person who is the subject of proceedings.[120]

15.156 Mental Health Carers NSW (MHCN) raised concerns that the prohibition does not adequately protect carers and family members who make frank disclosures that have the potential to damage their relationship with the person.[121] This is especially important where a patient may be discharged back into their care. The MHCN submitted that the MHRT should:

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113. NSW, Mental Health Review Tribunal, *Preliminary Submission PCI23*, 3.
114. NSW, Mental Health Review Tribunal, *Practice Direction: Publication of Names*, 29 August 2018, 1.
115. Legal Aid NSW, *Submission CI57*, 15.
116. Legal Aid NSW, *Submission CI24*, 6.
117. See, eg, *Mental Health Act 2014* (Vic) s 194; *Mental Health and Related Services Act 1998* (NT) s 138; *Mental Health Act 2009* (SA) s 107.
118. NSW, Mental Health Review Tribunal, *Consultation CIC10.*
119. 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.
120. See *Mental Health Act 2014* (WA) s 468.
121. Mental Health Carers NSW Inc, *Submission CI45*, 2–3.

> establish an ethical and transparent process for both forensic and civil divisions to allow families and carers to provide confidential statements to their proceedings, which may be subject to clinical review and disclosed to [patients or their] *advocates*, but which may be withheld from [patients] or consumers themselves at the order of the MHRT when it is deemed necessary to preserve the relationship or safety of the families and carers making the statement (or others), while preserving natural justice and the integrity of the MHRT process.[122]

15.157 In our view, the statutory prohibition applies to carers and family members if they are "a person involved in the proceedings". The other issues raised by MHCN relate to the MHRT's procedures and are a matter for the MHRT.

Application of the prohibition to related proceedings

Recommendation 15.7: Extension of s 162 of the *Mental Health Act* to related proceedings in the Supreme Court

Section 162 of the *Mental Health Act 2007* (NSW) should apply to related proceedings in the Supreme Court.

15.158 Section 162 of the *Mental Health Act* should clarify that it expressly applies to related proceedings in the Supreme Court, for example, appeal or extension order proceedings.

15.159 The MHRT, the Supreme Court and Legal Aid supported extending the application of the prohibition.[123] This should ensure that a consistent approach to protecting a person's identity is taken across the two jurisdictions.

15.160 Despite the prohibition stating it applies "whether before or after the hearing is completed",[124] consultations indicated that the identities of people involved in MHRT proceedings may not be protected before the Supreme Court.[125]

15.161 The MHRT said that the Supreme Court generally allocates pseudonyms where there are appeals against decisions of the MHRT made under the *Mental Health Act*.[126] The Supreme Court has observed that "pseudonyms are customarily deployed by the Court in appeals from the Tribunal in conformity with s 162(1) of the *Mental Health Act 2007* NSW".[127] Other cases indicate that the Supreme Court has made orders under the

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122. Mental Health Carers NSW Inc, *Submission CI45*, 10.
123. NSW, Mental Health Review Tribunal, *Submission CI06*, 2; Supreme Court of NSW, *Consultation CIC22;* Legal Aid NSW, *Submission CI24*, 6.
124. *Mental Health Act 2007* (NSW) s 162(1).
125. Legal Aid NSW, *Preliminary Submission PCI39*, 5–6; NSW, Mental Health Review Tribunal, *Preliminary Submission PCI23*, 2–3.
126. NSW, Mental Health Review Tribunal, *Preliminary Submission PCI23*, 2.
127. *A (by his tutor Collins) v Mental Health Review Tribunal (No 4)* [2014] NSWSC 31 [5].

CSNPO Act rather than by reference to the statutory prohibition, but have considered the prohibition when making such an order.[128]

15.162 However, the MHRT observed that the Supreme Court does not consistently allocate pseudonyms where there are appeals against decisions concerning forensic patients.[129] For example, in a case concerning an extension order, the Supreme Court declined to make an order on the basis that s 162 of the *Mental Health Act* did not apply to the Supreme Court, and the *CSNPO Act* appears not to have been considered.[130]

15.163 Legal Aid stated that when an application is made to the Supreme Court to extend a person's forensic status, they can be identified, including in the published decision.[131] Legal Aid raised concerns that the sensitive medical and health information divulged before the MHRT should be protected not only while it is before the MHRT, but when it is before any court or tribunal, arguing:

> Without a non-publication or suppression order, the information which was protected before the MHRT is laid bare in public during extension proceedings. If the person's limiting term is extended, they are again referred back to the MHRT where the whole process begins again under the protection of section 162 …
>
> In our view, it is inconsistent to protect this type of information before the MHRT but not before other forums. The primary consideration should always be the nature of information sought to be protected and the reason why it should be protected, not the forum in which it is used. It is important that patients feel comfortable disclosing very sensitive information to their treating teams. Openness about their health reduces the risk of harm to both patients and the broader community. If forensic patients know that this information will be discussed in open court, they are likely to be more guarded with their treatment teams.[132]

15.164 Legal Aid observed that sometimes the only option for forensic patients is to apply for a suppression or non-publication order under the *CSNPO Act* to protect their identities, which "often results in varying, and inconsistent outcomes".[133] While it is "theoretically possible" for a forensic patient to obtain an order, it is difficult to do so as:

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128. See, eg, *Secretary, NSW Ministry of Health v W* [2020] NSWCA 212, 102 NSWLR 969 [6]; *AG (NSW) v Kereopa* [2017] NSWSC 411 [37]–[43].
129. NSW, Mental Health Review Tribunal, *Preliminary Submission PCI23*, 2.
130. *Minister for Mental Health v Paciocco* [2017] NSWSC 4 [50]–[51].
131. Legal Aid NSW, *Preliminary Submission PCI39*, 5–6.
132. Legal Aid NSW, *Submission CI57*, 15–16.
133. Legal Aid NSW, *Submission CI24*, 6.

> they bear the onus of satisfying the court, generally against the objections of the Crown, that there is no prevailing public interest in publishing or broadcasting their proceedings.[134]

15.165 In a case concerning an extension order, the Supreme Court considered an application for both non-publication and suppression orders over the person's name, as well as a pseudonym, under the *CSNPO Act*. The Supreme Court stated that the statutory prohibition in the *Mental Health Act* did not apply to the proceedings, and that the application did not satisfy the Court that an order under the *CSNPO Act* was necessary to prevent prejudice to the proper administration of justice.[135]

15.166 An express statement in the *Mental Health Act* that the statutory prohibition applies to related proceedings in the Supreme Court is intended to resolve these inconsistencies.

Considerations before granting leave for a publication

Recommendation 15.8: Considerations before granting leave for publication under s 162 of the *Mental Health Act*

Section 162 of the *Mental Health Act 2007* (NSW) should provide that, in deciding whether to grant leave for the publication of the identity of a person protected by the prohibition, the Tribunal must take into account:

(a) the views of the person, considered in light of the person's decision-making ability

(b) the views of any other person who is protected by the prohibition and who may be identified by the publication (if these views are known or ascertainable), and

(c) any other factor that the Tribunal considers relevant.

15.167 Section 162(1) of the *Mental Health Act* provides that the MHRT may give "consent" to publication or broadcast of a person's name.

15.168 The language should change from "consent" to "leave", consistent with the language we have recommended in relation our standard lifting mechanism for statutory prohibitions in other subject-specific legislation (chapters 8–12) and NCAT (recommendation 15.3).

15.169 Currently, there is no guidance in the provision about what factors the MHRT should take into account when considering whether to grant leave.[136] The MHRT practice direction provides that it will conduct a hearing.[137] In practice, the MHRT considers the person's attitude and their capacity to consent to the publication of their identity.[138]

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134. Legal Aid NSW, *Submission CI57*, 15.

135. *AG (NSW) v Huckstadt (No 2)* [2017] NSWSC 595 [47], [58].

136. Legal Aid NSW, *Submission CI24*, 6.

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

138. NSW, Mental Health Review Tribunal, *Preliminary Submission PCI23*, 1–2, citing *Mr Ephram* [2013] NSWMHRT 7; *Ms Kerr and Mr Liu* [2014] NSWMHRT 4; NSW, Mental Health Review Tribunal,

15.170 Recommendation 15.8 is intended to ensure that the *Mental Health Act* contains the standard considerations we recommend for lifting mechanisms in relation to all statutory prohibitions. These considerations substantially reflect the existing practice direction.

15.171 Recommendation 15.8(a) is similar to our draft proposal, which was that the MHRT should be required to consider whether the person consents to publication, in light of that person's capacity to give consent.[139] However, the recommendation uses the term "decision-making ability", to ensure there is no confusion between the court's role in granting leave and the absence of a mechanism for consent to a publication.

15.172 Under recommendation 15.8(b) the MHRT would also be required to consider views of any other person protected by the statutory prohibition. This is consistent with the standard lifting mechanism for statutory prohibitions in subject-specific legislation outlined in chapter 8.

15.173 To ensure that the recommended provision is not interpreted to mean that the person's views are the only relevant consideration, recommendation 15.8(c) makes it clear that the MHRT can consider any other factor that it considers relevant.

No lifting mechanism by consent

15.174 In the course of this review, we considered whether to recommend a mechanism for a person to consent to publication without any intervention by the MHRT. We have recommended such a mechanism for some other existing subject-specific legislation in chapters 8–12.

15.175 An alternative option that we considered was a lifting mechanism based on both the consent of the person and leave of the MHRT. The previous *Mental Health Act 1990* (NSW) provided that the name of a person involved in an inquiry before a Magistrate could be published or broadcast with the approval of the Magistrate and the consent of the person (or their representative).[140]

15.176 Legal Aid observed that individuals connected to MHRT proceedings may wish to speak about their experiences to advocate for reform and to remove stigma surrounding mental illness and disability. Under current prohibitions, they are unable to discuss their experiences. For example, some have been unable to share fully their experiences with the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability for fear of breaching the prohibition.[141]

Practice Direction: Publication of Names, 29 August 2018, 1; NSW, Mental Health Review Tribunal, *Preliminary Consultation PCI10*; NSW, Mental Health Review Tribunal, *Submission CI06*, 2.

139. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 5.14(1)(a).

140. *Mental Health Act 1990* (NSW) s 273, as repealed by *Mental Health Act 2007* (NSW) s 200.

141. Legal Aid NSW, *Submission CI57*, 19.

15.177 In respect of the provision generally, the MHRT acknowledged the difficulties for victims and the media who may wish to write about forensic patients. Some information about patients may be known to past courts and media reports, and yet current circumstances, such as treatment and service providers, are not known. However, making this public may jeopardise these support services or a patient's accommodation.[142]

15.178 One issue with introducing a consent mechanism is that in some cases the person may not have the capacity to give consent.[143] Another is that these approaches may not consider the protection afforded to others by the prohibition, or they may place the onus of ascertaining the views of other people protected by the prohibition on the person wanting to publish the information. Requiring the leave of the MHRT to lift the prohibition avoids both of these issues while still ensuring the person has a voice in the process (recommendation 15.8).

Discretions to make non-publication and non-disclosure orders

15.179 Under s 151(4) of the *Mental Health Act*, the MHRT may make the following types of orders:

- An order prohibiting or restricting the publication or broadcasting of any report of proceedings before the MHRT. We classify this as a discretion to make a non-publication order (chapter 3).
- An order prohibiting or restricting the publication of evidence given before the MHRT, whether in public or in private, or of matters contained in documents lodged with the Tribunal or received in evidence. We classify this as a discretion to make a non-publication order (chapter 3).
- An order prohibiting or restricting the disclosure to some or all of the parties to the proceedings of evidence given before the MHRT, or of the contents of a document lodged with the Tribunal or received in evidence, in relation to the proceedings. We classify this as a discretion to make a non-disclosure order (chapter 3).

15.180 The MHRT may make such orders, on its own motion or on application, if satisfied that it is desirable to do so for the welfare of a person who has a matter before it or for any other reason.[144]

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142. NSW, Mental Health Review Tribunal, *Submission CI33*, 2.
143. See, eg, *Mr Turner* [2019] NSWMHRT 4 [29].
144. *Mental Health Act 2007* (NSW) s 151(4).

Duration of orders

Recommendation 15.9: Duration of non-publication and non-disclosure orders made under s 151(4) of the *Mental Health Act*

Section 151(4) of the *Mental Health Act 2007* (NSW) should provide:

(1) A non-publication or non-disclosure order must specify the period for which the order operates.

(2) The Tribunal, in deciding the period for which an order is to operate, must ensure that the order operates for no longer than is reasonably necessary to achieve the purpose for which the order is made.

(3) The period for which an order operates is to be determined by reference to:

(a) a fixed or ascertainable period, or

(b) the occurrence of a specified future event.

(4) An order may be specified to operate indefinitely in exceptional circumstances or where it is not reasonably practicable to specify a duration.

15.181 Recommendation 15.9 is for the same duration provision to be included in legislation relating to the MHRT as for NCAT (recommendation 15.4), the new Act,[145] and some discretions to make non-publication or non-disclosure orders (chapters 8, 11–12).

15.182 Our draft proposal was that s 151 of the *Mental Health Act* should require orders to specify their duration and prohibit orders from operating indefinitely.[146] The MHRT said that most orders are likely to be made indefinitely, or for lengthy periods.[147]

15.183 Recommendation 15.9 includes a requirement to specify a duration for orders in most cases, although indefinite orders may still be made in exceptional circumstances or where it is not practicable to specify a duration. This is intended to provide greater certainty and prevent orders from operating for longer than necessary.

Procedures, reviews and appeals

Recommendation 15.10: Pathways for reviews, appeals and procedural rules in the *Mental Health Act*

The *Mental Health Act 2007* (NSW) should:

(a) provide pathways for reviews and appeals of non-publication and non-disclosure orders made under s 151(4) of the Act and decisions about whether to lift the statutory prohibition on publication in s 162 of the Act, and

(b) enable the Mental Health Review Tribunal to make procedural rules for applications, reviews and appeals.

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145. Recommendation 6.9.

146. NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Draft Proposals (2021) proposal 6.9.

147. NSW, Mental Health Review Tribunal, *Submission CI47*, 2.

15.184 Unlike the *NCAT Act*, the *Mental Health Act* does not provide any avenue for review or appeal of non-publication or non-disclosure orders and decisions about whether to lift the statutory prohibition on publication.

15.185 Section 151(1) of the *Mental Health Act* directs that proceedings in the MHRT should take place with as "little formality and technicality, and with as much expedition" as the Act allows. However, under recommendation 15.10(a), providing people with the opportunity to apply for review and appeal of non-publication and non-disclosure orders, and decisions to lift the statutory prohibition, would be an important transparency and accountability measure.

15.186 Recommendation 15.10(b) is that the MHRT should be able to make procedural rules in relation to applications for, and reviews and appeals of, non-publication and non-disclosure orders as well as for lifting the statutory prohibition. This is intended to provide greater clarity for people involved in tribunal proceedings or who are the subject of orders. It may, for example, help them to understand the mechanisms available to seek a review.

15.187 We do not make any specific recommendations about the procedures that should be applied. Some guidance may be gained from our approach to procedures in the new Act (chapter 7), although the MHRT may require more flexibility in its own approach.

Dealing with breaches

Recommendation 15.11: Offence and contempt provisions in the *Mental Health Act*

Section 151 and s 161 of the *Mental Health Act 2007* (NSW) should provide:

(1) A person commits an offence if the person:

(a) contravenes the statutory prohibition in s 162 of the Act, or

(b) contravenes an order made under s 151(4) of the Act and knows of, or is reckless as to, the existence of an order.

(2) The maximum penalty for the offence of breaching an order made under s 151(4) of the Act is the same as in s 162 of the Act for breach of the statutory prohibition.

(3) If a corporation commits the offence of breaching the statutory prohibition in s 162 of the Act or an order made under s 151 of the Act, each person who is a director of the corporation or who is concerned in the management of the corporation is taken to have committed the same offence, unless the person satisfies the Tribunal that:

(a) the person was not in a position to influence the conduct of the corporation in relation to its contravention, or

(b) the person, if in such a position, used all due diligence to prevent the contravention.

(4) Proceedings for an offence of breaching the statutory prohibition on publication in s 162 of the Act or an order made under s 151 of the Act must be commenced within two years of the date of the alleged offence.

15.188 Breach of a non-publication or non-disclosure order made under s 151(4) of the *Mental Health Act* is an offence of "Contempt of Tribunal", outlined in s 161 of the Act. It attracts a maximum penalty of 50 penalty units ($5,500).

15.189 There is a separate offence for breach of the statutory prohibition in s 162 of the Act, which attracts a penalty of 50 penalty units ($5,500) and/or or imprisonment for 12 months for an individual, or 100 penalty units ($11,000) for a corporation.

15.190 Consistent with our recommendation in relation to courts in chapter 13, and NCAT (recommendation 15.5), recommendation 15.11 is that:

- The offence for contravention of the statutory prohibition on publication in s 162 of the *Mental Health Act* should be one of strict liability.
- The offence for contravention of an order made under s 151(4) of the Act should provide that a person commits an offence if the person knows of or is reckless as to the existence of an order.
- Both the offence of breaching an order made under s 151(4) and the offence of breaching the statutory prohibition in s 162 should provide for personal liability of company directors.
- There should be a two-year time limit for prosecutions of these offences to commence. This is intended to allow sufficient time for evidence to be collected to support enforcement.

15.191 Recommendation 15.11(2) is that the penalty for both types of offences should be consistent. The current penalty for breach of an order is significantly out of step with the penalty for breach of the statutory prohibition.

Publication of tribunal decisions

Decisions of NCAT

15.192 Some submissions supported increased availability of decisions by NCAT.[148] NCAT's approach to publication varies across its divisions "because of the diversity of the jurisdictions exercised by the Divisions".[149] For example:

- 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.
- The Consumer and Commercial Division and Guardianship Division publish a selection of reasons, determined by the Heads of these Divisions in line with the criteria set out in NCAT's policy:

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148. Tenants' Union of NSW, *Submission CI11*, 2; Australia's Right to Know, *Submission CI27*, 62–63; L Steele, *Submission CI37*, 1–2.

149. NSW Civil and Administrative Tribunal, *NCAT Policy 2: Publishing Reasons for Decisions* (2019) [12].

- whether the reasons establish or consider principles that could be applied or used in other proceedings, and
- whether the reasons or proceedings raise issues of public interest or importance.[150]

The Guardianship Division also publishes significant decisions concerning particular aspects of the division's jurisdiction and decisions that represent the majority of applications before the division. This approach assists people appearing before the division and explains the workings of the division to the public.[151]

15.193 The Tenants' Union of NSW suggested a presumption in favour of publishing reasons for decisions in all residential tenancy matters in the Consumer and Commercial Division and Appeal Panel. Alternatively, it supported a requirement for the Consumer and Commercial Division to publish a minimum percentage of decisions each year.[152]

15.194 Another submission suggested that decisions in the Guardianship Division, as well as in the Protective List of the Supreme Court, should be "publicly accessible on an equal basis to other jurisdictions", because this:

> is central to gaining a comprehensive understanding of the justice system's role in restrictive practices, in order to more fully address the systemic issue of violence against people with disability and ensure equality in the justice system for people with disability.[153]

15.195 There should not be changes to the current practices of the Consumer and Commercial Division and Guardianship Division. Consultations indicated that published reasons for decisions in these divisions appropriately function like guideline judgments on important or unique issues.[154]

15.196 In addition, any reasons for decisions in the Guardianship Division must be published in an anonymised or de-identified form, as legislation prohibits publication of the identity of people involved in guardianship proceedings.[155] Consultations indicated that this is a difficult and time-consuming process.[156]

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150. NSW Civil and Administrative Tribunal, *NCAT Policy 2: Publishing Reasons for Decisions* (2019) [13], [19]–[20], [24], [26], [29].
151. NSW Civil and Administrative Tribunal, *NCAT Policy 2: Publishing Reasons for Decisions* (2019) [23].
152. Tenants' Union of NSW, *Submission CI11*, 5–6.
153. L Steele, *Submission CI18*, 1.
154. NSW Civil and Administrative Tribunal, *Consultation CIC15.*
155. NSW Civil and Administrative Tribunal, *NCAT Policy 2: Publishing Reasons for Decisions* (2019) [23]; *Civil and Administrative Tribunal Act 2013* (NSW) s 65.
156. NSW Civil and Administrative Tribunal, *Consultation CIC15.*

15.197 A presumption in favour of publishing reasons for decisions, or a requirement to publish a minimum percentage of decisions, would be arbitrary and impractical given the large number of matters heard by NCAT.

Decisions of the MHRT

15.198 We do not recommend changes to the approach taken by the MHRT to publishing decisions. The President of the 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.[157]

15.199 Like decisions in the Guardianship Division of NCAT, MHRT decisions must be published in a de-identified form, as legislation prohibits publication of the identity of people involved in MHRT proceedings. This is a time-consuming process.[158] Accordingly, it is appropriate for the President to decide what decisions should be published.

157. NSW, Mental Health Review Tribunal, *Practice Direction: Publication of Official Reports of the Tribunal's Proceedings*, 19 June 2013 [1]–[2].

158. NSW, Mental Health Review Tribunal, *Submission CI06*, 2.

16. Education about open justice and implementation of reforms

In Brief

Education about the laws relating to open justice is needed to improve awareness and understanding of these laws and ensure that any reforms arising from this report can achieve their full impact. The new Act should include a statutory review mechanism so that the impact of the new Act in practice, and any potential issues, can be identified. Appropriate resourcing is also needed to ensure our recommendations are implemented effectively.

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16.1 The laws relating to open justice are numerous and complex, and we make many recommendations for reform to these laws. In this chapter, we outline the need for education about existing laws relating to open justice and any reforms arising from this report.

16.2 Our recommended reforms include a new Act that contains a legislative framework governing access to records on the court file, general powers to make non-publication, non-disclosure, exclusion and closed court orders, and a register of those orders. In this chapter, we consider how to facilitate the successful impact of these reforms through education and implementation.

Education about laws relating to open justice

16.3 This review has highlighted the complexity of the laws relating to open justice. There are many different statutes that relate to non-publication and non-disclosure of information with respect to court proceedings, excluding people from the courtroom and closing the

court. Some submissions said that navigating the various statutes is complex,[1] and the way they interact has the potential to confuse the courts, parties, the media and members of the public.[2]

16.4 Submissions and consultations indicated a lack of awareness and understanding of the laws.[3] To address this, education about the existing laws and any reforms that are implemented from this report should be provided for judicial officers, court staff, lawyers, other court participants (such as parties, victims and witnesses), the media and the community generally.

For the courts

Recommendation 16.1: Education for the courts about laws relating to open justice

(1) The Judicial Commission should provide education for judicial officers about laws relating to open justice, including any reforms resulting from this report.

(2) The Department of Communities and Justice should provide education and guidance to court staff about laws relating to open justice, including any reforms resulting from this report.

For judicial officers

16.5 Submissions and consultations suggested that the laws relating to open justice are sometimes misunderstood or misapplied by judicial officers.[4] To address this, recommendation 16.1 is for the Judicial Commission to provide education and training about these laws for judicial officers.

16.6 The Judicial Commission is an independent statutory corporation established under the *Judicial Officers Act 1986* (NSW). One of its functions is to provide continuing education and training for judicial officers.[5]

16.7 Some stakeholders said that non-publication or non-disclosure orders are sometimes made where a statutory prohibition already applies.[6] Similarly, in Victoria, a review of the *Open Courts Act 2013* (Vic) (*Open Courts Act*) looked at 1,279 orders made under the Act and found that around 20%:

> were made on the basis of preventing undue distress or embarrassment to complainants or child witnesses. Information generally relating to victims

1. Legal Aid NSW, *Preliminary Submission PCI39*, 9; Banki Haddock Fiora, *Submission CI29*, 9.
2. Local Court of NSW, *Preliminary Submission PCI40*, 1.
3. See, eg, Children's Court of NSW, *Preliminary Consultation PCIC08*; Australia's Right to Know, *Submission CI27*, 57; Children's Court of NSW, *Submission CI28*, 10–11.
4. Banki Haddock Fiora, *Preliminary Submission PCI27*, 4; Australia's Right to Know, *Submission CI27*, 57; Roundtable 1, *Consultation CIC02*; Roundtable 2, *Consultation CIC03*.
5. *Judicial Officers Act 1986* (NSW) s 9(1).
6. Australia's Right to Know, *Submission CI27*, 57.

> amounted to 15% of all categories of suppressed information. It is likely that some of these orders overlapped with existing statutory restrictions … to some extent.[7]

16.8 Judicial officers may benefit from additional education about the statutory prohibitions on publishing or disclosing certain information contained in subject-specific legislation.

16.9 Information about statutory prohibitions in the subject-specific legislation should be included in the Judicial Commission *Criminal Trials Bench Book* and *Civil Trials Court Bench Book.* Both list some examples of statutory prohibitions, but do not provide a comprehensive overview.[8] The *Criminal Trial Courts Bench Book* also observes that there are:

> mandatory provisions that may obviate the need to make suppression or non-publication orders in particular proceedings or in relation to particular persons (eg children and complainants in prescribed sexual assault proceedings) or witnesses.[9]

16.10 Additional guidance about statutory prohibitions may help to avoid non-publication or non-disclosure orders being made where prohibitions already apply.[10]

16.11 For example, the United Kingdom (UK) Judicial College has published a guide on reporting restrictions in the criminal courts, which contains a section explaining various "automatic reporting restrictions". It also includes a "[r]eady reference guide to automatic reporting restrictions", which directs judicial officers to the statutory prohibitions that apply in different proceedings.[11]

16.12 In addition, we recommend reforms to existing mechanisms for lifting statutory prohibitions and to introduce new mechanisms in some cases (chapters 8–12). Education for judicial officers about these lifting mechanisms (particularly mechanisms for lifting a prohibition with leave of the court) may be beneficial.

16.13 Education for the courts could address the differences between non-publication and non-disclosure orders. Australia's Right to Know observed that:

> the two types of order are often conflated when, in fact, they have differing effects. It is not uncommon for court staff and even the occasional lawyer to inform a journalist that a "suppression order" has been made when, once the

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7 F Vincent, *Open Courts Act Review* (2017) [436].

8. Judicial Commission of NSW, *Criminal Trial Courts Bench Book* [1-359] (retrieved 7 March 2022); Judicial Commission of NSW, *Civil Trials Bench Book* [1-0440] (retrieved 7 March 2022).

9. Judicial Commission of NSW, *Criminal Trial Courts Bench Book* [1-359] (retrieved 7 March 2022).

10. Supreme Court of NSW, *Consultation CIC14.*

11. United Kingdom, Judicial College, *Reporting Restrictions in the Criminal Courts* (2016) 11–17, 37.

terms of the order are ascertained, it is quite plain that the order is a non-publication order.[12]

16.14 The new terminology using "non-disclosure" in place of "suppression" should help to mitigate this (chapter 3).

16.15 The courts may also benefit from further assistance in framing clear and effective non-publication and non-disclosure orders. The *Court Suppression and Non-publication Orders Act 2010* (NSW) (*CSNPO Act*) requires orders to specify the information to which they apply and the grounds on which they are made,[13] and these requirements would also be included in the new Act (chapter 6).

16.16 The *Criminal Trial Courts Bench Book* includes a "[c]hecklist for suppression orders", which sets out the *CSNPO Act* requirements.[14] However, consultations suggested that orders are sometimes unclear, and courts do not always specify the ground or grounds for the order, as required by the *CSNPO Act*.[15]

16.17 Like the *CSNPO Act,* the Victorian *Open Courts Act* also requires orders to specify the information to which they apply and the grounds on which they are made.[16] However, the 2017 *Open Courts Act* review found that, of 1,279 orders made under the *Open Courts Act*:

- 306 orders (24%) did not adequately specify the information subject to suppression
- 274 orders (22%) were "blanket bans", meaning that the orders did not identify the subject matter to be suppressed at all or stated that "the whole or any part of the proceeding" was suppressed, and
- 148 orders (12%) did not specify a ground upon which they were made.[17]

16.18 In 2020, the Judicial College of Victoria *Open Courts Bench Book* was updated to include model suppression, pseudonym and closed court orders.[18] A similar approach could be adopted in NSW.

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12. Australia's Right to Know, *Submission CI27*, 48.
13. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 8(2), s 9(5).
14. Judicial Commission of NSW, *Criminal Trial Courts Bench Book*, "Checklist for Suppression Orders" [1-359] (retrieved 7 March 2022).
15. Roundtable 1, *Consultation CIC02*; Roundtable 2, *Consultation CIC03*.
16. *Open Courts Act 2013* (Vic) s 13.
17. F Vincent, *Open Courts Act Review* (2017) [456]–[457].
18. Judicial College of Victoria, *Open Courts Bench Book*, "11 Model orders and undertakings" (last updated 14 February 2020) <www.judicialcollege.vic.edu.au/eManuals/OCBB/index.htm#67772.htm>.

16.19 Judicial officers may also benefit from further assistance around drafting orders in accessible language. This may help to ensure a broad range of people who are impacted by orders can understand the terms of the order.[19]

16.20 Education of judicial officers should extend beyond the existing laws relating to open justice to any new legislation that is enacted as a result of this report. The new Act is different from the *CSNPO Act* in several respects, including:

- new grounds for making non-publication and non-disclosure orders
- new powers and grounds for making exclusion and closed court orders, and
- a new requirement to give reasons for decisions made under the Act on request of certain people (chapters 6–7).

16.21 In particular, judges and magistrates should be educated about the distinction between exclusion and closed court orders. As we discuss in chapter 3, there is at present some uncertainty about whether closing the court also has the effect of prohibiting disclosure (including by publication) of information in the closed proceedings, which has resulted in some inconsistencies. Education about the distinction between exclusion and closed court orders may help to ensure that any exception to open justice is to the minimal extent necessary.

16.22 Judicial officers and registrars may also benefit from education about the access framework, including the considerations that courts must take into account in deciding whether to grant leave to an applicant to access certain records (chapter 5).

For court staff

16.23 The Department of Communities and Justice should provide education for court staff about laws relating to open justice, to ensure they are aware of and understand them.

16.24 For example, in the UK, Her Majesty's Courts and Tribunal Service (HMCTS) provides guidance to staff about matters including:

- reporting restrictions, and
- what to do if something is published that may constitute contempt of court.[20]

16.25 The guidance also clarifies that the media, and not HMCTS, carries the legal obligation to comply with reporting restrictions.[21] Similar guidance could provide greater clarity to court staff about their obligations.

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19. knowmore, *Submission CI43*, 6–7.
20. United Kingdom, Her Majesty's Courts and Tribunal Service, *General Guidance to Staff on Supporting Media Access to Courts and Tribunals* (2021) 5.

16.26 Further, as court staff would be responsible for processing access applications, there should be education and guidance for court staff about the new Act, in particular about the elements and operation of the access framework, including:

- the types of records that are accessible to certain applicants as of right and those that require leave for access
- the circumstances in which there is no access to court records, and
- the methods by which access can be provided (chapter 5).

For lawyers

Recommendation 16.2: Education for lawyers about laws relating to open justice

The Bar Association and the Law Society should provide education to the legal profession about laws relating to open justice, including any reforms resulting from this report.

16.27 The Law Society submitted that the different provisions relating to open justice across different courts and statutes, cause confusion and difficulties for practitioners.[22] Recommendation 16.2 is for additional education for lawyers, which may help to address this.

For other court participants

Recommendation 16.3: Education for other court participants about laws relating to open justice

(1) The Department of Communities and Justice and the Office of the Director of Public Prosecutions should provide education and guidance for court participants about existing laws relating to open justice and any reforms resulting from this report, including about the process of applying for orders and access to records on the court file for a proceeding.

(2) The following people and agencies should provide information and support to people whose identities are protected by a statutory prohibition on publication or disclosure or a non-publication or non-disclosure order, including information about the effect of these prohibitions and orders and how to report a suspected breach:

(a) in criminal proceedings: the prosecutor and the defence legal representative, and

(b) in care and protection proceedings in the Children's Court: the Department of Communities and Justice.

16.28 Court participants, including victims, witnesses and self-represented litigants, should be provided with information about the laws relating to open justice and any reforms resulting from this report.

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21. United Kingdom, Her Majesty's Courts and Tribunal Service, *General Guidance to Staff on Supporting Media Access to Courts and Tribunals* (2021) 3.

22. Law Society of NSW, *Preliminary Submission PCI31*, 3.

16.29 There is a range of protections for the benefit of victims and witnesses, including statutory prohibitions on publishing the identity of a sexual offence complainant and a person who was a child when they were involved in criminal proceedings. Many of our recommendations seek to extend or enhance protections for victims and witnesses or introduce new protections.

16.30 The existing and recommended protections are intended to assist the administration of justice by encouraging victims and witnesses to participate in the court process and help them give their best evidence. However, this can only occur if victims and witnesses are aware of them.

16.31 Some submissions suggested a lack of awareness by victims and witnesses about the available protections. For example, Legal Aid submitted that many domestic and family violence victims are unaware that they can apply for a suppression or non-publication order under the *CSNPO Act*.[23]

16.32 The Office of the Director of Public Prosecutions (ODPP) submitted that as statutory prohibitions apply automatically, the effect or purpose of a prohibition is often not explained in court proceedings. This means parties, supporters and witnesses may not understand the scope of the prohibition or the reasons for it.[24]

16.33 This may also be the case with requirements to make non-publication and non-disclosure orders. As legislation requires the court to make the order, witnesses may not understand why the order has been made if this is not explained in the proceedings.

16.34 Some resources for victims and witnesses already exist. For example, Victims Services produced *A Guide to the Media for Victims of Crime*, which includes a section about restrictions on what journalists can report. The section explains the statutory prohibitions on publishing the identity of a sexual offence complainant or a child involved in criminal proceedings and the fact that judges can make non-publication orders.[25]

16.35 The ODPP Witness Assistance Service provides support and information to vulnerable witnesses, such as children and young people under 18 and victims of sexual assault and serious domestic and family violence. The information provided includes the special court arrangements available to vulnerable witnesses, such as giving evidence via

23. Legal Aid NSW, *Submission CI24*, 12.

24. NSW Office of the Director of Public Prosecutions, *Submission CI17*, 6.

25. NSW, Department of Communities and Justice, Victims Services, *A Guide to the Media for Victims of Crime* (2020) 19–20.

closed-circuit television.[26] It does not explain relevant exceptions to open justice and how they operate.

16.36 Victims Services and the ODPP should provide additional information for victims and witnesses about available protections. This information could explain the process for applying for, and appearing and being heard on, applications for and reviews of non-publication, non-disclosure, exclusion and closed court orders under the new Act (chapter 7).

16.37 Victims, witnesses and their families may also benefit from further information about mechanisms to lift statutory prohibitions. For example, s 15C of the *Children (Criminal Proceedings) Act 1987* (NSW) allows the court, at sentencing, to order that the name of a person who was under 18 at the time of committing a "serious children's indictable offence" be published (in other words, lifting the prohibition on publishing the person's identity under s 15A) (chapter 9). Education for victims, witnesses and their families about mechanisms for lifting statutory prohibitions will enable them to employ these mechanisms.

16.38 Victims Services and the ODPP should provide additional information about accessing court records that explains how victims and witnesses can apply for access. Victims Services has an information guide for victims of crime, which explains how to access court documents from the Local, District or Supreme Court.[27] Rape and Domestic Violence Services Australia (RDVSA) observed that the information available on the Victims Services website is "difficult to locate" and does not link to the relevant policies in different courts.[28]

16.39 In addition, participants in court proceedings whose identities are protected by non-publication and non-disclosure orders or statutory prohibitions on publication or disclosure should be provided with information and support about how to report an alleged breach of a prohibition or order. The recent Victorian Law Reform Commission (VLRC) review of contempt made a similar recommendation.[29]
Recommendation 16.3(2) is that this information should be provided, where relevant, by:

- the prosecutor and defence legal representative in criminal proceedings, and
- the Department of Communities and Justice in care and protection proceedings in the Children's Court.

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26. NSW Office of the Director of Public Prosecutions, "Support Services for Victims and Witnesses" (2021) <www.odpp.nsw.gov.au/victims-witnesses/support-services-victims-and-witnesses> (retrieved 25 May 2022).
27. NSW, Department of Communities and Justice, Victims Services, *Access to Court Documents: Information for Victims of Crime* (2019).
28. Rape and Domestic Violence Services Australia, *Submission CI08* [25].
29. Victorian Law Reform Commission, *Contempt of Court*, Report (2020) rec 130 [16.66]–[16.67].

16.40 There could also be additional guidance for self-represented litigants about applying for non-publication or non-disclosure orders. Justice Action supported a "guidebook" for self-represented litigants, which sets out the steps for applying for non-publication or non-disclosure orders in simple language.[30]

For the media

Recommendation 16.4: Education for the media about laws relating to open justice

The Department of Communities and Justice should provide education and guidance to the media about laws relating to open justice, including any reforms resulting from this report.

16.41 Recommendation 16.4 is that the Department of Communities and Justice should provide additional education and guidance for the media about the laws relating to open justice. Some resources already exist, including on the courts' websites. For example, the Supreme Court website explains that:

- court proceedings and documents may be restricted from publication in various ways
- publishing restricted information can have serious consequences for the administration of justice (for example, it can lead to criminal trials being prejudiced and even aborted), and
- the Court's Media Manager advises journalists and media lawyers when non-publication and suppression orders are made, varied or revoked.[31]

16.42 The Supreme Court *Media Guidelines* also explain that a judge may make a non-publication or suppression order under the *CSNPO Act* and that the Court's Media Manager circulates these orders to an opt-in email list of journalists and media lawyers.[32]

16.43 The media may need additional information about the statutory prohibitions on publishing or disclosing information. Submissions and consultations indicated mixed views about the media's level of awareness and understanding of these prohibitions. For example, Banki Haddock Fiora submitted:

> Given that there might be hundreds of media reports of criminal proceedings each week, in a fast moving and high pressure environment, the rarity of prosecutions for deliberate or inadvertent contraventions of the statutory

30. Justice Action, *Submission CI15,* 7.
31. Supreme Court of NSW, "Media Resources" (16 February 2022) <www.supremecourt.justice.nsw.gov.au/Pages/sco2_newscarousel/media_resources.html,c=y.aspx#media7> (retrieved 25 May 2022).
32. Supreme Court of NSW, *Media Guidelines: Reporting Criminal Proceedings in the Supreme Court of New South Wales* (2016) 3.

publication restrictions is a testament to the diligence of the media in seeking to comply with those restrictions.[33]

16.44 Others raised concerns about the media's understanding of and compliance with statutory prohibitions. Consultations indicated that the media often publish information that may identify a child involved in criminal proceedings, such as the child's school.[34] This may lead to "jigsaw identification", where children and young people have been identified by piecing together the information that has been published in different sources.[35] The Children's Court submitted there is sometimes a failure to appreciate that the statutory prohibition does not only apply to criminal proceedings involving children which are heard by the Children's Court,[36] but applies to all criminal matters involving children and young people in all courts.

16.45 The Department of Communities and Justice could provide a guide for journalists about the laws relating to open justice. For example, in New Zealand, the Ministry of Justice has produced a *Media Guide* for reporting on the courts and tribunals, which contains a section on statutory prohibitions and suppression orders.[37] Among other things, the guide says that if there is an order or prohibition in relation to a person's name, "the law says you may not publish, show or repeat that person's name or any particulars likely to lead to the person's identification".[38] An appendix to the guide explains various statutory prohibitions on publishing certain information.[39]

16.46 The County Court of Victoria has produced a question and answer guide for journalists, which explains that a person does not need to be named to be identified, as details of the circumstances can also lead to identification.[40]

16.47 The media may also require education about the reforms we recommend, which relate specifically to journalists. For example, we recommend that journalists should be entitled to:

- access certain records on the court file (chapter 5), and

33. Banki Haddock Fiora, *Submission CI29*, 12.
34. Children's Court of NSW, *Preliminary Consultation PCIC08.*
35. Children's Court of NSW, *Preliminary Consultation PCIC08*; Children's Court of NSW, *Submission CI28*, 11.
36. Children's Court of NSW, *Submission CI28*, 10.
37. New Zealand, Ministry of Justice, *Media Guide for Reporting the Courts and Tribunals* (4.1 ed, 2019) [4.10].
38. New Zealand, Ministry of Justice, *Media Guide for Reporting the Courts and Tribunals* (4.1 ed, 2019) [4.10].
39. New Zealand, Ministry of Justice, *Media Guide for Reporting the Courts and Tribunals* (4.1 ed, 2019) appendix G.
40. County Court of Victoria, *Covering the Courts: A Q and A Guide for Journalists* (2018) 6.

- be present in certain proceedings from which the public have been excluded (chapters 6 and 8–12).

16.48 Awareness of these entitlements would enable the media to exercise them effectively.

For the community

Recommendation 16.5: Education for the community about laws relating to open justice

The Department of Communities and Justice should provide information to the community about laws relating to open justice, including any reforms resulting from this report.

16.49 Recommendation 16.5 is that the community is provided with information about the laws relating to open justice and any reforms resulting from this report. Improved community awareness and understanding of non-publication and non-disclosure orders, and statutory prohibitions on publishing or disclosing information, may help avoid breaches.[41]

16.50 Information for the public could explain what these restrictions are and provide examples of activities that could breach the restrictions. For example, the UK Government has established a website that gives the public a simple and concise summary of contempt law, with examples of actions that could constitute contempt.[42] The ODPP supported this approach.[43]

16.51 There should also be more community education about the reasons for restrictions on publication and disclosure of information. Legal Aid observed that the principles and policies underpinning the law are not well understood by the community.[44] If the public understand the reasons why information may be restricted, this may improve the likelihood of compliance with the restrictions. The VLRC reached a similar conclusion in its report on contempt.[45]

16.52 The Law Society supported education initiatives designed to improve public understanding about open justice principles and some of the broad categories of exceptions. It suggested that such education could be in the form of a manual, guidance notes or website.[46]

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41. See, eg, University of Sydney, Law Reform Research Project, *Preliminary Submission PCI44*, 7; NSW, Public Defenders, *Preliminary Submission PCI33*, 13.
42. United Kingdom Government, "Contempt of Court" <www.gov.uk/contempt-of-court> (retrieved 25 May 2022).
43. NSW Office of the Director of Public Prosecutions, *Submission CI17*, 32.
44. Legal Aid NSW, *Submission PCI39*, 7.
45. Victorian Law Reform Commission, *Contempt of Court*, Report (2020) [16.43]–[16.47] rec 129.
46. Law Society of NSW, *Submission CI19*, 2.

Implementing the reforms

The need for statutory review

Recommendation 16.6: Statutory review of the new Act

The new Act should provide:

(1) The Minister is to review this Act to determine whether:

(a) the policy objectives of the Act remain valid, and

(b) the terms of the Act remain appropriate for achieving the objectives.

(2) The review is to be undertaken as soon as practicable after the period of five years from commencement of the new Act.

(3) A report on the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of five years.

16.53 Recommendation 16.6 is for the new Act to include a statutory review mechanism, as it represents a substantial change to the law.

16.54 RDVSA supported a legislative mechanism for ongoing monitoring and evaluation of any changes to the law or legal processes.[47] The Aboriginal Legal Service submitted that reviewing the efficacy of the new powers in the new Act:

> is important to ensure that there are not unintended consequences such as preferring certain orders which do not ensure for the proper administration of justice.[48]

16.55 Under recommendation 16.6(1) the Minister would be required to determine whether the policy objectives of the new Act remain valid and whether the terms of the Act remain appropriate for achieving the objectives. This is a common way to describe the terms of reference of a statutory review.[49]

16.56 In chapter 4, we recommend that the new Act should specify its objects. A review of the new Act should consider whether these objects remain valid and whether they have been realised.

16.57 A statutory review of the new Act would also provide an opportunity to:

- consider its practical impact and operation
- identify elements that work well

47. Rape and Domestic Violence Services Australia, *Submission CI08* [35].
48. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission CI49*, 2.
49. See, eg, *Advocate for Children and Young People Act 2014* (NSW) s 43(1); *Ageing and Disability Commissioner Act 2019* (NSW) s 36(1); *Children's Guardian Act 2019* (NSW) s 183(1); *Disability Inclusion Act 2014* (NSW) s 51(1).

- identify any unintended consequences or aspects that could be improved, and
- make recommendations for any necessary changes.

16.58 As we outline in chapter 4, the new Act would allow the rules committee of a court to make rules that supplement the Act. This is intended to give courts the flexibility to make rules where this is necessary to take account of contextual and procedural factors.

16.59 The Local Court observed that given the differing operating environments, and the discretion vested in heads of jurisdiction, there may not be complete uniformity between the courts.[50] The statutory review could consider how rules made under the Act's rule-making power interact with the Act's objects and make recommendations to heads of jurisdiction if necessary.

16.60 Recommendation 16.6(2) is for the statutory review to be undertaken as soon as practicable after the period of five years from commencement of the new Act. This should allow enough time to assess how the Act is working in practice and whether any issues have emerged. Statutory review provisions in NSW generally include a five-year timeframe.[51]

16.61 Our recommendation for an online register of orders[52] should be implemented at the same time as any legislative reform. A five-year timeframe should provide sufficient time for the data and information contained in such a register to inform the statutory review.

16.62 Recommendation 16.6(3) is for the statutory review report to be tabled in each House of Parliament within 12 months after the end of the period of five years. This is similar to existing statutory review provisions.[53]

The need for appropriate resourcing

Recommendation 16.7: Appropriate resourcing

The Government should provide appropriate resourcing, including to the courts, to enable the implementation of any reforms resulting from this report.

16.63 The full and effective implementation of the reforms we recommend in this report will require appropriate resourcing, including to the courts. Submissions identified a number of recommendations that will likely have resource implications.

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50. Local Court of NSW, *Submission CI58*, 9–10.
51. See, eg, *Abortion Law Reform Act 2019* (NSW) s 17(1); *Advocate for Children and Young People Act 2014* (NSW) s 43(2).
52. Recommendation 13.8.
53. See, eg, *Advocate for Children and Young People Act 2014* (NSW) s 43(3); *Children's Guardian Act 2019* (NSW) s 183(3).

16.64 For example, we recommend that the new Act contain a legislative framework governing access to records on the court file (chapters 4–5). In determining whether to grant leave to an applicant to access a court record, which contains personal identification information, we recommend that the court be required to consider whether it would be reasonably practicable to give the applicant access to a copy of the record from which such information has been deleted or removed.[54]

16.65 Courts, Tribunals and Service Delivery (CTSD) submitted that redaction of court records can only occur if courts are adequately resourced, have suitability trained staff and appropriate technology.[55] While we also recommend that regulations should be able to prescribe fees for redaction, where this is ordered by the court, CTSD, the Supreme Court, and the Local Court all questioned whether charging a fee would cover the entire cost and effort involved.[56] The Supreme Court observed:

> What would be needed is a significant increase of the Court's resources to enable it to be done. At a very minimum the Court would require a further Media Manager employed fulltime, a lawyer to supervise the process and one clerical assistant.[57]

16.66 As another example, we recommend establishing an online register of non-publication, non-disclosure and closed court orders.[58] The Supreme Court submitted that this "would require significant staff and other resources to develop and maintain" and "significant funding would be needed".[59] CTSD observed that separate funding would be required to develop an electronic system to transfer information held in JusticeLink to a register that could be accessed by, or automatically update, other systems.[60]

16.67 Some of our recommendations may, however, offer potential cost savings. During implementation, the Government should conduct analysis to determine what efficiencies and costs savings may be gained from our recommendations, including those relating to:

- standardised approaches in legislation containing exceptions to open justice (chapters 3–4 and 6–12), and
- a single framework for accessing records on the court file (chapters 4–5).

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54. Recommendation 5.5(1)(i).
55. Courts, Tribunals and Service Delivery, NSW Department of Communities and Justice, *Submission CI53,* 6.
56. Courts, Tribunals and Service Delivery, NSW Department of Communities and Justice, *Submission CI53*, 6; Supreme Court of NSW, *Submission CI55* [25]; Local Court of NSW, *Submission CI58*, 11.
57. Supreme Court of NSW, *Submission CI55* [25].
58. Recommendation 13.8.
59. Supreme Court of NSW, *Submission CI55*, 4.
60. Courts, Tribunals and Service Delivery, NSW Department of Communities and Justice, *Submission CI53*, 7.

Appendix A
List of recommendations

3. Classification framework and uniform definitions

Recommendation 3.1: Definitions of "non-publication order", "non-disclosure order", "exclusion order" and "closed court order"

(1) "Non-publication order" should be defined as an order that prohibits or restricts publication of information (but that does not otherwise restrict the disclosure of information).

(2) "Non-disclosure order" should be defined as an order that prohibits or restricts disclosure of information (by publication or otherwise).

(3) "Exclusion order" should be defined as an order:

(a) to exclude a specified person or class of people, or all people other than those whose presence is necessary, from the whole or any part of proceedings, and

(b) that does not, of itself, restrict or prohibit the disclosure (by publication or otherwise) of information.

(4) "Closed court order" should be defined as an order that:

(a) excludes all people, other than those whose presence is necessary, from the whole or any part of proceedings, and

(b) has the effect of prohibiting disclosure (by publication or otherwise) of information from the closed part of proceedings.

Recommendation 3.2: Definitions of "publish" and "disclose"

(1) "Publish" should be defined as 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

(b) broadcast by radio or television

(c) public exhibition, or

(d) broadcast or publication by means of the internet or other form of electronic communication, including through social media, and

(e) any other means specified in regulations.

(2) "Disclose" should be defined as including:

(a) making information available to a person by any means, or

(b) releasing or providing access to information to a person,

by publication or otherwise.

Recommendation 3.3: Definition of "information tending to identify" a person

"Information tending to identify" a person should be defined as information that:

(a) has a real possibility of identifying a person to a member of the public or a member of the section of the public to which the information is provided, and

(b) can include, but is not limited to:

(i) the person's name, title or alias

(ii) the address of premises where the person lives or works, or the premises' locality

(iii) the address or name of the school attended by the person or the school's locality

(iv) any employment or occupation engaged in, profession practised or calling pursued by the person, or any official or honorary position held

(v) the person's relationship to identified relatives or the person's association with identified friends or businesses, or the person's official or professional acquaintances

(vi) the recreational interests or the political, philosophical or religious beliefs or interests of the person

(vii) any real or personal property in which the person has an interest or with which the person is associated, and

(viii) the person's biometric information, such as fingerprints, facial patterns or voice of the person.

Recommendation 3.4: Definition of "contact information"

(1) s 149B, s 247S, s 280 and s 280A of the *Criminal Procedure Act 1986* (NSW) should use the term "contact information" instead of "personal details", "address or telephone number" or "personal information".

(2) "Contact information" should be defined to include:

(a) a private, business or official telephone number

(b) a private, business or official address, and

(c) a private, business or official email address or social media profile.

Recommendation 3.5: Definitions of "journalist", "news media organisation" and "news medium"

(1) "Journalist" should be defined as a person engaged in the profession or occupation of journalism in connection with the publication of information in a news medium.

(2) In deciding whether a person is engaged in the profession or occupation of journalism, it is relevant to consider whether:

(a) the person is employed by a news media organisation

(b) a significant proportion of the person's professional activity involves:

(i) collecting and preparing information having the character of news, or

(ii) commenting or providing observations on news for dissemination in a news medium

(c) the information collected or prepared by the person is regularly published in a news medium

(d) the person's comments or observations on news are regularly published in a news medium, and

(e) in respect of the publication of:

(i) any information collected or prepared by the person, or

(ii) any comment or observation,

the person or the publisher of the information or observation is required to comply (including through a complaints process) with recognised journalistic or media professional standards or codes of practice.

(3) "News media organisation" should be defined as an enterprise or service that engages in the business of broadcasting or publishing news to the public or a section of the public as its principal activity.

(4) "News medium" should be defined as a medium for the dissemination to the public or a section of the public of news and observations on news, including:

(a) a newspaper, magazine, journal or other periodical

(b) a radio or television broadcasting service, and

(c) an electronic service (including a service provided by the internet) that is similar to a newspaper, magazine, radio broadcast or television broadcast.

Recommendation 3.6: Definition of "official report of proceedings"

An "official report of proceedings" should be defined as including:

(a) a report of proceedings intended primarily for use in a law report, or

(b) a report of proceedings approved by the court or tribunal.

Recommendation 3.7: Implementing the uniform definitions

To implement the definitions in recommendations 3.1–3.6 in legislation containing exceptions to open justice, consideration should be given to:

(a) adopting the definitions in full in the new Act, and

(b) cross-referring to these definitions in the new Act in other legislation containing exceptions to open justice.

4. The new Act: Introduction

Recommendation 4.1: NSW should enact a new Act

(1) NSW should enact a new Act that contains:

(a) a legislative framework governing access to records on the court file, and

(b) general powers to make non-publication, non-disclosure, exclusion and closed court orders.

(2) The new Act should replace:

(a) the *Court Information Act 2010* (NSW)

(b) s 314 of the *Criminal Procedure Act 1986* (NSW), and

(c) the *Court Suppression and Non-publication Orders Act 2010* (NSW).

(3) Rules of court should be amended to align with the new legislative frameworks.

Recommendation 4.2: Objects of the new Act

The objects of the new Act should be to:

(a) recognise and promote open justice, subject to necessary exceptions

(b) promote public confidence in and understanding of the courts

(c) provide clarity about the effect and operation of exceptions to open justice

(d) promote transparency of decision-making under the Act, and

(e) promote the efficient and effective operation of the courts.

Recommendation 4.3: Definitions of key terms used across the new Act

(1) The new Act should provide:

(a) "Court" means:

(i) the Supreme Court (including the Court of Appeal and the Court of Criminal Appeal), Land and Environment Court, District Court, Local Court and Children's Court and, for the avoidance of doubt, does not include a court exercising jurisdiction under the *Coroners Act 2009* (NSW) or the Drug Court, and

(ii) any other judicial body that is prescribed in regulations.

(b) "Complainant":

(i) in relation to proceedings for a prescribed sexual offence, has the same meaning as in s 290A(1) of the *Criminal Procedure Act 1986* (NSW), and

(ii) in relation to proceedings for a domestic violence offence, has the same meaning as the term "domestic violence complainant" in s 3(1) of the *Criminal Procedure Act 1986* (NSW).

(c) "Domestic violence offence" has the same meaning as in s 11 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW).

(d) "Prescribed sexual offence" has the same meaning as in s 3(1) of the *Criminal Procedure Act 1986* (NSW).

(e) "Proceeding" includes any civil or criminal proceeding.

(f) "Protected person" has the same meaning as in s 3(1) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW).

(g) "Victim" includes a person against whom an offence is alleged to have been committed.

(h) "Statutory prohibition on publication" means any provision in any other statute or law that prohibits or restricts the publication of information, without the need for an order.

(i) "Statutory prohibition on disclosure" means any provision in any other statute or law that prohibits or restricts the disclosure of information, without the need for an order.

(j) "Statutory exclusion provision" means any provision in any other statute or law that:

(i) provides that a specified person or class of people, or all people other than those whose presence is necessary, are excluded from the whole or any part of proceedings, without the need for an order, and

(ii) does not, of itself, restrict or prohibit the disclosure (by publication or otherwise) of information in that part of proceedings.

(k) "Statutory closed court provision" means any provision in any other statute or law that:

(i) provides that all people, other than those whose presence is necessary, are excluded from the whole or any part of proceedings, without the need for an order, and

(ii) has the effect of prohibiting disclosure (by publication or otherwise) of information from the closed part of proceedings.

(2) The new Act should define:

(a) "non-publication order", "non-disclosure order", "exclusion order" and "closed court order" in the same way as in recommendation 3.1

(b) "publish" and "disclose" in the same way as in recommendation 3.2, and

(c) "journalist", "news media organisation" and "news medium" in the same way as in recommendation 3.5.

Recommendation 4.4: Definitions of key terms in the access framework

(1) The access framework in the new Act should provide:

(a) "Court file" means any hard copy or electronic file maintained by the relevant court for the relevant proceedings and includes any of the following records relating to the proceedings that the court has in its possession or custody:

(i) a record filed or tendered by a party or a record of submissions made by a party

(ii) a record admitted into evidence in connection with the proceedings

(iii) a record of any judgment given and any directions given or orders made in proceedings before the court, and

(iv) a record of the proceedings (including any transcript or recording of the proceedings).

"Court file" does not include:

(i) any notes, working papers or deliberations produced by or for a judicial officer

(ii) a record produced on subpoena that is not admitted in evidence, or

(iii) a record that has been taken off the court file by order.

(b) "Personal identification information" includes:

(i) tax file number

(ii) Centrelink customer reference number

(iii) Medicare number

(iv) financial account numbers

(v) passport number

(vi) driver licence number

(vii) contact information

(viii) date of birth (other than year of birth), and

(ix) particulars of titles of land holdings.

(c) "Record" means any document (or copy of a document) or other source of information compiled, recorded or stored in written form or by electronic process, or in any other manner or by any other means.

(d) "Researcher" means a person who makes a request for access to a record on a court file for the purposes of academic research.

In deciding whether a request is for the purposes of academic research, the court may take into account:

(i) whether the person making the request works within a university or other institution that has research as one of its purposes

(ii) whether a significant proportion of the person's professional activity involves research

(iii) whether the person is required to comply with recognised ethical or other professional standards in the course of their professional activity, and

(iv) such other considerations as the court considers relevant.

(2) The access framework in the new Act should define "contact information" in the same way as in recommendation 3.4(2).

Recommendation 4.5: Definitions of key terms relating to orders

(1) In relation to general powers to make non-publication, non-disclosure, exclusion and closed court orders, the new Act should provide:

(a) "Child" means a person who is under the age of 18 years.

(b) "Cognitive impairment" has the same meaning as in s 5 of the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW).

(c) "Information" includes any document.

(d) "Party" to proceedings includes:

(i) a complainant, victim or protected person

(ii) any person named in evidence given in proceedings, and

(iii) in relation to proceedings that have concluded, a party to proceedings before the proceedings concluded.

(e) "Mental health impairment" has the same meaning as in s 4 of the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW).

(2) The new Act should define "information tending to identify" a person in the same way as in recommendation 3.3.

Recommendation 4.6: Inherent jurisdiction and powers of courts not affected

The new Act should not limit or otherwise affect any inherent jurisdiction or any powers that a court has apart from the Act to regulate its proceedings or deal with a contempt of the court.

Recommendation 4.7: The new Act should not interfere with other access provisions

The access framework in the new Act should provide that it does not prevent or otherwise interfere with the giving of access to a record on the court file as permitted or required by or under any other Act or law.

Recommendation 4.8: Powers to make orders under the new Act can only be exercised by a judicial officer

In relation to general powers to make non-publication, non-disclosure, exclusion and closed court orders, the new Act should provide that only a judicial officer can make such orders, unless otherwise provided by rules of court.

Recommendation 4.9: Other laws containing exceptions to open justice are not affected

In relation to general powers to make non-publication, non-disclosure, exclusion and closed court orders, the new Act should provide that it does not limit or otherwise affect the operation of any:

(a) statutory prohibition on publication or disclosure

(b) statutory exclusion or closed court provision

(c) requirement to make a non-publication, non-disclosure, exclusion or closed court order, or

(d) discretion to make a non-publication, non-disclosure, exclusion or closed court order,

in or under any other Act or law.

Recommendation 4.10: Interaction between the new Act and other laws

In relation to general powers to make non-publication, non-disclosure, exclusion and closed court orders, the new Act should:

(a) provide that, in deciding whether to make an order, a court should consider whether the following applies to the relevant information or circumstance:

  (i) a statutory prohibition on publication or disclosure in another Act or law

  (ii) a statutory exclusion or closed court provision in another Act or law

  (iii) a requirement to make a non-publication, non-disclosure, exclusion or closed court order under another Act or law, or

  (iv) a discretion to make a non-publication, non-disclosure, exclusion or closed court order under another Act or law, and

(b) contain a note providing examples of:

  (i) statutory prohibitions on publication and disclosure

  (ii) statutory exclusion and closed court provisions

  (iii) requirements to make non-publication, non-disclosure, exclusion and closed court orders, and

  (iv) discretions to make a non-publication, non-disclosure, exclusion and closed court orders.

Recommendation 4.11: Power to make regulations that supplement the new Act

The new Act should provide that regulations may be made, not inconsistent with this Act, for or with respect to:

(a) any matter that is required or permitted to be prescribed under the Act, or

(b) that is otherwise necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Recommendation 4.12: Power to make court rules that supplement the new Act

The new Act should provide:

(1) The rules committee of a court may make rules, not inconsistent with this Act, for or with respect to:

  (a) any matter that is required or permitted to be prescribed under the Act, or

  (b) that is otherwise necessary or convenient to be prescribed for carrying out or giving effect to the Act.

(2) In particular, the rules may make provisions for or with respect to the following matters:

  (a) what powers of the court may be exercised by registrars or other officers of the court

  (b) the records on the court file that an applicant is entitled to access, and

  (c) the procedure and practice to be followed in connection with the application and hearing of applications for:

    (i) non-publication, non-disclosure, exclusion and closed court orders

    (ii) reviews of non-publication, non-disclosure, exclusion and closed court orders, and

    (iii) leave and appeals of non-publication, non-disclosure, exclusion and closed court orders,

  including the filing and service of documents and the time limits for doing so.

5. The new Act: Framework for access to records on the court file

Recommendation 5.1: Records available to certain access applicants as of right

The access framework in the new Act should provide:

(1) A party to a proceeding and the party's legal representative is entitled to access any record on the court file for that proceeding.

(2) A journalist or researcher is entitled to access the following records on the court file:

- (a) an originating process, defence or other pleading filed in civil proceedings, but only after the time for filing a defence to the originating process or reply to the defence has expired
- (b) a notice of motion, but not before proceedings on a notice of motion have come before the court
- (c) an indictment, court attendance notice, summons or other document commencing criminal proceedings
- (d) a police fact sheet, statement of facts or any similar document summarising the prosecution case, but only if:
  - (i) the accused person has pleaded guilty to the offence
  - (ii) the prosecution has been withdrawn or dismissed
  - (iii) the trial is to proceed without a jury, or
  - (iv) the accused person has been found guilty or not guilty of the offence following a trial by jury.
- (e) subject to s 89 of the *Bail Act 2013* (NSW), any bail conditions imposed on an accused person
- (f) an affidavit admitted into evidence, but not a document used in conjunction with the affidavit as an annexure or exhibit
- (g) a witness statement admitted into evidence
- (h) a transcript of proceedings in open court
- (i) a record of the judge's summing up, oral directions to a jury, and any orders and judgments, including remarks on sentence, and
- (j) such other records as may be prescribed by rules of court.

(3) A member of the public is entitled to access such records on the court file as may be prescribed by rules of court.

(4) Access to a record on the court file under recommendation 5.1(1)–(3) is subject to recommendations 5.2–5.4.

Recommendation 5.2: Records available to certain access applicants with leave

The access framework in the new Act should provide:

(1) Despite recommendation 5.1(2)–(3), a journalist, researcher or member of the public may access the following records only with leave of the court:

- (a) a record on the court file for:
  - (i) criminal proceedings against a child
  - (ii) proceedings before the Children's Court or on appeal from the Children's Court
  - (iii) proceedings for a domestic violence offence or apprehended violence order

(iv) proceedings for a prescribed sexual offence, and

(b) a record on the court file that contains information subject to a non-publication order or statutory prohibition on publication.

(2) A journalist, researcher or member of the public may access a record on the court file not specified in recommendation 5.1(2)–(3) or recommendation 5.2(1) only with leave of the court.

(3) Access to a record on the court file under recommendation 5.2(1)–(2) is subject to recommendations 5.3–5.4.

Recommendation 5.3: Records that should not be accessible

The access framework in the new Act should provide:

(1) Despite recommendation 5.1(1), a party to a proceeding or the party's legal representative is not permitted in any case to access a record on the court file for that proceeding that:

(a) is subject to a claim of privilege that has not yet been decided

(b) a court has decided contains material that is privileged, or

(c) is required for the court's use and it is not reasonably practicable for the party or the party's legal representative to be given access to a copy of the record.

(2) Despite recommendations 5.1(2)–(3) and 5.2(1)–(2), a journalist, researcher or member of the public is not permitted in any case to access a record on the court file:

(a) relating to a part of the proceedings that was closed pursuant to a closed court order or statutory closed court provision

(b) that contains information subject to a non-disclosure order or statutory prohibition on disclosure, and it is not reasonably practicable for the journalist, researcher or member of the public to be given access to a copy of the record that does not contain information subject to the order or statutory prohibition

(c) that is subject to a claim of privilege that has not yet been decided

(d) that a court has decided contains material that is privileged, or

(e) that is required for the court's use and it is not reasonably practicable for the journalist, researcher or member of the public to be given access to a copy of the record.

Recommendation 5.4: Access to records should be subject to certain matters

The access framework in the new Act should provide:

(1) Despite recommendation 5.1(1), access to a record on the court file by a party or the party's legal representative is subject to:

(a) the prescribed fee (if any) for the provision of access to the record

(b) any order that restricts or otherwise affects access to the record that a court has made, on application, in the particular case, and

(c) any provision in any other Act or law that restricts or otherwise affects access to the record.

(2) Despite recommendations 5.1(2)–(3) and 5.2(1)–(2), access to a record on the court file by a journalist, researcher or member of the public is subject to:

(a) the prescribed fee (if any) for the provision of access to the record

(b) the prescribed fee (if any) for the deletion or removal of personal identification information from the record, where the journalist, researcher or member of the public has been granted leave to access the record and is to be given access to a copy of the record from which such information has been deleted or removed

(c) any order that restricts or otherwise affects access to the record that a court has made, on application, in the particular case

(d) any provision in any other Act or law that restricts or otherwise affects access to the record, and

(e) any condition imposed by the court under recommendation 5.8.

Recommendation 5.5: Considerations in deciding whether to grant leave for access

The access framework in the new Act should provide:

(1) In deciding whether to grant leave to access a record on the court file, the court must take the following matters into account to the extent to which it considers them relevant:

(a) the public interest in open justice

(b) the impact on the administration of justice, including the right to a fair trial

(c) the impact on an individual's privacy or safety

(d) the impact on the safety, welfare, wellbeing, privacy, rehabilitation prospects and other future prospects of a child

(e) the reasons for which access is sought

(f) the nature of the record sought, including whether it has been admitted in evidence or contains scandalous, frivolous, vexatious, irrelevant or otherwise oppressive material

(g) the appropriate method of access

(h) any conditions that can be imposed under recommendation 5.8

(i) where the record contains personal identification information, whether it would be reasonably practicable for the applicant to be given access to a copy of the record from which such information has been deleted or removed

(j) whether the record contains information subject to a statutory prohibition on publication or non-publication order, and

(k) any other matter the judicial officer or registrar considers relevant in the circumstances.

(2) In respect of recommendation 5.5(1)(j), the existence of a statutory prohibition on publication or non-publication order that applies to information contained in a record on the court file does not, of itself, operate to prevent an applicant from accessing the record or the court giving an applicant access to the record.

Recommendation 5.6: Procedures for access

The access framework in the new Act should provide:

(1) All requests for access to a record on the court file must provide details of:

(a) the relevant proceeding or proceedings

(b) the record or records sought

(c) the reasons for making the request, and

(d) the method of access sought.

(2) If the request is by a researcher, it must also include such information as will assist the court in determining whether the request is for the purposes of research.

(3) Where leave of the court is required to access the record on the court file, the court may notify parties to the proceedings and allow them to be heard in relation to the request.

Recommendation 5.7: Accessing and copying records

The access framework in the new Act should provide:

(1) If the applicant for access to a record on the court file for a proceeding is a party to the proceeding or the party's legal representative, the applicant may inspect, view, listen to or obtain a copy of the record.

(2) If the applicant for access to a record on the court file for a proceeding is a journalist, researcher or member of the public, the applicant may:

  (a) inspect, view or listen to the record, and

  (b) with leave of the court, obtain a copy of the record.

(3) "Obtain a copy" of a record includes making a digital copy of, or photocopying, scanning or photographing a record.

(4) A person who makes a copy of a record without the leave of the court under recommendation 5.7(2)(b), commits an offence, the maximum penalty for which is:

  (a) for an individual: a fine of 100 penalty units, or

  (b) for a corporation: a fine of 500 penalty units.

(5) Making a copy of a record without the leave of the court may be punished as a contempt of court even though it could be punished as an offence.

(6) Making a copy of a record without the leave of the court may be punished as an offence even though it could be punished as a contempt of court.

(7) If making a copy of a record without the leave of the court constitutes both an offence and a contempt of court, the offender is not liable to be punished twice.

(8) Proceedings for the offence are to be dealt with:

  (a) summarily before the Local Court, or

  (b) summarily before the Supreme Court in its summary jurisdiction.

Recommendation 5.8: Conditions on access to and use of court records

The access framework in the new Act should provide:

(1) In relation to a record on the court file which the applicant has been granted leave to access, a court may impose conditions, including:

  (a) a condition requiring the applicant to access the record under supervision

  (b) a condition prescribing the time and place for accessing the record, and

  (c) a condition on use (not including publication or disclosure) of the record.

(2) Any applicant who is given access to a record on a court file must not breach any condition imposed by the court.

(3) The maximum penalty for breaching a condition on access is:

  (a) for an individual: a fine of 100 penalty units, or

  (b) for a corporation: a fine of 500 penalty units.

(4) A breach of a condition may be punished as a contempt of court even though it could be punished as an offence.

(5) A breach of a condition may be punished as an offence even though it could be punished as a contempt of court.

(6) If a breach of a condition constitutes both an offence and a contempt of court, the offender is not liable to be punished twice.

(7) Proceedings for the offence are to be dealt with:

(a) summarily before the Local Court, or

(b) summarily before the Supreme Court in its summary jurisdiction.

Recommendation 5.9: Access fees

The access framework in the new Act should provide:

(1) Regulations may prescribe fees for:

(a) the provision of access to a record on the court file, and

(b) the deletion or removal of personal identification information from a record on the court file, where a journalist, researcher or member of the public has been granted leave to access the record and is to be given access to a copy of the record from which such information has been deleted or removed.

(2) Any prescribed fees should not exceed what is reasonably necessary to cover the cost of providing access to a record on the court file or deleting or removing personal identification information from a record on the court file.

Recommendation 5.10: Exemptions and reductions for access fees

The access framework in the new Act should provide:

(1) The following applicants are exempt from paying any prescribed fee for the provision of access to a record on the court file, or the deletion or removal of personal identification from a record on the court file:

(a) an accused person or an offender in a criminal proceeding or their legal representative, and

(b) a complainant or victim in a criminal proceeding or protected person.

(2) If the applicant is a member of the public, the court may waive or reduce any prescribed fee to access a record on the court file for a proceeding if the applicant would experience financial hardship as a result of paying the fee.

(3) If the applicant is a researcher, the court:

(a) may waive or reduce any prescribed fee to access a record on the court file for any reason it considers appropriate, and

(b) in determining whether to do so, may have regard to:

(i) the administrative burden of providing access to the record

(ii) the level of funding available to the researcher as part of the research project

(iii) the number or volume of records requested by the researcher, and

(iv) any other matter that the court considers relevant.

Recommendation 5.11: Protection in respect of actions for defamation or breach of confidence for courts and court officers

The access framework in the new Act should provide:

(1) If a record on the court file is provided to an applicant under the access framework:

(a) no action for defamation or breach of confidence lies against the Crown, a court or a court officer by reason of providing the record, and

(b) no action for defamation or breach of confidence in respect of any publication involved in, or resulting from, the provision of the record lies against the author of the record or any other person by reason of the author or other person having supplied the record to a court.

(2) For the purposes of the law relating to defamation or breach of confidence, the provision of access to a record on the court file under the access framework does not

constitute an authorisation or approval for the person to whom access is provided to publish a record, or its contents.

Recommendation 5.12: Protection in respect of criminal liability for court officers

The access framework in the new Act should provide that if a record on the court file is provided pursuant to a decision under the framework, and the decision-maker believes in good faith when making the decision that the framework permits or requires the decision to be made, neither the person who makes the decision nor any other person concerned in providing the record is guilty of an offence merely because of the making of the decision or the provision of the record.

Recommendation 5.13: Personal liability of court officers

The access framework in the new Act should provide that no matter or thing done or not done by a court officer, or by any person acting under the direction of a court officer, if the matter or thing was done or not done in good faith for the purposes of executing the access framework, subjects the court officer, or person so acting, personally to any action, liability, claim or demand.

Recommendation 5.14: Offence of unauthorised use or disclosure of personal information

The access framework in the new Act should provide:

(1) Any applicant who is given access to a record on a court file must not use or disclose (including by publication) any personal identification information contained in it except with the permission of:

  (a) the court, or

  (b) the person to whom the personal identification information relates, unless:

    (i) such information also includes personal identification information of another person, and

    (ii) that other person does not consent to use or disclosure of their personal identification information.

(2) The maximum penalty for using or disclosing personal identification information contained in a court record without permission is:

  (a) for an individual: a fine of 100 penalty units, or

  (b) for a corporation: a fine of 500 penalty units.

(3) Proceedings for the offence are to be dealt with:

  (a) summarily before the Local Court, or

  (b) summarily before the Supreme Court in its summary jurisdiction.

6. The new Act: Powers to make orders – powers, grounds and scope

Recommendation 6.1: Safeguarding the public interest in open justice is a primary consideration

The new Act should provide that safeguarding the public interest in open justice is a primary consideration when considering whether to make a non-publication, non-disclosure, exclusion or closed court order.

Recommendation 6.2: Powers to make orders

The new Act should provide:

(1) A court may, by making a non-publication or non-disclosure order on grounds permitted by this Act, prohibit or restrict the publication and/or disclosure of:

  (a) information tending to identify 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 (including by requiring the use of a pseudonym)

  (b) information, whether or not received into evidence, given in proceedings before the court, or

  (c) information that comprises evidence that may be adduced or given in proceedings before the court.

(2) A court may, by making an exclusion order on grounds permitted by this Act, exclude a specified person or class of people, or all people other than those whose presence is necessary, from the whole or any part of proceedings.

(3) A court may, by making a closed court order on grounds permitted in this Act:

  (a) exclude all people, other than those whose presence is necessary, from the whole or any part of proceedings, and

  (b) as a result, prohibit the disclosure (by publication or otherwise) of information from the closed part of proceedings.

Recommendation 6.3: Requirement to specify ground or grounds on which the order is made

The new Act should provide that a non-publication, non-disclosure, exclusion or closed court order must specify the ground or grounds on which the order is made.

Recommendation 6.4: Grounds for making a non-publication or non-disclosure order

The new Act should provide that a court may make a non-publication or non-disclosure order on one or more of the following grounds:

(a) the order is necessary to prevent prejudice to the proper administration of justice

(b) the order is necessary to prevent prejudice to the interests of the Commonwealth or a state or territory in relation to national or international security

(c) the order is necessary to protect the safety of any person

(d) the order is necessary to avoid causing undue distress or embarrassment to a party to or witness (not including a defendant) in any criminal proceeding that involves a prescribed sexual offence or domestic violence offence

(e) the order is necessary to avoid causing undue distress or embarrassment to a party to or witness in any civil proceeding that involves, or relates to, a prescribed sexual offence or domestic violence offence

(f) the order is necessary to avoid causing undue distress or embarrassment to a child who is a party to or witness in any legal proceeding, or

(g) 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.

Recommendation 6.5: Grounds for making an exclusion order

The new Act should provide that a court may make an exclusion order on one or more of the following grounds:

(a) the order is necessary to prevent prejudice to the proper administration of justice

(b) the order is necessary to prevent prejudice to the interests of the Commonwealth or a state or territory in relation to national or international security

(c) the order is necessary to protect the safety of any person

(d) the order is necessary to support a child or a person with a mental health impairment or cognitive impairment to give evidence, or

(e) 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.

Recommendation 6.6: Grounds for making a closed court order

The new Act should provide:

(1) A court may make a closed court order on one or more of the following grounds, and only where the ground cannot be addressed by other reasonably available means:

  (a) the order is necessary to prevent prejudice to the proper administration of justice

  (b) the order is necessary to prevent prejudice to the interests of the Commonwealth or a state or territory in relation to national or international security

  (c) the order is necessary to protect the safety of any person, or

  (d) 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.

(2) "Other reasonably available means" includes a non-publication, non-disclosure and/or exclusion order.

Recommendation 6.7: Scope of information to which a non-publication or non-disclosure order applies

The new Act should provide:

(1) A non-publication or non-disclosure order must specify the information to which the order applies with sufficient particularity to ensure the order is limited to achieving the purpose for which the order is made.

(2) A court, in determining the scope of a non-publication or non-disclosure order, must ensure that the order does not apply to any more information than is reasonably necessary to achieve the purpose for which the order is made.

Recommendation 6.8: Where a non-publication or non-disclosure order applies

The new Act should provide:

(1) A non-publication or non-disclosure order must specify the place where the order applies.

(2) The place in which a non-publication or non-disclosure order applies need not be limited to NSW, and can be made to apply anywhere inside, or outside, the Commonwealth.

(3) A court, in determining the place in which a non-publication or non-disclosure order applies, must have regard to what is necessary for achieving the purpose for which the order is made.

Recommendation 6.9: Duration of a non-publication or non-disclosure order

The new Act should provide:

(1) A non-publication or non-disclosure order (not including an interim order) must specify the period for which the order operates.

(2) A court, in deciding the period for which a non-publication or non-disclosure order is to operate, must ensure that the order operates for no longer than is reasonably necessary to achieve the purpose for which the order is made.

(3) The period for which a non-publication or non-disclosure order operates is to be determined by reference to:

(a) a fixed or ascertainable period, or

(b) the occurrence of a specified future event.

(4) A non-publication or non-disclosure order may be specified to operate indefinitely in exceptional circumstances or where it is not reasonably practicable to specify a duration.

Recommendation 6.10: Proceedings or part of proceedings to which an exclusion or closed court order applies

The new Act should provide:

(1) When making an exclusion or closed court order, a court must specify the proceedings or part of proceedings to which the order applies.

(2) A court, in determining the proceedings or part of proceedings to which an exclusion or closed court order applies, must ensure that the order operates for no longer than is reasonably necessary to achieve the purpose for which the order is made.

Recommendation 6.11: An order may be subject to exceptions and conditions

The new Act should provide that a non-publication, non-disclosure, exclusion or closed court order may be made subject to such exceptions or conditions as the court thinks fit and specifies in the order.

Recommendation 6.12: Exception for journalists when an exclusion order is made

The new Act should provide that an exclusion order made under the Act does not exclude a journalist unless the court is satisfied that it is in the interests of justice that they are excluded.

Recommendation 6.13: Disclosures that are not prevented by a non-disclosure order or closed court order

The new Act should provide:

(1) A non-disclosure or closed court order does not prevent a person from disclosing information if it is not by publication and is in the course of performing duties or exercising powers in a public official capacity:

(a) in connection with the conduct of proceedings or the recovery or enforcement of any penalty imposed in proceedings, or

(b) in compliance with any procedure adopted by a court for informing journalists or news media organisations of the existence and content of a non-publication, non-disclosure, exclusion or closed court order made by the court.

(2) A non-disclosure or closed court order does not prevent disclosure of information to the Bureau of Crime Statistics and Research if it is not by publication and the disclosure is made for the purposes of the compilation of statistical data about crime and criminal justice.

Recommendation 6.14: Interim non-publication and non-disclosure orders

The new Act should provide:

(1) If an application is made to a court for a non-publication or non-disclosure order, the court may, without determining the merits of the application, make an interim order to operate until the application is determined.

(2) If an interim order is made, the court must determine the application as a matter of urgency.

7. The new Act: Powers to make orders – procedures

Recommendation 7.1: Procedure for making a non-publication, non-disclosure, exclusion or closed court order

The new Act should provide:

(1) A court may make a non-publication, non-disclosure, exclusion or closed court order on its own initiative or on the application of:

  (a) a party to the proceedings, or

  (b) any other person who the court considers has a sufficient interest in the making of the order.

(2) The following persons are entitled to appear and be heard when a court is considering whether to make a non-publication, non-disclosure, exclusion or closed court order, either on its own initiative or on the application of a person referred to in recommendation 7.1(1):

  (a) the applicant for the order

  (b) a party to the proceedings

  (c) the government (or an agency of the government) of the Commonwealth or of a state or territory

  (d) a journalist

  (e) a news media organisation, and

  (f) any other person who, in the court's opinion, has a sufficient interest in the question of whether an order should be made.

(3) An order may be made:

  (a) at any time during proceedings or after proceedings have concluded, if it is a non-publication or non-disclosure order, or

  (b) at any time during proceedings, if it is an exclusion or closed court order.

Recommendation 7.2: Review of non-publication, non-disclosure and closed court orders

The new Act should provide:

(1) A court that made a non-publication, non-disclosure or closed court order may review the order on:

  (a) the court's own initiative, or

  (b) the application of a person who is entitled to apply for a review as listed in recommendation 7.2(2).

(2) The following persons are entitled to apply for, and appear and be heard on, the review of a non-publication, non-disclosure or closed court order:

  (a) the applicant for the order

  (b) a party to the proceedings in which the order was made

  (c) the government (or an agency of the government) of the Commonwealth or of a state or territory

(d) a journalist

(e) a news media organisation, and

(f) any other person who, in the court's opinion, has a sufficient interest in the question of whether an order should have been made or continue to operate.

(3) On a review, the court may confirm, vary or revoke the order and may in addition make any other order that the court can make under the Act.

Recommendation 7.3: Review of exclusion orders

The new Act should provide:

(1) A court that made an exclusion order may review the order on:

(a) the court's own initiative, or

(b) the application of:

(i) the applicant for the order

(ii) a party to the proceedings in which the order was made, or

(iii) any other person who, in the court's opinion, has a sufficient interest in the question of whether an order should have been made or continue to operate.

(2) On a review, the court may confirm, vary or revoke the order and may in addition make any other order that the court can make under the Act.

Recommendation 7.4: Revocation of a non-publication or non-disclosure order on review

The new Act should provide:

(1) On a review, a court must revoke a non-publication or non-disclosure order if:

(a) unless the review is on the court's own motion, the application for the review is made by:

(i) a complainant or victim of a prescribed sexual offence or a domestic violence offence or a protected person in an apprehended violence order proceeding, and

(ii) the order was made in relation to information tending to identify the complainant, victim or protected person, and

(b) the court is satisfied that the complainant, victim or protected person:

(i) is aged 18 years or over and consents to the revocation of the order, or

(ii) is aged 16 years or over but under 18 years and consents to the revocation of the order after receiving legal advice from an Australian legal practitioner about the implications of consenting, and

(c) the court is satisfied that it is otherwise appropriate in all the circumstances for the order to be revoked.

(2) Despite recommendation 7.4(1), the court must not revoke an order if:

(a) the revocation of the order would result in the publication or disclosure of the identity of any other person:

(i) against whom a prescribed sexual offence or domestic violence offence was allegedly committed and that was dealt with in the same proceeding, or

(ii) who is, or was, a protected person in the same apprehended violence order proceeding, and

(b) that person:

(i) does not give permission to that publication or disclosure, or

(ii) is aged under 18 years, unless the person is aged 16 years or over and has consented to publication or disclosure after receiving advice from an Australian legal practitioner about the implications of consenting, or

(c) the court is not satisfied it is appropriate in all the circumstances.

Recommendation 7.5: Appeals of non-publication, non-disclosure, exclusion and closed court orders

The new Act should provide:

(1) With leave of the appellate court, an appeal can be made against:

(a) a decision of the original court to make, or not make, a non-publication, non-disclosure, exclusion or closed court order

(b) a decision by the original court made on the review of a non-publication, non-disclosure, exclusion or closed court order, or

(c) a decision by the original court not to review a non-publication, non-disclosure, exclusion or closed court order.

(2) Appeals should be heard in the following courts:

(a) if the decision under appeal was made in the Supreme Court, the Land and Environment Court or the District Court – the Court of Appeal, or

(b) if the decision under appeal was made in the Local Court or Children's Court – the District Court.

(3) The following persons are entitled to apply for leave to appeal, and to appear and be heard on an application for leave to appeal, and an appeal:

(a) the applicant for the order

(b) a party to the proceedings in which the order or decision subject to appeal was made

(c) the government (or an agency of the government) of the Commonwealth or of a state or territory

(d) a journalist

(e) a news media organisation, and

(f) any other person who, in the appellate court's opinion, has a sufficient interest in the decision that is the subject of appeal.

(4) On appeal, the appellate court may confirm, vary or revoke the order or decision and may in addition make any order or decision that could have been made in the first instance.

(5) An appeal is to be by way of rehearing and fresh evidence may be given by leave.

Recommendation 7.6: Court must consider the views of the person who is, or would be, protected by an order when making a decision

The new Act should provide:

(1) When making a decision under the Act, the court must take into account, where relevant and practicable:

(a) the views of the person who is, or would be, protected by a non-publication, non-disclosure, exclusion or closed court order, considered in light of:

(i) if the person has a mental health impairment or cognitive impairment, their mental health impairment or cognitive impairment, or

(ii) if the person is a child, their age and understanding, and

(b) any other factor that the court considers relevant.

(2) "A decision" includes making a non-publication, non-disclosure, exclusion or closed court order, as well as making an order to confirm, vary or revoke an order on review or appeal.

Recommendation 7.7: Requirement to give reasons on request

The new Act should provide:

(1) The following persons may request reasons for a decision made under the new Act within 14 days of the making of the decision or such further time as the court may permit:

  (a) the applicant for the order

  (b) a party to the proceedings in which the order was made

  (c) the government (or an agency of the government) of the Commonwealth or of a state or territory

  (d) a journalist

  (e) a news media organisation, or

  (f) any other person who, in the court's opinion, has a sufficient interest in whether an order should have been made or should continue to operate.

(2) A court is not required to give reasons on request:

  (a) for an interim non-publication or non-disclosure order, or

  (b) if giving reasons would render the order ineffective.

(3) "A decision" includes making a non-publication, non-disclosure, exclusion or closed court order, as well as making an order to confirm, vary or revoke an order on review or appeal.

Recommendation 7.8: Costs in proceedings for orders

The new Act should provide:

(1) In proceedings on the application for or review of a non-publication, non-disclosure, exclusion or closed court order (including an interim order), a court may make an order for costs against a person only if the court is satisfied that the person's involvement in the application or review is frivolous or vexatious.

(2) In proceedings on an appeal from an order, a court may make an order for costs.

Recommendation 7.9: Requirement to post notice of a closed court order

In relation to closed court orders, the new Act should provide that a court must post notice of a closed court order, whether the proceedings are held in a courtroom or virtually.

Recommendation 7.10: Breaches of orders made under the new Act

The new Act should provide:

(1) A person commits an offence if the person contravenes a non-publication, non-disclosure, exclusion or closed court order and knows of, or is reckless as to, the existence of the order.

(2) Conduct that constitutes an offence may be punished as a contempt of court or as an offence.

(3) The offender is not liable to be punished both for contempt and an offence with respect to the same conduct.

(4) If a corporation contravenes the offence, each person who is a director of the corporation or who is concerned in the management of the corporation is taken to have committed the same offence, unless the person satisfies the court that:

(a) the person was not in a position to influence the conduct of the corporation in relation to its contravention, or

(b) the person, if in such a position, used all due diligence to prevent the contravention.

(5) Proceedings for this offence must be commenced within two years of the date of the alleged offence.

Recommendation 7.11: Maximum penalties for the offence in the new Act

The offence in the new Act for breaching a non-publication, non-disclosure, exclusion or closed court order should provide:

(1) The maximum penalty for the offence is:

(a) for an individual: 1,000 penalty units or imprisonment for 12 months, or both, or

(b) for a corporation: 5,000 penalty units.

(2) Proceedings for the offence are to be dealt with:

(a) summarily before the Local Court, or

(b) summarily before the Supreme Court in its summary jurisdiction.

(3) If proceedings are brought in the Local Court, the maximum monetary penalty that the Local Court may impose for the offence, despite any higher maximum monetary penalty provided by this Act in respect of the offence, is:

(a) for an individual: 100 penalty units, or

(b) for a corporation: 500 penalty units.

Recommendation 7.12: Geographic limit of the offence of breaching a non-publication or non-disclosure order under the new Act

The new Act should provide that, for the purposes of s 10C of the *Crimes Act 1900* (NSW), the necessary geographical nexus exists between NSW and an offence if the offence involves a contravention of a non-publication order or non-disclosure order made by a NSW court.

9. Legislation relating to children and young people

Recommendation 9.1: Uniform terminology in the prohibition on publishing the identity of a child involved in criminal proceedings

(1) Part 2 Division 3A of the *Children (Criminal Proceedings) Act 1987* (NSW) should:

(a) define “publish” in the same way as in recommendation 3.2, and

(b) adopt the term “information tending to identify” a person and define it in the same way as in recommendation 3.3.

(2) s 15B of the *Children (Criminal Proceedings) Act 1987* (NSW) should define “official report of proceedings” in the same way as in recommendation 3.6.

Recommendation 9.2: The application and duration of the prohibition on publishing the identity of a child involved in criminal proceedings

Section 15A of the *Children (Criminal Proceedings) Act 1987* (NSW) should:

(a) apply to the publication of a person’s identity before the proceedings are commenced, during the proceedings and after the proceedings are disposed of

(b) apply to the publication of a person’s identity in a way that connects them with a criminal investigation

(c) apply to a person who is reasonably likely to appear, be mentioned, or be otherwise involved in the proceedings

(d) provide that the publication of the identity of a person is permitted where it is necessary:

  (i) for the safety and welfare of the person, or

  (ii) for the purposes of a criminal investigation or a missing person investigation, and

(e) define "criminal investigation" as an investigation conducted by police officers, or other persons charged with the duty of investigating, into whether a person should be charged with an offence.

Recommendation 9.3: Exception to allow for the publication of the identity of a child victim of an alleged homicide

Section 15A of the *Children (Criminal Proceedings) Act 1987* (NSW) should provide that the prohibition does not apply to the publication of a child's identity where:

(a) there has been prior lawful publication of the child's identity pursuant to the exception in recommendation 9.2(d), and

(b) the child is a victim of an alleged homicide.

Recommendation 9.4: Mechanism for the court to grant leave to lift the prohibition on publication when the person is alive

Section 15D of the *Children (Criminal Proceedings) Act 1987* (NSW) should provide, in relation to the statutory prohibition in s 15A of the Act:

(1) A court may grant leave to publish a person's identity before, during and after the proceedings.

(2) Before granting leave, a court must take into account:

  (a) the views of the person and of any other person who is protected by the prohibition and who may be identified by the publication (if these views are known or ascertainable), and

  (b) the public interest.

(3) However, a court cannot grant leave to publish the identity of a person who is aged under 16 years at the time of the publication.

Recommendation 9.5: Mechanism for the court to grant leave to lift the prohibition on publication when the person is deceased

(1) s 15E of the *Children (Criminal Proceedings) Act 1987* (NSW) should be repealed.

(2) s 15D of the *Children (Criminal Proceedings) Act 1987* (NSW) should provide, in relation to the statutory prohibition in s 15A of the Act:

  (a) A court may grant leave to publish a deceased person's identity before, during and after the proceedings.

  (b) Before granting leave, a court must take into account:

    (i) what the deceased person would have wanted if they had been alive

    (ii) the views of family members of the deceased person, unless the family member is also the alleged or convicted offender

    (iii) the views of any other person who is protected by the prohibition and who may be identified by the publication (if these views are known or ascertainable), and

    (iv) the public interest.

Recommendation 9.6: Where an application to lift the prohibition on publication can be heard before proceedings have commenced

Section 15D of the *Children (Criminal Proceedings) Act 1987* (NSW) should provide, in relation to the statutory prohibition in s 15A of the Act, that, before proceedings have commenced, applications to publish the identity of a person protected by the prohibition can be heard by any court in which the proceedings could be commenced.

Recommendation 9.7: Mechanism for a person to consent to lifting the prohibition on publication

Section 15D of the *Children (Criminal Proceedings) Act 1987* (NSW) should provide, in relation to the statutory prohibition in s 15A of the Act:

(1) A child aged under 16 years at the time of publication cannot consent to the publication of their identity.

(2) A person aged 16 years or over but under 18 years at the time of publication can consent to the publication of their identity after receiving advice from an Australian legal practitioner about the implications of consenting.

(3) A person aged 18 years or over at the time of publication can consent to the publication of their identity.

(4) However, a person cannot consent to the publication of their identity under recommendation 9.7(2)–(3) if:

  (a) the publication may identify:

    (i) a child who is protected by the prohibition and who is aged under 16 years, or

    (ii) any other person who is protected by the prohibition and who has not consented to the publication of their identity, or

  (b) the proceedings are ongoing.

Recommendation 9.8: Uniform terminology in certain prohibitions on publication concerning children and young people

(1) s 65 of the *Young Offenders Act 1997* (NSW), s 105 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW), s 180 of the *Adoption Act 2000* (NSW), s 52 of the *Surrogacy Act 2010* (NSW) and s 25 of the *Status of Children Act 1996* (NSW) should:

  (a) adopt the term "publish" and define it in the same way as in recommendation 3.2, and

  (b) adopt the term "information tending to identify" a person and define it in the same way as in recommendation 3.3.

(2) s 65 of the *Young Offenders Act 1997* (NSW), s 105 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) and s 180 of the *Adoption Act 2000* (NSW) should define "official report of proceedings" in the same way as in recommendation 3.6.

(3) s 52 of the *Surrogacy Act 2010* (NSW) and s 25 of the *Status of Children Act 1996* (NSW) should:

  (a) include an exception for an official report of proceedings, and

  (b) define "official report of proceedings" in the same way as in recommendation 3.6.

Recommendation 9.9: Application of certain prohibitions on publication concerning children and young people to a deceased person

Section 65 of the *Young Offenders Act 1997* (NSW), s 105 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW), s 180 of the *Adoption Act 2000* (NSW),

s 52 of the *Surrogacy Act 2010* (NSW) and s 25 of the *Status of Children Act 1996* (NSW) should apply even if the person protected by the prohibition is deceased at the time of publication.

Recommendation 9.10: Mechanism for the court to grant leave to lift certain prohibitions on publication concerning children and young people when the person is alive

(1) s 65 of the *Young Offenders Act 1997* (NSW) and s 105 of the C*hildren and Young Persons (Care and Protection) Act 1998* (NSW) should provide:

(a) A court may grant leave to publish a person's identity before, during and after the proceedings.

(b) Before granting leave, a court must take into account:

(i) the views of the person and of any other person who is protected by the prohibition and who may be identified by the publication (if these views are known or ascertainable), and

(ii) the public interest.

(c) However, a court cannot grant leave to publish the identity of a child who is aged under 16 years at the time of publication.

(2) s 180 and s 180A of the *Adoption Act 2000* (NSW)*,* s 52 of the *Surrogacy Act 2010* (NSW) and s 25 of the *Status of Children Act 1996* (NSW) should provide:

(a) A court may grant leave to publish a person's identity during and after the proceedings.

(b) Before granting leave, a court must take into account:

(i) the views of the person and of any other person who is protected by the prohibition and who may be identified by the publication (if these views are known or ascertainable), and

(ii) the public interest.

(c) However, a court cannot grant leave to publish the identity of a child who is aged under 16 years at the time of publication.

Recommendation 9.11: Mechanism for the court to grant leave to lift certain prohibitions on publication concerning children and young people when the person is deceased

(1) s 65 of the *Young Offenders Act 1997* (NSW) and s 105 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) should provide:

(a) A court may grant leave to publish a deceased person's identity before, during and after the proceedings.

(b) Before granting leave, a court must take into account:

(i) what the deceased person would have wanted if they had been alive

(ii) the views of family members of the deceased person

(iii) the views of any other person who is protected by the prohibition and who may be identified by the publication (if these views are known or ascertainable), and

(iv) the public interest.

(2) s 180 and s 180A of the *Adoption Act 2000* (NSW)*,* s 52 of the *Surrogacy Act 2010* (NSW) and s 25 of the *Status of Children Act 1996* (NSW) should provide:

(a) A court may grant leave to publish a deceased person's identity during and after the proceedings.

(b) Before granting leave, a court must take into account:

(i) what the deceased person would have wanted if they had been alive

(ii) the views of family members of the deceased person

(iii) the views of any other person who is protected by the prohibition and who may be identified by the publication (if these views are known or ascertainable), and

(iv) the public interest.

Recommendation 9.12: Where an application to lift certain prohibitions on publication concerning children and young people can be heard before proceedings have commenced

Section 65 of the *Young Offenders Act 1997* (NSW) and s 105 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) should provide that before proceedings have commenced, applications to publish the identity of a person protected by the prohibition can be heard by any court in which the proceedings could be commenced.

Recommendation 9.13: Mechanism for a person to consent to lifting certain prohibitions on publication concerning children and young people with consent

Section 65 of the *Young Offenders Act 1997* (NSW), s 105 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW), s 180 of the *Adoption Act 2000* (NSW), s 52 of the *Surrogacy Act 2010* (NSW) and s 25 of the *Status of Children Act 1996* (NSW) should provide:

(1) A child aged under 16 years at the time of publication cannot consent to the publication of their identity.

(2) A person aged 16 years or over but under 18 years at the time of publication can consent to the publication of their identity after receiving advice from an Australian legal practitioner about the implications of consenting.

(3) A person aged 18 years or over at the time of publication can consent to the publication of their identity.

(4) However, a person cannot consent to the publication of their identity under recommendation 9.13(2)–(3) if:

(a) the publication may identify:

(i) a child who is protected by the prohibition and who is aged under 16 years, or

(ii) any other person who is protected by the prohibition and who has not consented to the publication of their identity, or

(b) the proceedings are ongoing.

Recommendation 9.14: Uniform terminology in discretions to make non-publication orders in the *Adoption Act* and *Minors (Property and Contracts) Act*

Section 186(2) of the *Adoption Act 2000* (NSW) and s 43(5) of the *Minors (Property and Contracts) Act 1970* (NSW) should:

(a) adopt language consistent with a discretion to make a non-publication order

(b) define “non-publication order” in the same way as in recommendation 3.1, and

(c) define “publish” in the same way as in recommendation 3.2.

Recommendation 9.15: Uniform terminology in the prohibition on disclosing the identity of a person who reports a child or young person at risk of harm

Section 29(1)(f) of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) should:

(a) define “disclose” in the same way as in recommendation 3.2, and

(b) adopt the term “information tending to identify” a person and define it in the same way as in recommendation 3.3.

Recommendation 9.16: Application of the prohibition on disclosing the identity of a person who reports a child or young person at risk of harm to a deceased person

Section 29(1)(f) of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) should apply even if the person protected by the prohibition is deceased at the time of publication.

Recommendation 9.17: Mechanism for the court to grant leave to lift the prohibition on disclosure when the person is deceased

Section 29(1)(f) of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) should provide:

(1) A court may grant leave to disclose a deceased person’s identity during and after the proceedings.

(2) Before granting leave, a court must take into account:

  (a) what the deceased person would have wanted if they had been alive

  (b) the views of family members of the deceased person

  (c) the views of any other person who is protected by the prohibition and who may be identified by the disclosure (if these views are known or ascertainable), and

  (d) the public interest.

Recommendation 9.18: Mechanism for a person to consent to lifting the prohibition on disclosure

Section 29(1)(f)(i) of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) should provide that the person cannot consent to disclosure of their identity if:

(a) the disclosure may identify another person who is protected by the prohibition and who has not consented to disclosure of their identity, or

(b) the proceedings are ongoing.

Recommendation 9.19: Uniform terminology in statutory exclusion provisions applying in proceedings relating to children

Section 10(1) of the *Children (Criminal Proceedings) Act 1987* (NSW) and s 104C of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) should:

(a) adopt the term “journalist”, and

(b) define “journalist”, “news media organisation” and “news medium” in the same way as in recommendation 3.5.

Recommendation 9.20: Uniform terminology in discretions to make exclusion orders in children’s criminal proceedings and care and protection proceedings

(1) s 10(2) of the *Children (Criminal Proceedings) Act 1987* (NSW) should adopt language consistent with a discretion to make an exclusion order excluding any person (other than the child or any other person who is directly interested in the proceedings or a family victim).

(2) s 104(1) of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) should adopt language consistent with a discretion to make an exclusion order excluding the child or young person.

(3) s 104(4) of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) should:

(a) adopt language consistent with a discretion to make an exclusion order excluding a journalist, and

(b) define "journalist", "news media organisation" and "news medium" in the same way as in recommendation 3.5.

(4) s 104A(1) of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) should adopt language consistent with a discretion to make an exclusion order excluding any person (other than the child or young person).

(5) s 10(2) of the *Children (Criminal Proceedings) Act 1987* (NSW) and s 104 and s 104A of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) should provide that "exclusion order" has the same meaning and effect as it has in recommendation 3.1.

Recommendation 9.21: Considerations for making an exclusion order in children's criminal proceedings

Section 10(2) of the *Children (Criminal Proceedings) Act 1987* (NSW) should provide that the court may make an exclusion order for the examination of any witness if the court is of the opinion that:

(a) it is in the interests of the child defendant, or

(b) if the witness is a child, it is in the interests of that child witness.

Recommendation 9.22: Application of s 10 of the *Children (Criminal Proceedings) Act*

Section 10 of the *Children (Criminal Proceedings) Act 1987* (NSW) should clarify that it applies while a court is hearing criminal proceedings to which:

(a) a child is a party, or

(b) a person who was a child at the time the offence was committed is a party.

Recommendation 9.23: No exception for traffic proceedings

Section 10(3) of the *Children (Criminal Proceedings) Act 1987* (NSW) should be repealed.

Recommendation 9.24: Uniform terminology in requirements to make closed court orders in adoption, surrogacy, parentage and guardianship proceedings

Section 119(1) of the *Adoption Act 2000* (NSW), s 47 of the *Surrogacy Act 2010* (NSW), s 24(1) of the *Status of Children Act 1996* (NSW) and s 21 of the *Guardianship of Infants Act 1916* (NSW) should:

(a) adopt language consistent with a requirement to make a closed court order

(b) define "closed court order" in the same way as in recommendation 3.1, and

(c) define "disclose" in the same way as in recommendation 3.2.

Recommendation 9.25: Interaction with the mechanism to lift the statutory prohibition in relation to adoption, surrogacy and parentage proceedings

(1) s 180 of the *Adoption Act 2000* (NSW) should provide that consent of the person under s 180 of the Act also operates to lift any prohibition on disclosing the identity of the person arising from s 119(1) of the Act.

(2) s 52 of the *Surrogacy Act 2010* (NSW) should provide that consent of the person under s 52 of the Act also operates to lift any prohibition on disclosing the identity of the person arising from s 47 of the Act.

(3) s 25 of the *Status of Children Act 1996* (NSW) should provide that consent of the person under s 25 of the Act also operates to lift any prohibition on disclosing the identity of the person arising from s 24(1) of the Act.

10. Legislation relating to sexual offence proceedings

Recommendation 10.1: Uniform terminology in the prohibition on publishing the identity of a complainant in sexual offence proceedings

Section 578A of the *Crimes Act 1900* (NSW) should:

(a) define "publish" in the same way as in recommendation 3.2

(b) adopt the term "information tending to identify" the complainant and define it in the same way as in recommendation 3.3, and

(c) adopt the term "official report of proceedings" and define it in the same way as in recommendation 3.6.

Recommendation 10.2: When the prohibition on publishing the identity of a complainant in sexual offence proceedings commences

Section 578A of the *Crimes Act 1900* (NSW) should provide that the prohibition commences:

(a) where a complaint has been made to the police, and

(b) regardless of whether legal proceedings have commenced in relation to the offence.

Recommendation 10.3: Application of the prohibition on publication to a deceased complainant

Section 578A of the *Crimes Act 1900* (NSW) should apply even if the complainant protected by the prohibition is deceased at the time of publication.

Recommendation 10.4: Exception to allow for publication of the identity of a victim of a sexual offence, where they are also the victim of an associated homicide

Section 578A of the *Crimes Act 1900* (NSW) should provide that the prohibition does not apply to a publication made after the death of a person against whom a prescribed sexual offence is alleged to have been committed if that person died in a homicide connected to the alleged sexual offence.

Recommendation 10.5: Mechanism for the court to grant leave to lift the prohibition on publication when the complainant is alive

Section 578A of the *Crimes Act 1900* (NSW) should provide:

(1) A court may grant leave to publish a complainant's identity before, during and after the proceedings.

(2) Before granting leave, a court must take into account:

  (a) the views of the complainant and of any other complainant who is protected by the prohibition and who may be identified by the publication (if these views are known or ascertainable), and

  (b) the public interest.

(3) However, a court cannot grant leave to publish the identity of a complainant who is aged under 16 years at the time of publication.

Recommendation 10.6: Mechanism for the court to grant leave to lift the prohibition on publication when the complainant is deceased

Section 578A of the *Crimes Act 1900* (NSW) should provide:

(1) A court may grant leave to publish a deceased complainant's identity before, during and after the proceedings.

(2) Before granting leave, a court must take into account:

  (a) what the deceased complainant would have wanted if they had been alive

  (b) the views of family members of the deceased complainant, unless the family member is also the alleged or convicted offender

  (c) the views of any other complainant who is protected by the prohibition and who may be identified by the publication (if these views are known or ascertainable), and

  (d) the public interest.

Recommendation 10.7: Where an application to lift the prohibition on publication can be heard before proceedings have commenced

Section 578A of the *Crimes Act 1900* (NSW) should provide that before proceedings have commenced, applications to publish the identity of a complainant protected by the prohibition can be heard by any court in which the proceedings could be commenced.

Recommendation 10.8: Mechanism for a complainant to consent to lifting the prohibition on publication

Section 578A of the *Crimes Act 1900* (NSW) should provide:

(1) A complainant aged under 16 years at the time of publication cannot consent to the publication of their identity.

(2) A complainant aged 16 years or over but under 18 years at the time of publication can consent to the publication of their identity after receiving advice from an Australian legal practitioner about the implications of consenting.

(3) A complainant aged 18 years or over at the time of publication can consent to the publication of their identity.

(4) However, a complainant cannot consent to the publication of their identity under recommendation 10.8(2)–(3) if:

  (a) the publication may identify:

    (i) a complainant who is protected by the prohibition and who is aged under 16 years, or

    (ii) any other complainant who is protected by the prohibition and who has not consented to the publication of their identity, or

  (b) the proceedings are ongoing.

Recommendation 10.9: Uniform terminology in the discretion to make a non-publication order in relation to a tendency witness

Section 294D(4) of the *Criminal Procedure Act 1986* (NSW) should:

(a) adopt language consistent with a discretion to make a non-publication order

(b) define "non-publication order" in the same way as in recommendation 3.1

(c) define "publish" in the same way as in recommendation 3.2, and

(d) adopt the term "information tending to identify" a sexual offence witness and define it in the same way as in recommendation 3.3.

Recommendation 10.10: Uniform terminology in requirements to make exclusion orders in sexual offence proceedings

Section 291 of the *Criminal Procedure Act 1986* (NSW) and s 30I of the *Crimes (Sentencing Procedure) Act 1999* (NSW) should:

(a) adopt language consistent with a requirement to make an exclusion order, excluding all people other than those whose presence is necessary for the proceedings, and

(b) provide that "exclusion order" has the same meaning and effect as it has in recommendation 3.1.

Recommendation 10.11: Uniform terminology in the discretion to make an exclusion order in sexual offence proceedings

Section 291A of the *Criminal Procedure Act 1986* (NSW) should:

(a) adopt language consistent with a discretion to make an exclusion order, and

(b) provide that "exclusion order" has the same meaning and effect as it has in recommendation 3.1.

Recommendation 10.12: Limited exception for journalists when an exclusion order is made in sexual offence proceedings

(1) s 291C of the *Criminal Procedure Act 1986* (NSW) should provide that if a court makes an exclusion order under s 291 or s 291A of the Act, a journalist may:

  (a) view or hear the proceedings, or view or hear a record of the proceedings, if:

    (i) the complainant is aged 16 years or over but under 18 years and consents to this, after receiving advice from an Australian legal practitioner about the implications of consenting, or

    (ii) the complainant is aged 18 years or over and consents to this, or

    (iii) the complainant is aged 16 years or over and the court is satisfied that the public interest in allowing the journalist to view or hear the proceedings, or view or hear a record of the proceedings significantly outweighs the complainant's wishes, but

  (b) not be present in the courtroom or other place where the evidence is given.

(2) s 30I of the *Crimes (Sentencing Procedure) Act 1999* (NSW) should provide that if a court makes an exclusion order under s 30I of the Act, a journalist may:

  (a) view or hear the part of the proceedings in which the victim impact statement is read out if:

    (i) the victim is aged 16 years or over but under 18 years and consents to this, after receiving advice from an Australian legal practitioner about the implications of consenting, or

    (ii) the victim is aged 18 years or over and consents to this, or

    (iii) the victim is aged 16 years or over and the court is satisfied that the public interest in allowing the journalist to view or hear the part of the proceedings in which the victim impact statement is read out significantly outweighs the victim's wishes, but

  (b) not be present in the courtroom or other place where the victim impact statement is read out.

(3) In s 291C of the *Criminal Procedure Act 1986* (NSW) and s 30I of the *Crimes (Sentencing Procedure) Act 1999* (NSW), "journalist" should be defined in the same way as in recommendation 3.5.

Recommendation 10.13: Uniform terminology in the requirement to make a closed court order in incest proceedings

Section 291B of the *Criminal Procedure Act 1986* (NSW) should:

(a) adopt language consistent with a requirement to make a closed court order

(b) define "closed court order" in the same way as in recommendation 3.1, and

(c) define "disclose" in the same way as in recommendation 3.2.

Recommendation 10.14: Interaction with the mechanism to lift the statutory prohibition on publishing the identity of a complainant

The *Crimes Act 1900* (NSW) should provide that consent of the person under s 578A of the Act also operates to lift any prohibition on disclosing the identity of the person arising from s 291B of the *Criminal Procedure Act 1986* (NSW).

11. Legislation relating to domestic violence proceedings

Recommendation 11.1: Uniform terminology in s 45 of the *Crimes (Domestic and Personal Violence) Act*

Section 45 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) should:

(a) adopt the term "publish" and define it in the same way as in recommendation 3.2

(b) adopt the term "information tending to identify" a person and define it in the same way as in recommendation 3.3, and

(c) define "official report of proceedings" in the same way as in recommendation 3.6.

Recommendation 11.2: The prohibition on publication should apply to both a child under 16 and a young person under 18

Section 45(1) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) should apply to information tending to identify a child or young person who is under the age of 18 years.

Recommendation 11.3: Application of the prohibition on publication to a deceased person

Section 45(1) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) should apply even if the person protected by the prohibition is deceased at the time of publication.

Recommendation 11.4: Mechanism for the court to grant leave to lift the prohibition on publication when the person is alive

Section 45 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) should provide, in relation to the statutory prohibition in s 45(1) of the Act:

(1) A court may grant leave to publish a person's identity before, during and after the proceedings.

(2) Before granting leave, a court must take into account:

  (a) the views of the person and of any other person who is protected by the prohibition and who may be identified by the publication (if these views are known or ascertainable), and

  (b) the public interest.

(3) However, a court cannot grant leave to publish the identity of a person who is aged under 16 years at the time of publication.

Recommendation 11.5: Mechanism for the court to grant leave to lift the prohibition on publication when the person is deceased

Section 45 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) should provide, in relation to the statutory prohibition in s 45(1) of the Act:

(1) A court may grant leave to publish a deceased person's identity before, during and after the proceedings.

(2) Before granting leave, a court must take into account:

  (a) what the deceased person would have wanted if they had been alive

  (b) the views of family members of the deceased person

  (c) the views of any other person who is protected by the prohibition and who may be identified by the publication (if these views are known or ascertainable), and

  (d) the public interest.

Recommendation 11.6: Where an application to lift the prohibition on publication can be heard before proceedings have commenced

Section 45 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) should provide, in relation to the statutory prohibition in s 45(1) of the Act, that before proceedings have commenced, applications to publish the identity of a person protected by the prohibition can be heard by any court in which the proceedings could be commenced.

Recommendation 11.7: Mechanism for a person to consent to lifting the prohibition on publication on publication

Section 45 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) should provide, in relation to the statutory prohibition in s 45(1) of the Act:

(1) A child aged under 16 years at the time of publication cannot consent to the publication of their identity.

(2) A person aged 16 years or over but under 18 years at the time of publication can consent to the publication of their identity after receiving advice from an Australian legal practitioner about the implications of consenting.

(3) A person aged 18 years or over at the time of publication can consent to the publication of their identity.

(4) However, a person cannot consent to the publication of their identity under recommendation 11.7(2)–(3) if:

  (a) the publication may identify:

    (i) a child who is protected by the prohibition and who is aged under 16 years, or

    (ii) any other person who is protected by the prohibition and who has not consented to the publication of their identity, or

  (b) the proceedings are ongoing.

Recommendation 11.8: Uniform terminology in the discretion to make a non-publication order under s 45(2) of the *Crimes (Domestic and Personal Violence) Act*

Section 45(2) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) should:

(a) adopt language consistent with a discretion to make a non-publication order, and

(b) define "non-publication order" in the same way as in recommendation 3.1.

Recommendation 11.9: Duration of non-publication orders under s 45(2) of the *Crimes (Domestic and Personal Violence) Act*

Section 45 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) should provide, in relation to an order made under s 45(2) of the Act:

(1) A non-publication order must specify the period for which the order operates.

(2) A court, in deciding the period for which an order is to operate, must ensure that the order operates for no longer than is reasonably necessary to achieve the purpose for which the order is made.

(3) The period for which an order operates is to be determined by reference to:

  (a) a fixed or ascertainable period, or

  (b) the occurrence of a specified future event.

(4) An order may be specified to operate indefinitely in exceptional circumstances or where it is not reasonably practicable to specify a duration.

Recommendation 11.10: Procedures for applying for and reviewing a non-publication order under s 45(2) of the *Crimes (Domestic and Personal Violence) Act*

Section 45 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) should provide, in relation to an order made under s 45(2) of the Act:

(1) A non-publication order may be made on:

  (a) the court's own initiative, or

  (b) the application of a party to the proceedings or a person that the court considers has sufficient interest.

(2) The court that made a non-publication order may vary or revoke it on:

  (a) the court's own initiative, or

  (b) the application of a party to the proceedings or a person that the court considers has sufficient interest.

Recommendation 11.11: Uniform terminology in statutory exclusion provisions in AVO proceedings involving children

(1) s 41(2) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) should provide that all people, other than those whose presence is necessary, are excluded from the proceedings or part of proceedings to which s 41 applies, unless the court hearing the proceedings otherwise directs.

(2) s 41AA(1) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) should provide that all people, other than those whose presence is necessary, are excluded from the proceedings or part of proceedings to which s 41AA applies, unless the court hearing the proceedings otherwise directs.

(3) s 58(1)–(2) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) should provide:

  (a) In application proceedings before the court, if the defendant is under the age of 18 years, all people, other than those whose presence is necessary, are excluded from the proceedings, unless the court hearing the proceedings otherwise directs.

  (b) In any other circumstances, application proceedings are to be heard in open court.

Recommendation 11.12: Requirement to make an exclusion order in all ADVO proceedings involving adults

(1) s 289U of the *Criminal Procedure Act 1986* (NSW) should apply only to domestic violence offence proceedings.

(2) A new provision, based on s 289U of the *Criminal Procedure Act 1986* (NSW), should be inserted into the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) that applies when a person in need of protection aged 18 years or over gives evidence in an apprehended domestic violence order proceeding.

Recommendation 11.13: Uniform terminology in the requirements to make exclusion orders in domestic violence proceedings and ADVO proceedings

Section 289U of the *Criminal Procedure Act 1986* (NSW) and the new provision referred to in recommendation 11.12(2) should:

(a) adopt language consistent with a requirement to make an exclusion order, excluding all people other than those whose presence is necessary for the proceedings, and

(b) provide that "exclusion order" has the same meaning and effect as it has in recommendation 3.1.

Recommendation 11.14: Discretion to make an exclusion order in all ADVO proceedings involving adults

A new provision, based on s 289UA of the *Criminal Procedure Act 1986* (NSW), should be inserted into the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) that applies in apprehended domestic violence order proceedings when a protected person is aged 18 years or over.

Recommendation 11.15: Uniform terminology in the discretions to make exclusion orders in domestic violence proceedings and ADVO proceedings

(1) s 289UA of the *Criminal Procedure Act 1986* (NSW) and the new provision referred to in recommendation 11.14 should adopt language consistent with a discretion to make an exclusion order.

(2) s 41(3) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) should adopt language consistent with a discretion to make an exclusion order excluding any person (other than a person who is directly interested in the proceedings).

(3) s 289UA of the *Criminal Procedure Act 1986* (NSW), the new provision referred to in recommendation 11.14 and s 41(3) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) should provide that "exclusion order" has the same meaning and effect as it has in recommendation 3.1.

Recommendation 11.16: Limited exceptions for journalists in domestic violence proceedings, AVO and ADVO proceedings

(1) The *Criminal Procedure Act 1986* (NSW) should provide that if a court makes an exclusion order under s 289U or s 289UA of the Act, a journalist may:

  (a) view or hear the proceedings, or view or hear a record of the proceedings, if:

    (i) the complainant is aged 16 years or over but under 18 years and consents to this, after receiving advice from an Australian legal practitioner about the implications of consenting, or

    (ii) the complainant is aged 18 years or over and consents to this, or

    (iii) the complainant is aged 16 years or over and the court is satisfied that the public interest in allowing the journalist to view or hear the proceedings, or view or hear a record of the proceedings significantly outweighs the complainant's wishes, but

  (b) not be present in the courtroom or other place where the evidence is given.

(2) The *Crimes (Domestic and Personal Violence) Act 2007* (NSW) should provide that if a court makes an exclusion order under the new provisions referred to in recommendations 11.12(2) and 11.14, a journalist may:

(a) view or hear the proceedings, or view or hear a record of the proceedings, if:

(i) the protected person is aged 16 years or over but under 18 years and consents to this, after receiving advice from an Australian legal practitioner about the implications of consenting, or

(ii) the protected person is aged 18 years or over and consents to this, or

(iii) the protected person is aged over 16 years or over and the court is satisfied that the public interest in allowing the journalist to view or hear the proceedings, or view or hear a record of the proceedings significantly outweighs the protected person's wishes, but

(b) not be present in the courtroom or other place where the evidence of the protected person is given.

(3) s 41AA and s 58(1)(a) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) should provide that despite anything else in that section, a journalist may:

(a) view or hear the proceedings, or view or hear a record of the proceedings, if:

(i) the young person consents to this on the advice of an Australian legal practitioner about the implications of consenting, or

(ii) the court is satisfied that the public interest in allowing the journalist to view or hear the proceedings, or view or hear a record of the proceedings significantly outweighs the young person's wishes, but

(b) not be present in the courtroom or other place where the evidence is given.

(4) In these provisions, "journalist" should be defined in the same way as in recommendation 3.5.

12. Other legislation containing exceptions to open justice

Recommendation 12.1: Uniform terminology in certain prohibitions on publication

Section 108(6) and s 111 of the *Crimes (Appeal and Review) Act 2001* (NSW), s 101A(8) of the *Supreme Court Act 1970* (NSW), s 89 of the *Bail Act 2013* (NSW), s 100H of the *Crimes (Sentencing Procedure) Act 1999* (NSW), s 43 of the *Crimes (Forensic Procedures) Act 2000* (NSW) and s 80 of the *Criminal Procedure Act 1986* (NSW) should, where relevant:

(a) adopt the term "publish" and define it in the same way as in recommendation 3.2

(b) define "disclose" in the same way as in recommendation 3.2, and

(c) adopt the term "information tending to identify" a person and define it in the same way as in recommendation 3.3.

Recommendation 12.2: Exception for an official report of proceedings in certain prohibitions on publication

Section 101A(8) of the *Supreme Court Act 1970* (NSW) and s 111 of the *Crimes (Appeal and Review) Act 2001* (NSW) should:

(a) include an exception for an official report of proceedings, and

(b) define "official report of proceedings" in the same way as in recommendation 3.6.

Recommendation 12.3: Exceptions to the prohibitions relating to prohibited associates

Section 89(3) of the *Bail Act 2013* (NSW) and s 100H(2) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) should provide that, for the avoidance of doubt, the prohibition does not apply to the disclosure of information to the people prescribed in each provision.

Recommendation 12.4: Mechanism for a person to consent to lifting the prohibition in proceedings following acquittals

Section 101A(8)(b) of the *Supreme Court Act 1970* (NSW) should provide that the alleged contemnor:

(a) can consent to publication of their identity during or after proceedings, but

(b) cannot consent to publication of their identity if it may identify any other person who is protected by the prohibition and who has not consented to the publication of their identity.

Recommendation 12.5: Lifting mechanisms for the prohibition in relation to forensic procedures

Section 43 of the *Crimes (Forensic Procedures) Act 2000* (NSW) should provide:

(1) In making an order authorising publication under s 43(1) of the Act, a magistrate must take into account:

  (a) the views of the suspect and of any other person who is protected by the prohibition and who may be identified by the publication (if these views are known or ascertainable), and

  (b) the public interest.

(2) A magistrate cannot make an order authorising publication under s 43(1) of the Act in relation to a person aged under 16 years at the time of publication.

(3) A suspect aged under 16 years at the time of publication cannot consent to the publication of their identity.

(4) A suspect aged 16 years or over but under 18 years at the time of publication can consent to the publication of their identity after receiving advice from an Australian legal practitioner about the implications of consenting.

(5) A suspect aged 18 years or over at the time of publication can consent to the publication of their identity.

(6) However, the suspect cannot consent to the publication of their identity under recommendation 12.5(4)–(5) if:

  (a) the publication may identify:

    (i) a child who is protected by the prohibition and who is aged under 16 years, or

    (ii) any other person who is protected by the prohibition and who has not consented to the publication of their identity, or

  (b) the proceedings under the Act are ongoing.

Recommendation 12.6: Uniform terminology in discretions to make non-publication orders under the *Conveyancers Licensing Act,* the *Property and Stock Agents Act* and the *Lie Detectors Act*

Section 107(2) of the *Conveyancers Licensing Act 2003* (NSW), s 140(2) of the *Property and Stock Agents Act 2002* (NSW) and s 6(3) of the *Lie Detectors Act 1983* (NSW) should:

(a) adopt language consistent with a discretion to make a non-publication order

(b) define “non-publication order” in the same way as in recommendation 3.1, and

(c) define “publish” in the same way as in recommendation 3.2.

Recommendation 12.7: Duration of non-publication orders under the *Conveyancers Licensing Act,* the *Property and Stock Agents Act* and the *Lie Detectors Act*

Section 107(2) of the *Conveyancers Licensing Act 2003* (NSW), s 140(2) of the *Property and Stock Agents Act 2002* (NSW) and s 6(3) of the *Lie Detectors Act 1983* (NSW) should provide:

(1) A non-publication order must specify the period for which the order operates.

(2) A court, in deciding the period for which an order is to operate, must ensure that the order operates for no longer than is reasonably necessary to achieve the purpose for which the order is made.

(3) The period for which an order operates is to be determined by reference to:

  (a) a fixed or ascertainable period, or

  (b) the occurrence of a specified future event.

(4) An order may be specified to operate indefinitely in exceptional circumstances or where it is not reasonably practicable to specify a duration.

Recommendation 12.8: Uniform terminology in the requirement to make a non-disclosure order under s 30N of the *Crimes (Sentencing Procedure) Act*

Section 30N of the *Crimes (Sentencing Procedure) Act 1999* (NSW) should:

(a) adopt language consistent with a requirement to make a non-disclosure order

(b) define "non-disclosure order" in the same way as in recommendation 3.1, and

(c) define "disclose" in the same way as in recommendation 3.2.

Recommendation 12.9: Uniform terminology in the discretion to make an exclusion order when a victim reads out a victim impact statement

Section 30K of the *Crimes (Sentencing Procedure) Act 1999* (NSW) should:

(a) adopt language consistent with a discretion to make an exclusion order, excluding all people other than those whose presence is necessary, and

(b) provide that "exclusion order" has the same meaning and effect as it has in recommendation 3.1.

Recommendation 12.10: Exception for journalists when an exclusion order is made for the reading of a victim impact statement

Section 30K of the *Crimes (Sentencing Procedure) Act 1999* (NSW) should provide that an exclusion order made under this section does not exclude a journalist unless the court is satisfied that it is in the interests of justice that they are excluded.

Recommendation 12.11: Uniform terminology in the requirements to make closed court orders in proceedings following acquittals and under the *Public Health Act*

Section 108(5) of the *Crimes (Appeal and Review) Act 2001* (NSW), s 101A(7) of the *Supreme Court Act 1970* (NSW) and s 58(3), s 59 and s 80 of the *Public Health Act 2010* (NSW) should:

(a) adopt language consistent with a requirement to make a closed court order

(b) define "closed court order" in the same way as in recommendation 3.1, and

(c) define "disclose" in the same way as in recommendation 3.2.

Recommendation 12.12: Exception to s 101A(7) of the *Supreme Court Act*

The exception allowing an Australian legal practitioner to be present at the proceedings for the purpose of reporting the case for any lawful purpose of the Council of Law Reporting for New South Wales in s 101A(7) of the *Supreme Court Act 1970* (NSW) should be repealed.

Recommendation 12.13: Interaction with the mechanism to lift the statutory prohibition in the *Supreme Court Act*

Section 101A of the *Supreme Court Act 1970* (NSW) should provide that consent of the person under s 101A(8)(b) of the Act also operates to lift any prohibition on disclosing the identity of the person arising from s 101A(7) of the Act.

Recommendation 12.14: Uniform terminology in discretions to make an exclusion or closed court order in proceedings to appoint a receiver, examinations of defaulting officers and Land and Environment Court proceedings

Section 107(1) of the *Conveyancers Licensing Act 2003* (NSW), s 140(1) of the *Property and Stock Agents Act 2002* (NSW), s 214(5)(a) of the *Co-operative Housing and Starr-Bowkett Societies Act 1998* (NSW) and s 62 of the *Land and Environment Court Act 1979* (NSW) should:

(a) provide that the court may make an exclusion order or a closed court order

(b) define “exclusion order” and “closed court order” in the same way as in recommendation 3.1, and

(c) define “disclose” in the same way as in recommendation 3.2.

13. Dealing with breaches

Recommendation 13.1: How breaches of statutory prohibitions, statutory provisions and orders may be punished

All statutory prohibitions on publication and disclosure, statutory exclusion and closed court provisions, and discretions and requirements to make non-publication, non-disclosure, exclusion and closed court orders, should provide:

(a) breach of the prohibition, provision or order constitutes an offence

(b) if conduct that constitutes an offence is also a contempt of court, it may be punished as a contempt of court or as an offence, and

(c) the offender is not liable to be punished both for contempt and an offence with respect to the same conduct.

Recommendation 13.2: The physical element of offences for breaches

All offences for breaches of statutory prohibitions on publication and disclosure, statutory exclusion and closed court provisions, and non-publication, non-disclosure, exclusion and closed court orders should provide that it is an offence to contravene the prohibition, provision or order.

Recommendation 13.3: Strict liability offences

All offences for breaches of statutory prohibitions on publication and disclosure and statutory exclusion and closed court provisions should provide that the offence is one of strict liability.

Recommendation 13.4: Offences requiring knowledge or recklessness

All offences for breach of a non-publication, non-disclosure, exclusion or closed court order should provide that a person commits an offence if the person knows of, or is reckless as to, the existence of the order.

Recommendation 13.5: Directors' liability for breaches

All offences for breaches of statutory prohibitions on publication and disclosure, statutory exclusion and closed court provisions, and non-publication, non-disclosure, exclusion and closed court orders should provide that if a corporation contravenes the offence, each person who is a director of the corporation or who is concerned in the management of the corporation is taken to have committed the same offence, unless the person satisfies the court that:

(a) the person was not in a position to influence the conduct of the corporation in relation to its contravention, or

(b) the person, if in such a position, used all due diligence to prevent the contravention.

Recommendation 13.6: The time limit to bring proceedings for offences for breaches of statutory prohibitions, statutory provisions and orders

All offences for breaches of statutory prohibitions on publication and disclosure, statutory exclusion and closed court provisions, and non-publication, non-disclosure, exclusion and closed court orders, should provide that proceedings must be commenced within two years of the date of the alleged offence.

Recommendation 13.7: Responsibility for dealing with breaches

The Department of Communities and Justice should form a working group (with an ongoing role) with Police, the Office of the Director of Public Prosecutions, Legal Aid and other relevant agencies to:

(a) improve communication and coordination between agencies responsible for handling complaints about, and investigating and prosecuting, breaches of statutory prohibitions on publication and disclosure, statutory exclusion and closed court provisions, and non-publication, non-disclosure, exclusion and closed court orders, and

(b) monitor the operation of the system.

Recommendation 13.8: A register of orders

(1) There should be an online register of all non-publication, non-disclosure and closed court orders made by a court pursuant to:

    (a) the new Act, or

    (b) a discretion to make an order under another Act or law.

(2) The new Act should provide that regulations may provide for the following:

    (a) who is to administer the register

    (b) other types of orders that must be entered on the register

    (c) exceptions to when an order must or may be entered on the register

    (d) who may access the register

    (e) conditions on access to the register (including fees and fee waiver)

    (f) how information on the register may be used, and

    (g) other features of the register.

14. Technology and related issues

Recommendation 14.1: Remote access to proceedings

(1) Where remote access is available to court or tribunal proceedings, courts and tribunals should establish clear processes for access by members of the public, journalists and researchers.

(2) Those processes should not limit a court or tribunal's ability to control or limit access by those who have remote access to proceedings where the proceedings are subject to a statutory exclusion or closed court provision or exclusion or closed court order.

(3) s 9 of the *Court Security Act 2005* (NSW) should be amended to make clear that it prohibits the recording of court or tribunal proceedings by a person who accesses the proceedings remotely.

(4) People who have remote access to court or tribunal proceedings should, as a condition of access, be required to:

  (a) acknowledge the prohibition on recording the proceedings in s 9 of the *Court Security Act 2005* (NSW), and

  (b) if they are permitted to attend proceedings from which others are excluded, declare that no other person is attending with them.

Recommendation 14.2: Journalists may record proceedings unless the court orders otherwise

Section 9 of the *Court Security Act 2005* (NSW) should be amended to provide:

(1) A journalist may use a recording device to make an audio recording of all or part of the proceedings upon having notified the court of the intention to do so, unless the presiding judicial officer otherwise orders where the needs of justice require it.

(2) The recording may only be used by a journalist to prepare an accurate report of proceedings and may not be used for any other purpose.

(3) The recording may not be disclosed or transmitted for a purpose other than preparing an accurate report of proceedings.

15. Tribunals and specialised courts

Recommendation 15.1: Uniform terminology in the *Civil and Administrative Tribunal Act* and the *Mental Health Act*

Section 4, s 49, s 64 and s 65 of the *Civil and Administrative Tribunal Act 2013* (NSW), and s 151 and s 162 of the *Mental Health Act 2007* (NSW) should, where relevant:

(a) adopt the term "publish" and define it in the same way as in recommendation 3.2

(b) define "disclose" in the same way as in recommendation 3.2

(c) adopt the term "information tending to identify" a person and define it in the same way as in recommendation 3.3

(d) define "official report of proceedings" in the same way as in recommendation 3.6

(e) provide that a non-publication order or non-disclosure order, or order to lift a statutory prohibition, may include a requirement to use a pseudonym

(f) provide that the tribunal may make an exclusion order or a closed court order in the proceedings to which the provisions currently apply, and

(g) define "exclusion order" and "closed court order" in the same way as recommendation 3.1.

Recommendation 15.2: Application of s 65 of the *Civil and Administrative Tribunal Act* to information that would connect a person to the proceedings

Section 65 of the *Civil and Administrative Tribunal Act 2013* (NSW) should apply to the publication of information tending to identify a person involved in proceedings in the Guardianship Division, or proceedings for a decision for the purposes of community welfare legislation, in a way that connects the person with the proceedings.

Recommendation 15.3: Considerations before granting leave for publication under s 65 of the *Civil and Administrative Tribunal Act*

Section 65 of the *Civil and Administrative Tribunal Act 2013* (NSW) should provide that, in deciding whether to grant leave for the publication of the identity of a person involved in proceedings, the Tribunal must take into account:

(a) the views of the person, considered in light of the person's decision-making ability

(b) the views of any other person who is protected by the prohibition and who may be identified by the publication (if these views are known or ascertainable), and

(c) any other factor that the Tribunal considers relevant.

Recommendation 15.4: Duration of non-publication and non-disclosure orders made under s 64 of the *Civil and Administrative Tribunal Act*

Section 64 of the *Civil and Administrative Tribunal Act 2013* (NSW) should provide:

(1) A non-publication or non-disclosure order must specify the period for which the order operates.

(2) The Tribunal, in deciding the period for which an order is to operate, must ensure that the order operates for no longer than is reasonably necessary to achieve the purpose for which the order is made.

(3) The period for which an order operates is to be determined by reference to:

  (a) a fixed or ascertainable period, or

  (b) the occurrence of a specified future event.

(4) An order may be specified to operate indefinitely in exceptional circumstances or where it is not reasonably practicable to specify a duration.

Recommendation 15.5: Offence and contempt provisions in the *Civil and Administrative Tribunal Act*

Section 64, s 65 and s 72 of the *Civil and Administrative Tribunal Act 2013* (NSW) should provide:

(1) A person commits an offence if the person:

  (a) contravenes the statutory prohibition in s 65 of the Act, or

  (b) contravenes an order made under s 64(1) of the Act and knows of, or is reckless as to, the existence of an order.

(2) If a corporation commits the offence of breaching the statutory prohibition in s 65 of the Act or an order made under s 64(1) of the Act, each person who is a director of the corporation or who is concerned in the management of the corporation is taken to have committed the same offence, unless the person satisfies the Tribunal that:

  (a) the person was not in a position to influence the conduct of the corporation in relation to its contravention, or

  (b) the person, if in such a position, used all due diligence to prevent the contravention.

(3) Proceedings for an offence of breaching the statutory prohibition in s 65 of the Act or an order made under s 64(1) of the Act must be commenced within two years of the date of the alleged offence.

Recommendation 15.6: Application of s 162 of the *Mental Health Act* to information that would connect a person to the proceedings

Section 162 of the *Mental Health Act 2007* (NSW) should apply to the publication of information tending to identify a person involved in proceedings before the Mental Health Review Tribunal in a way that connects the person with the proceedings.

Recommendation 15.7: Extension of s 162 of the *Mental Health Act* to related proceedings in the Supreme Court

Section 162 of the *Mental Health Act 2007* (NSW) should apply to related proceedings in the Supreme Court.

Recommendation 15.8: Considerations before granting leave for publication under s 162 of the *Mental Health Act*

Section 162 of the *Mental Health Act 2007* (NSW) should provide that, in deciding whether to grant leave for the publication of the identity of a person protected by the prohibition, the Tribunal must take into account:

(a) the views of the person, considered in light of the person's decision-making ability

(b) the views of any other person who is protected by the prohibition and who may be identified by the publication (if these views are known or ascertainable), and

(c) any other factor that the Tribunal considers relevant.

Recommendation 15.9: Duration of non-publication and non-disclosure orders made under s 151(4) of the *Mental Health Act*

Section 151(4) of the *Mental Health Act 2007* (NSW) should provide:

(1) A non-publication or non-disclosure order must specify the period for which the order operates.

(2) The Tribunal, in deciding the period for which an order is to operate, must ensure that the order operates for no longer than is reasonably necessary to achieve the purpose for which the order is made.

(3) The period for which an order operates is to be determined by reference to:

  (a) a fixed or ascertainable period, or

  (b) the occurrence of a specified future event.

(4) An order may be specified to operate indefinitely in exceptional circumstances or where it is not reasonably practicable to specify a duration.

Recommendation 15.10: Pathways for reviews, appeals and procedural rules in the *Mental Health Act*

The *Mental Health Act 2007* (NSW) should:

(a) provide pathways for reviews and appeals of non-publication and non-disclosure orders made under s 151(4) of the Act and decisions about whether to lift the statutory prohibition on publication in s 162 of the Act, and

(b) enable the Mental Health Review Tribunal to make procedural rules for applications, reviews and appeals.

Recommendation 15.11: Offence and contempt provisions in the *Mental Health Act*

Section 151 and s 161 of the *Mental Health Act 2007* (NSW) should provide:

(1) A person commits an offence if the person:

(a) contravenes the statutory prohibition in s 162 of the Act, or

(b) contravenes an order made under s 151(4) of the Act and knows of, or is reckless as to, the existence of an order.

(2) The maximum penalty for the offence of breaching an order made under s 151(4) of the Act is the same as in s 162 of the Act for breach of the statutory prohibition.

(3) If a corporation commits the offence of breaching the statutory prohibition in s 162 of the Act or an order made under s 151 of the Act, each person who is a director of the corporation or who is concerned in the management of the corporation is taken to have committed the same offence, unless the person satisfies the Tribunal that:

(a) the person was not in a position to influence the conduct of the corporation in relation to its contravention, or

(b) the person, if in such a position, used all due diligence to prevent the contravention.

(4) Proceedings for an offence of breaching the statutory prohibition on publication in s 162 of the Act or an order made under s 151 of the Act must be commenced within two years of the date of the alleged offence.

16. Education about open justice and implementation of reforms

Recommendation 16.1: Education for the courts about laws relating to open justice

(1) The Judicial Commission should provide education for judicial officers about laws relating to open justice, including any reforms resulting from this report.

(2) The Department of Communities and Justice should provide education and guidance to court staff about laws relating to open justice, including any reforms resulting from this report.

Recommendation 16.2: Education for lawyers about laws relating to open justice

The Bar Association and the Law Society should provide education to the legal profession about laws relating to open justice, including any reforms resulting from this report.

Recommendation 16.3: Education for other court participants about laws relating to open justice

(1) The Department of Communities and Justice and the Office of the Director of Public Prosecutions should provide education and guidance for court participants about existing laws relating to open justice and any reforms resulting from this report, including about the process of applying for orders and access to records on the court file for a proceeding.

(2) The following people and agencies should provide information and support to people whose identities are protected by a statutory prohibition on publication or disclosure or a non-publication or non-disclosure order, including information about the effect of these prohibitions and orders and how to report a suspected breach:

(a) in criminal proceedings: the prosecutor and the defence legal representative, and

(b) in care and protection proceedings in the Children's Court: the Department of Communities and Justice.

Recommendation 16.4: Education for the media about laws relating to open justice

The Department of Communities and Justice should provide education and guidance to the media about laws relating to open justice, including any reforms resulting from this report.

Recommendation 16.5: Education for the community about laws relating to open justice

The Department of Communities and Justice should provide information to the community about laws relating to open justice, including any reforms resulting from this report.

Recommendation 16.6: Statutory review of the new Act

The new Act should provide:

(1) The Minister is to review this Act to determine whether:

  (a) the policy objectives of the Act remain valid, and

  (b) the terms of the Act remain appropriate for achieving the objectives.

(2) The review is to be undertaken as soon as practicable after the period of five years from commencement of the new Act.

(3) A report on the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of five years.

Recommendation 16.7: Appropriate resourcing

The Government should provide appropriate resourcing, including to the courts, to enable the implementation of any reforms resulting from this report.

Appendix B
Provisions excluded from the report

1. Provisions that are unique and/or form part of uniform, national or reciprocal laws

- *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW) s 14, s 16H, s 18
- *Child Protection (Offenders Prohibition Orders) Regulation 2018* (NSW) r 9
- *Coroners Act 2009* (NSW) s 47, s 74, s 75, s 76
- *Court Security Act 2005* (NSW) s 7
- *Crimes (Criminal Organisations Control) Act 2012* (NSW) s 28K
- *Criminal Procedure Act 1986* (NSW) s 302(1)
- *Drug and Alcohol Treatment Act 2007* (NSW) s 37(4), s 41
- *Evidence (Audio and Audio Visual Links) Act 1998* (NSW) s 15
- *Evidence Act 1995* (NSW) s 126E, s 195
- *Law Enforcement (Controlled Operations) Act 1997* (NSW) s 28
- *Law Enforcement and National Security (Assumed Identities) Act 2010* (NSW) s 11(3), s 14(3), s 34
- *Surveillance Devices Act 2007* (NSW) s 17(6), s 25(6), s 33(5), s 42(5)–(6)
- *Terrorism (High Risk Offenders) Act 2017* (NSW) s 59F
- *Terrorism (Police Powers) Act 2002* (NSW) s 26P, s 27Y, s 27ZA
- *Vexatious Proceedings Act 2008* (NSW) s 17
- *Witness Protection Act 1995* (NSW) s 26, s 31E(3), s 31E(6)–(7)

2. Provisions related to the NSW Civil and Administrative Tribunal

- *Births, Deaths and Marriages Registration Act 1995* (NSW) s 31L(3)(b)

- *Commercial Agents and Private Inquiry Agents Act 2004* (NSW) s 20(2)(b)
- *Firearms Act 1996* (NSW) s 75(5)(b)
- *Health Practitioner Regulation National Law (NSW) 2009* (NSW) s 165K
- *Liquor Act 2007* (NSW) s 144(3)(b)
- *Motor Dealers and Repairers Act 2013* (NSW) s 176(3)(b)
- *Pawnbrokers and Second-hand Dealers Act 1996* (NSW) s 39(1B)(b)
- *Security Industry Act 1997* (NSW) s 29(3)(b)
- *Tattoo Parlours Act 2012* (NSW) s 27(4)(b)
- *Tow Truck Industry Act 1998* (NSW) s 45(1A)(b)
- *Weapons Prohibition Act 1998* (NSW) s 35(3)(b)

Appendix C
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 OAM (24 May 2019)
PCI11 University of Sydney Policy Reform Project (24 May 2019)
PCI12 NSW Office of the Director of Public Prosecutions (24 May 2019)
PCI13 Australia's Right to Know (28 May 2019)
PCI14 Professor Luke McNamara and Associate Professor Julia Quilter (28 May 2019)
PCI15 Office of the General Counsel, NSW Department of Communities and Justice (22 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 NSW, Mental Health Review Tribunal (31 May 2019)
PCI24 Information and Privacy Commission NSW (29 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, HIV/AIDS Legal Centre Inc (NSW) (31 May 2019)
PCI29 NSW Council for Civil Liberties (28 May 2019)
PCI30 Women's Domestic Violence Court Advocacy Service NSW Inc (31 May 2019)
PCI31 Law Society of NSW (31 May 2019)
PCI32 Victims of Crime Assistance League Inc NSW (31 May 2019)
PCI33 NSW, Public Defenders (3 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 Local Court of NSW (24 June 2019)
PCI41 NSW Bar Association (20 June 2019)
PCI42 Domestic Violence NSW (27 June 2019)
PCI43 NSW, Workers Compensation Commission (22 February 2019)
PCI44 University of Sydney, Law Reform Research Project (17 July 2019)
PCI45 Australian Federal Police (14 June 2019)

Appendix D
Preliminary consultations

NSW Department of Communities and Justice (PCIC01)

6 October 2020

Angus Huntsdale, Director of Digital, Media and Events

Commonwealth Director of Public Prosecutions (PCIC02)

8 October 2020

Caroline Steel, Witness Assistance Manager

NSW Office of the Director of Public Prosecutions (PCIC03)

9 October 2020

Anna Cooper, Media Liaison and Communications Advisor

Women's Legal Service NSW (PCIC04)

20 October 2020

Liz Snell, Law Reform and Policy Coordinator

Federal Court of Australia (PCIC05)

22 October 2020

Scott Tredwell, Acting Deputy Principal Registrar

Sydney Morning Herald (PCIC06)

26 October 2020

Georgina Mitchell, Sydney Morning Herald

Sydney Morning Herald (PCIC07)

26 October 2020

Michaela Whitbourn, Sydney Morning Herald

Children's Court of NSW (PCIC08)

27 October 2020

Rosemary Davidson, Executive Officer

9News (PCIC09)

29 October 2020

Kelly Fedor, 9News

NSW, Mental Health Review Tribunal (PCIC10)

29 October 2020

Anina Johnson, Deputy President
Alisa Kelley, Registrar

Supreme Court of NSW (PCIC11)

29 October 2020

Stephanie Chia, Deputy Registrar

Local Court of NSW (PCIC12)

30 October 2020

Jacinta Haywood, Local Court of NSW, Executive Officer
Brooke Delbridge, Local Court of NSW, Policy Officer
Louise Blazejowska, Courts, Tribunals and Service Delivery, NSW Department of Communities and Justice, Director
Alison Passé-de Silva, Courts, Tribunals and Service Delivery, NSW Department of Communities and Justice, Senior Project Officer

NSW Civil and Administrative Tribunal (PCIC13)

6 November 2020

The Honourable Justice Lea Armstrong, President
Cathy Szczygielski, Executive Director and Principal Registrar

NSW Office of the Director of Public Prosecutions (PCIC14)

10 November 2020

Leeanne Kelly, Witness Assistance Service Manager

Office of the General Counsel, NSW Department of Communities and Justice (PCIC15)

16 November 2020

Bernhard Ripperger, Director, Community Protection
Vicki Hughes, Senior Solicitor

Confidential (PCIC16)

17 November 2020

Child Protection Law Unit, NSW Department of Communities and Justice (PCIC17)

27 November 2020

Kathy Williamson, Acting Director

Appendix E
Submissions

CI01 Dr Jason Chin (20 January 2021)
CI02 NSW Council for Civil Liberties (5 February 2021)
CI03 Chris and Mandy Burgess (16 February 2021)
CI04 Medical Insurance Group Australia (MIGA) (17 February 2021)
CI05 NSW, Office of the Advocate for Children and Young People (16 February 2021)
CI06 NSW, Mental Health Review Tribunal (17 February 2021)
CI07 Youth Justice NSW, NSW Department of Communities and Justice (18 February 2021)
CI08 Rape and Domestic Violence Services Australia (18 February 2021)
CI09 Information and Privacy Commission NSW (18 February 2021)
CI10 knowmore (18 February 2021)
CI11 Tenants' Union of New South Wales (19 February 2021)
CI12 Robert Wade (19 February 2021)
CI13 Associate Professor Jane Johnston, Professor Patrick Keyzer and Tess Johnston (19 February 2021)
CI14 Public Interest Advocacy Centre (19 February 2021)
CI15 Justice Action (19 February 2021)
CI16 Feminist Legal Clinic Inc (19 February 2021)
CI17 NSW Office of the Director of Public Prosecutions (23 February 2021)
CI18 Dr Linda Steele (24 February 2021)
CI19 Law Society of NSW (4 March 2021)
CI20 Australasian Legal Information Institute (5 March 2021)
CI21 Commonwealth Director of Public Prosecutions (5 March 2021)
CI22 Aboriginal Legal Service (NSW/ACT) Ltd (5 March 2021)
CI23 UTS Jumbunna Institute for Indigenous Education and Research, Aboriginal Legal Service (NSW/ACT) and National Justice Project (5 March 2021)
CI24 Legal Aid NSW (8 March 2021)
CI25 Local Court of NSW (8 March 2021)
CI26 Supreme Court of NSW (8 March 2021)
CI27 Australia's Right to Know (8, 15, 17 and 23 March 2021)
CI28 Children's Court of NSW (9 March 2021)
CI29 Banki Haddock Fiora (9 March 2021)
CI30 Professor Judy Cashmore AO, Associate Professor Amy Conley White, Ms Meredith McLaine and Professor Rita Shackel (15 March 2021)
CI31 Confidential (22, 23 March 2021)
CI32 Fighters Against Child Abuse Australia (1 April 2021)
CI33 NSW, Mental Health Review Tribunal (supplementary, 28 April 2021)
CI34 NSW Council for Civil Liberties (8 July 2021)
CI35 Michael Douglas (12 July 2021)
CI36 NSW Civil and Administrative Tribunal (23 July 2021)
CI37 Dr Linda Steele (25 July 2021)

CI38 NSW Police Force (28 July 2021)
CI39 Youth Justice NSW, NSW Department of Communities and Justice (30 July 2021)
CI40 Professor Tania Sourdin (30 July 2021)
CI41 Michael Taylor (2 August 2021)
CI42 Medical Insurance Group Australia (MIGA) (2 August 2021)
CI43 knowmore (2 August 2021)
CI44 Dr Monika Zalnieriute (2 August 2021)
CI45 Mental Health Carers NSW Inc (3 August 2021)
CI46 Professor Michael Legg, Mr Anthony Song, Professor Lyria Bennett Moses and Professor Richard Buckland (2 August 2021)
CI47 NSW, Mental Health Review Tribunal (3 August 2021)
CI48 NSW Office of the Director of Public Prosecutions (4 August 2021)
CI49 Aboriginal Legal Service (NSW/ACT) Ltd (4 August 2021)
CI50 Rule of Law Education Centre (9 August 2021)
CI51 Confidential (9 August 2021)
CI52 NSW Society of Labor Lawyers (9 August 2021)
CI53 Courts, Tribunals and Service Delivery, NSW Department of Communities and Justice (10 August 2021)
CI54 Law Society of NSW (6 August 2021)
CI55 Supreme Court of NSW (10 August 2021)
CI56 NSW Bar Association (12 August 2021)
CI57 Legal Aid NSW (16 August 2021)
CI58 Local Court of NSW (17 August 2021)
CI59 Australia's Right to Know (17 August 2021)
CI60 Confidential (23 August 2021)
CI61 Rape and Domestic Violence Services Australia (2 September 2021)
CI62 Children's Court of NSW (2 September 2021)

Appendix F
Consultations

Confidential (CIC01)

22 January 2021

Roundtable 1 (CIC02)

8 March 2021

Larina Alick, Australia's Right to Know
Dr Rebecca Ananian-Welsh, University of Queensland
Associate Professor Jason Bosland, University of Melbourne
Michael McHugh SC, NSW Bar Association
Gina McWilliams, Australia's Right to Know
Associate Professor Jane Johnston, University of Queensland
Johanna Pheils, NSW Office of the Director of Public Prosecutions
Nicholas Pullen, HBL Ebsworth Lawyers

Roundtable 2 (CIC03)

10 March 2021

Jake Blundell, Banki Haddock Fiora
Todd Davis, Legal Aid NSW
Michelle Falstein, NSW Council for Civil Liberties
Kelly Fedor, 9News
Sylvia Fernandez, Law Society of NSW
Lisa Lewis, Crown Solicitor's Office
Grant McAvaney, Australian Broadcasting Corporation
Belinda Rigg SC, NSW Public Defenders
Michaela Whitbourn, Sydney Morning Herald

Gina McWilliams, Newscorp (CIC04)

11 March 2021

Gina McWilliams, Senior Legal Counsel

Roundtable 3 (CIC05)

15 March 2021

Lucy Belling, NSW, Office of the Advocate for Children and Young People
Professor Annie Cossins, University of New South Wales
Sarah Crellin, Aboriginal Legal Service (NSW/ACT) Ltd
Rosemary Davidson, Children's Court of NSW
Renata Field, Domestic Violence NSW

Hayley Foster, Women's Safety NSW
Natalie Gouda, Rape and Domestic Violence Services Australia
Lauren Hancock, knowmore
Leonie Hazelton, People with Disability Australia
Stephanie O'Leary, Legal Aid NSW
Vikas Parwani, HIV/AIDS Legal Centre
Louise Pounder, Legal Aid NSW
Frances Quan Farrant, People with Disability Australia
Liz Snell, Women's Legal Service NSW
Kerrie Thompson, Victims of Crime Assistance League Inc NSW
Adam Washbourne, Fighters Against Child Abuse Australia
Anne Whitehead, NSW Office of the Director of Public Prosecutions

Dr Rebecca Ananian-Welsh and Professor Peter Greste (CIC06)

22 March 2021

Dr Rebecca Ananian-Welsh, University of Queensland
Professor Peter Greste, University of Queensland

Women's Legal Service NSW (CIC07)

23 March 2021

Liz Snell, Law Reform and Policy Coordinator

Roundtable 4 (CIC08)

23 March 2021

Professor Katherine Biber, University of Technology Sydney
Janet Fife-Yeomans, Daily Telegraph
Associate Professor Jane Johnston, University of Queensland
Gina McWilliams, Australia's Right to Know
Georgina Mitchell, Sydney Morning Herald
Ananya Nandakumar, Information and Privacy Commission NSW
Associate Professor Julia Quilter, University of Wollongong
Professor Anne Wallace, La Trobe University
Michaela Whitbourn, Sydney Morning Herald

Roundtable 5 (CIC09)

29 March 2021

Sunita Bose, Digital Industry Group Inc (DIGI)
Assistant Commissioner Scott Cook, NSW Police Force
Natalie Marsic, NSW Police Force
Professor Mark Pearson, Griffith University
Dianne Perry, NSW Office of the Director of Public Prosecutions
Marlia Saunders, Australia's Right to Know

NSW, Mental Health Review Tribunal (CIC10)

31 March 2021

Anina Johnson, Deputy President
Alisa Kelley, Registrar

Children's Court of NSW (CIC11)

12 April 2021

His Honour Judge Peter Johnstone, President
James Hogan, Registrar
Rosemary Davidson, Executive Officer
Alana McKinnon, Associate

Local Court of NSW (CIC12)

12 April 2021

His Honour Judge Graeme Henson AM, Chief Magistrate
Deputy Chief Magistrate Jane Mottley AM
Louise Blazejowska, Courts, Tribunals and Service Delivery, NSW Department of Communities and Justice
Brooke Delbridge, Policy Officer, Chief Magistrate's Office
Alison Passé-de Silva, Courts, Tribunals and Service Delivery, NSW Department of Communities and Justice

District Court of NSW (CIC13)

14 April 2021

The Honourable Justice Derek Price AO, Chief Judge

Supreme Court of NSW (CIC14)

14 April 2021

The Honourable Thomas Bathurst AC QC, Chief Justice
Chris D'Aeth, Executive Director and Principal Registrar

NCAT, NSW Civil and Administrative Tribunal (CIC15)

16 April 2021

The Honourable Justice Lea Armstrong, President
Her Honour Judge Susanne Cole, Deputy President and Division Head of the Administrative and Equal Opportunity Division and Occupational Division
Cathy Szczygielski, Executive Director and Principal Registrar

Reporting Services Branch, Courts, Tribunals and Service Delivery, NSW Department of Communities and Justice (CIC16)

27 April 2021

Melinda Beck, Centre Supervisor, Client Services
Gary Head, Senior Manager, Reporting Services
Charlotte Moa, Manager, Training and Quality Assurance

Strategy, Reform and Support, Courts, Tribunals and Service Delivery, NSW Department of Communities and Justice (CIC17)

29 April 2021

Paula James, Director, Support Services

Coroners Court of NSW (CIC18)

29 April 2021

Teresa O'Sullivan, State Coroner
Derek Lee, Deputy State Coroner
Elaine Truscott, Deputy State Coroner
Ann Lambino, Registrar
Don McLennan, Executive Officer

Technology Operations, Enterprise Audio Visual Technology, NSW Department of Communities and Justice (CIC19)

30 April 2021

Peter Xenos, Manager, Enterprise Audio Visual Technology
Eden Vella, A/Team Leader, Enterprise Audio Visual Technology
Omar Habbouche, Manager, Digital Records and Video Monitoring
Dan Hampton, IDS Frontline Divisional Services
Ashley Loveridge, Senior Systems Administrator

Office of the Sherriff, NSW Department of Communities and Justice (CIC20)

3 May 2021

Sheriff of NSW Tracey Hall PSM
A/Chief Superintendent Daniel Gordon, Commander, Operational Capability and Performance
Assistant Sheriff Scott Mayer, Commander, Security Intelligence and Risk
Jackie Hanna, Manager Jury Services

Rule of Law Education Centre (CIC21)

16 August 2021

Sally Layson, General Manager
Malcolm Stewart, Senior Vice-President
Chris Merritt, Vice-President

Supreme Court of NSW (CIC22)

29 September 2021

The Honourable Thomas Bathurst AC QC, Chief Justice
The Honourable Justice Andrew Bell, President of the Court of Appeal
The Honourable Justice Robert Beech-Jones, Chief Judge at Common Law
The Honourable Justice Julie Ward, Chief Judge in Equity
Chris D'Aeth, Executive Director and Principal Registrar

Local Court of NSW (CIC23)

6 October 2021

His Honour Judge Peter Johnstone, Chief Magistrate
His Honour Magistrate Michael Allen, Deputy Chief Magistrate
Brooke Delbridge, Policy Officer
Alana McKinnon, Associate to the Chief Magistrate
Louise Blazejowska, Courts, Tribunals and Service Delivery, NSW Department of Communities and Justice
Alison Passé-de Silva, Policy Officer

Courts, Tribunals and Service Delivery, NSW Department of Communities and Justice (CIC24)

22 October 2021

Children's Court of NSW (CIC25)

25 October 2021

Her Honour Magistrate Ellen Skinner, Acting President

NSW, Mental Health Review Tribunal (CIC26)

28 October 2021

Anina Johnson, Deputy President

Confidential (CIC27)

28 October 2021

Land and Environment Court of NSW (CIC28)

29 October 2021

The Honourable Justice Brian Preston SC, Chief Judge

Land and Environment Court of NSW (CIC29)

29 October 2021

The Honourable Justice Brian Preston SC, Chief Judge

NSW Civil and Administrative Tribunal (CIC30)

2 November 2021

The Honourable Justice Lea Armstrong, President

Drug Court of NSW (CIC31)

4 November 2021

Her Honour Judge Jane Mottley AM, Senior Judge

Supreme Court of NSW (CIC32)

4 November 2021

The Honourable Thomas Bathurst AC QC, Chief Justice

Local Court of NSW (CIC33)

12 November 2021

Appendix G
Classification of provisions in subject-specific legislation

1. Non-publication provisions

1.1 Statutory prohibitions on publication

- *Adoption Act 2000* (NSW) s 180
- *Bail Act 2013* (NSW) s 89
- *Children (Criminal Proceedings) Act 1987* (NSW) s 15A
- *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 105
- *Civil and Administrative Tribunal Act 2013* (NSW) s 65
- *Crimes Act 1900* (NSW) s 578A
- *Crimes (Appeal and Review) Act 2001* (NSW) s 108(6)
- *Crimes (Appeal and Review) Act 2001* (NSW) s 111
- *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 45(1)
- *Crimes (Forensic Procedures) Act 2000* (NSW) s 43
- *Crimes (Sentencing Procedure) Act 1999* (NSW) s 100H
- *Criminal Procedure Act 1986* (NSW) s 80
- *Mental Health Act 2007* (NSW) s 162
- *Status of Children Act 1996* (NSW) s 25
- *Supreme Court Act 1970* (NSW) s 101A(8)
- *Surrogacy Act 2010* (NSW) s 52
- *Young Offenders Act 1997* (NSW) s 65

1.2 Requirements to make a non-publication order

No provisions

1.3 Discretions to make a non-publication order

- *Adoption Act 2000* (NSW) s 186(2)
- *Civil and Administrative Tribunal Act 2013* (NSW) s 64(1)(b)
- *Civil and Administrative Tribunal Act 2013* (NSW) s 64(1)(c)
- *Conveyancers Licensing Act 2003* (NSW) s 107(2)
- *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 45(2)
- *Criminal Procedure Act 1986* (NSW) s 294D(4)
- *Lie Detectors Act 1983* (NSW) s 6(3)
- *Mental Health Act 2007* (NSW) s 151(4)(b)
- *Mental Health Act 2007* (NSW) s 151(4)(c)
- *Minors (Property and Contracts) Act 1970* (NSW) s 43(5)
- *Property and Stock Agents Act 2002* (NSW) s 140(2)

2. Non-disclosure provisions

2.1 Statutory prohibitions on disclosure

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

2.2 Requirements to make a non-disclosure order

- *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30N

2.3 Discretions to make a non-disclosure order

- *Civil and Administrative Tribunal Act 2013* (NSW) s 64(1)(a)
- *Civil and Administrative Tribunal Act 2013* (NSW) s 64(1)(d)
- *Mental Health Act 2007* (NSW) s 151(4)(d)

3. Exclusion provisions

3.1 Statutory exclusion provisions

- *Children (Criminal Proceedings) Act 1987* (NSW) s 10(1)

- *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 104B
- *Crimes (Domestic and Personal Violence Act) 2007* (NSW) s 41(2)
- *Crimes (Domestic and Personal Violence Act) 2007* (NSW) s 41AA(1)
- *Crimes (Domestic and Personal Violence Act) 2007* (NSW) s 58(1)(a)

3.2 Requirements to make an exclusion order

- *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30I
- *Criminal Procedure Act 1986* (NSW) s 289U
- *Criminal Procedure Act 1986* (NSW) s 291

3.3 Discretions to make an exclusion order

- *Co-operative Housing and Starr-Bowkett Societies Act 1998* (NSW) s 214(5)(a)[1]
- *Children (Criminal Proceedings) Act 1987* (NSW) s 10(2)
- *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 104(1)
- *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 104(4)
- *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 104A(1)
- *Civil and Administrative Tribunal Act 2013* (NSW) s 49(2)[2]
- *Conveyancers Licensing Act 2003* (NSW) s 107(1)[3]
- *Crimes (Domestic and Personal Violence Act) 2007* (NSW) s 41(3)
- *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30K
- *Criminal Procedure Act 1986* (NSW) s 289UA
- *Criminal Procedure Act 1986* (NSW) s 291A
- *Land and Environment Court Act 1979* (NSW) s 62[4]
- *Mental Health Act 2007* (NSW) s 151(4)(a)[5]

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1. Note we classify this provision as a discretion to make an exclusion *or* closed court order.
2. Note we classify this provision as a discretion to make an exclusion *or* closed court order
3. Note we classify this provision as a discretion to make an exclusion *or* closed court order
4. Note we classify this provision as a discretion to make an exclusion *or* closed court order

- *Property and Stock Agents Act 2002* (NSW) s 140(1)[6]

4. Closed court provisions

4.1 Statutory closed court provisions

No provisions

4.2 Requirements to make a closed court order

- *Adoption Act 2000* (NSW) s 119(1)
- *Crimes (Appeal and Review) Act 2001* (NSW) s 108(5)
- *Criminal Procedure Act 1986* (NSW) s 291B
- *Guardianship of Infants Act 1916* (NSW) s 21
- *Public Health Act 2010* (NSW) s 58(3)
- *Public Health Act 2010* (NSW) s 59
- *Public Health Act 2010* (NSW) s 80
- *Status of Children Act 1996* (NSW) s 24(1)
- *Supreme Court Act 1970* (NSW) s 101A(7)
- *Surrogacy Act 2010* (NSW) s 47

4.3 Discretions to make a closed court order

- *Civil and Administrative Tribunal Act 2013* (NSW) s 49(2)[7]
- *Co-operative Housing and Starr-Bowkett Societies Act 1998* (NSW) s 214(5)(a)[8]
- *Conveyancers Licensing Act 2003* (NSW) s 107(1)[9]
- *Land and Environment Court Act 1979* (NSW) s 62[10]

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5. Note we classify this provision as a discretion to make an exclusion *or* closed court order
6. Note we classify this provision as a discretion to make an exclusion *or* closed court order
7. Note we classify this provision as a discretion to make an exclusion *or* closed court order
8. Note we classify this provision as a discretion to make an exclusion *or* closed court order
9. Note we classify this provision as a discretion to make an exclusion *or* closed court order
10. Note we classify this provision as a discretion to make an exclusion *or* closed court order

- *Mental Health Act 2007* (NSW) s 151(4)(a)[11]
- *Property and Stock Agents Act 2002* (NSW) s 140(1)[12]

11. Note we classify this provision as a discretion to make an exclusion *or* closed court order
12. Note we classify this provision as a discretion to make an exclusion *or* closed court order

Appendix H

Statute annotations (recommendations)

Adoption Act 2000 (NSW)
s 119(1) ..... R9.24,R9.25(1)
s 180 ..... R9.8(1) - R9.8(2),R9.9,R9.10(2),R9.11(2),R9.13,R9.25(1)
s 180A ..... R9.10(2),R9.11(2)
s 186(2) R9.14
Bail Act 2013 (NSW)
s 89 ..... R12.1
s 89(3) R12.3
Children (Criminal Proceedings) Act 1987 (NSW)
pt 2 div 3A ..... R9.1(1)
s 10 ..... R9.22
s 10(1) R9.19
s 10(2) ..... R9.20(1),R9.20(5),R9.21
s 10(3) R9.23
s 15A ..... R9.2-R9.4,R9.5(2),R9.6 - R9.7
s 15B ..... R9.1(2)
s 15D ..... R9.4,R9.5(2),R9.6,R9.7
s 15E ..... R9.5(1)
Children and Young Persons (Care and Protection) Act 1998 (NSW)
s 29(1)(f) ..... R9.15 - R9.18
s 104 ..... R9.20(5)
s 104(1) ..... R9.20(2)
s 104(4) ..... R9.20(3)
s 104A ..... R9.20(4)-(5)
s 104C R9.19
s 105 ..... R9.8(1)-(2),R9.9,R9.10(1),R9.11(1),R9.12,R9.13
Civil and Administrative Tribunal Act 2013 (NSW)
s 4 R15.1
s 49 ..... R15.1
s 64 ..... R15.1,R15.4 - R15.5
s 65 ..... R15.1 - R15.3,R15.5
s 72 ..... R15.5
Conveyancers Licensing Act 2003 (NSW)
s 107(1) R12.14
s 107(2) ..... R12.6 - R12.7
Co-operative Housing and Starr-Bowkett Societies Act 1998 (NSW)
s 214(5)(a) R12.14
Court Information Act 2010 (NSW) ..... R4.1(2)
Court Security Act 2005 (NSW)
s 9 ..... R14.1(3),R14.2

Court Suppression and Non-publication Orders Act 2010 (NSW) .....R4.1(2)
Crimes (Appeal and Review) Act 2001 (NSW)
s 108(5) R12.11
s 108(6) R12.1
s 111..... R12.1 - R12.2
Crimes (Domestic and Personal Violence) Act 2007 (NSW)
s 41(2) .....R11.11(1)
s 41(3) ..... R11.15(2)-(3)
s 41AA ..... R11.11(2),R11.16(3)
s 45..... R11.1,R11.4 - R11.7,R11.9 - R11.10
s 45(1) ..... R11.2 - R11.7
s 45(2) ..... R11.8 - R11.10
s 58(1)–(2) .....R11.11(3)
s 58(1)(a) .....R11.16(3)
Crimes (Forensic Procedures) Act 2000 (NSW)
s 43.....R12.1,R12.5
Crimes (Sentencing Procedure) Act 1999 (NSW)
s 30I.....R10.10,R10.12(2)-(3)
s 30K ..... R12.9 - R12.10
s 30N R12.8
s 100H R12.1
s 100H(2).....R12.3
Crimes Act 1900 (NSW)
s 578A ..... R10.1 - R10.8,R10.14
Criminal Procedure Act 1986 (NSW)
s 80.....R12.1
s 149B R3.4
s 247S R3.4
s 280.....R3.4
s 280A R3.4
s 289U .....R11.12 - R11.13,R11.16(1)
s 289UA.....R11.15(1)-(3),R11.16(1)
s 291..... R10.10,R.10.12(1)
s 291A ..... R10.11,R10.12(1)
s 291B ..... R10.13 - R10.14
s 291C ..... R10.12(1),R10.12(3)
s 294D(4).....R10.9
s 314.....R4.1(2)
Guardianship of Infants Act 1916 (NSW)
s 21.....R9.24
Land and Environment Court Act 1979 (NSW)
s 62.....R12.14
Lie Detectors Act 1983 (NSW)
s 6(3) ..... R12.6 - R12.7
Mental Health Act 2007 (NSW)
s 151..... R15.1,R15.9 - R15.11

s 161 ..... R15.11
s 162 ..... R15.1,R15.6 - R15.8,R15.10
Minors (Property and Contracts) Act 1970 (NSW)
s 43(5) R9.14
Property and Stock Agents Act 2002 (NSW)
s 140(1) R12.14
s 140(2) ..... R12.6 - R12.7
Public Health Act 2010 (NSW)
s 58(3) R12.11
s 59 ..... R12.11
s 80 ..... R12.11
Status of Children Act 1996 (NSW)
s 24(1) ..... R9.24,R9.25(3)
s 25 ..... R9.8(1),R9.8(3),R9.9,R9.10(2),R9.11(2),R9.13,R9.25(3)
Supreme Court Act 1970 (NSW)
s 101A R12.13
s 101A(7) ..... R12.11 - R12.13
s 101A(8) ..... R12.1 - R12.2
s 101A(8)(b) R12.4,R12.13
Surrogacy Act 2010 (NSW)
s 47 ..... R9.24,R9.25(2)
s 52 ..... R9.8(1),R9.8(3),R9.9,R9.10(2),R9.11(2),R9.13,R9.25(2)
Young Offenders Act 1997 (NSW)
s 65 ..... R9.8(1)-(2),R9.9,R9.10(1),R9.11(1),R9.12,R9.13

Appendix I

Laws in other jurisdictions and international law relating to open justice

Laws in other Australian jurisdictions **555**

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I.1 As in NSW, the Commonwealth of Australia, other states and territories in Australia and some overseas jurisdictions have a range of subject-specific statutory provisions governing exceptions to open justice. Some jurisdictions also have legislation conferring general powers on courts to make an exception to open justice.

I.2 In addition, other jurisdictions have regimes governing access to records or other information held by courts. In several jurisdictions, the rules for accessing court records are different for criminal and civil matters.

I.3 International law recognises that the determination of criminal and civil proceedings should be by public hearing and allows exclusion of the media and the public in certain cases. It also recognises that children involved in court proceedings are entitled to special protections.

Laws in other Australian jurisdictions

Commonwealth

General powers to make orders

I.4 Like NSW, the Commonwealth has legislation governing non-publication and non-disclosure orders based on the model provisions developed by the Standing Committee of Attorneys-General.[1] In contrast to NSW, however, these provisions are enacted in a part of each federal court's respective Act.[2] Other than contextual changes to the preliminary sections of each part to account for differences between courts,[3] each part is identical.

I.5 The Commonwealth provisions are similar to the *Court Suppression and Non-publication Orders Act 2010* (NSW) (*CSNPO Act*). However, the Commonwealth provisions differ from the *CSNPO* Act in five areas:

- In addition to identifying information, and evidence or information about evidence, the Commonwealth provisions allow the suppression of information obtained during discovery, produced under subpoena, or lodged or filed in the court.[4]
- Unlike in the *CSNPO Act*, there is no catch-all ground allowing the court to make a suppression order where 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".[5]
- In the *CSNPO Act*, an order can be made on the ground of avoiding causing undue distress or embarrassment to a defendant in sexual offence proceedings only in "exceptional circumstances".[6] The Commonwealth provisions contain no such restriction.

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1. Australia, Standing Committee of Attorneys-General, Court Suppression and Non-publication Orders Bill 2010, Draft Model Bill (2010); NSW, *Parliamentary Debates*, Legislative Assembly, Agreement in Principle Speech, 29 October 2010, 27196; Australia, *Parliamentary Debates*, House of Representatives, Second Reading Speech, 23 November 2011, 13553–13554.
2. *Judiciary Act 1903* (Cth) pt XAA; *Federal Court of Australia Act 1976* (Cth) pt VAA; *Family Law Act 1975* (Cth) pt XIA; *Federal Circuit and Family Court of Australia Act 2021* (Cth) ch 4 pt 7.
3. *Judiciary Act 1903* (Cth) s 77RB–77RC; *Federal Court of Australia Act 1976* (Cth) s 37AB–37AD; *Family Law Act 1975* (Cth) s 102PA–102PC; *Federal Circuit and Family Court of Australia Act 2021* (Cth) s 226–228.
4. See, eg, *Judiciary Act 1903* (Cth) s 77RE(1)(b)(ii)–(iv).
5. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 8(1)(e).
6. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 8(3).

- The definition of "news publisher" in the Commonwealth legislation is possibly broader than its equivalent in NSW, as it encompasses "a person" rather than "a commercial enterprise".[7]

- There is no specific review mechanism in the Commonwealth provisions.[8]

Enforcement of orders

I.6 As in NSW, it is an offence to breach a suppression or non-publication order. The offences in both jurisdictions are largely identical, in that:

- breach of an order can be punished as a statutory offence or contempt of court,[9] and

- the offender must be reckless as to whether their conduct constitutes a breach of an order.[10]

Other legislation governing exceptions to open justice

I.7 Like the states and territories, the Commonwealth has a variety of subject-specific legislation which provides for exceptions to open justice.[11]

Regimes for accessing court information

I.8 Any person can have electronic access to a document issued or filed in the High Court, upon payment of a fee. There are some exceptions, including in relation to:

- affidavits and exhibits to affidavits that have not been received in evidence in court, and

- documents containing information that would disclose the identity of a person, where such disclosure is prohibited.[12]

I.9 In the Federal Court, non-parties can inspect "unrestricted" documents including applications, pleadings, judgments and orders, reasons for judgment and transcripts of hearings in open court. This is subject to any order or direction of the court, and certain exceptions regarding confidentiality and restriction from publication.[13]

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7. *Judiciary Act 1903* (Cth) s 77RA definition of "news publisher"; *Court Suppression and Non-publication Orders Act 2010* (NSW) s 3 definition of "news media organisation".
8. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 13.
9. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 16(2)–(4); See, eg, *Judiciary Act 1903* (Cth) s 77RK(2)–(4).
10. *Court Suppression and Non-publication Orders Act 2010* (NSW) s 16(1); see, eg, *Judiciary Act 1903* (Cth) s 77RK(1)(b); *Criminal Code* (Cth) s 5.6(2).
11. See, eg, *Crimes Act 1914* (Cth) s 15MK, s 15YP, s 15YR; *Witness Protection Act 1994* (Cth) s 28.
12. *High Court Rules 2004* (NSW) r 4.07.4.
13. *Federal Court Rules 2011* (Cth) r 2.32(2)–(3); Federal Court of Australia, *Access to Documents and Transcripts Practice Note (GPN-ACCS)*, 25 October 2016 [4.5].

I.10 Any document in a proceeding in the Federal Court that falls outside the categories of "unrestricted" documents is essentially a "restricted" document.[14] Non-parties must have leave of the court to inspect such documents.[15]

I.11 On making an access request, the applicant must pay the fee for inspecting the documents, and any applicable fees for copies. Fees for the request, production and copying of court file documents are set out in regulations.[16]

I.12 In the Federal Circuit and Family Court, a person with a "proper interest" in a case, or in information obtainable from the court record in the case, can have access with the court's permission. A person researching the court record relating to a case can also have access with the court's permission, but without the need to show a "proper interest".[17]

I.13 A person can access a "court document" (which includes a document filed in case, but does not include correspondence or a transcript) and, with permission of the court, "any other part of the court record".[18]

Victoria

I.14 The principal legislation in Victoria that governs exceptions to open justice is the *Open Courts Act 2013* (Vic) (*Open Courts Act*). While the inherent jurisdiction of the Supreme Court is preserved, the Act replaces common law and implied powers to make orders prohibiting or restricting publication.[19]

I.15 The *Open Courts Act* contains provisions for both suppression orders (which are divided into "proceeding suppression orders" and "broad suppression orders") and closed court orders. The difference between "proceeding" and "broad" suppression orders is the source of the information being suppressed:

- "proceeding suppression orders" prohibit or restrict the disclosure of reports of proceedings or information derived from a proceeding,[20] and
- "broad suppression orders" cover any information not covered by proceeding suppression orders.[21]

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14. Federal Court of Australia, *Access to Documents and Transcripts Practice Note (GPN-ACCS)*, 25 October 2016 [4.6].
15. *Federal Court Rules 2011* (Cth) r 2.32(4).
16. *Federal Court and Federal Circuit and Family Court Regulations 2012* (Cth) sch 1 item 123.
17. *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* (Cth) r 15.13(1)(d)–(e).
18. *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* (Cth) r 15.13(3), r 15.13(6) definition of "court document".
19. *Open Courts Act 2013* (Vic) s 5.
20. *Open Courts Act 2013* (Vic) s 17.
21. *Open Courts Act 2013* (Vic) s 24.

I.16 Practically, "information not covered by proceeding suppression orders" means information deriving from a source other than the proceedings. For example, information about evidence given by a complainant during proceedings could be suppressed under a proceeding suppression order, while newspaper articles from before the proceedings revealing an image of the accused could be suppressed under a broad suppression order.[22] The Vincent review of the *Open Courts Act* recommended removing the distinction between "proceeding suppression orders" and "broad suppression orders" on the grounds that it is "unnecessary".[23]

I.17 When making either type of suppression order, Victorian courts and tribunals must have regard to the "primacy of the principle of open justice and the free communication and disclosure of information". The general test for making any suppression order is whether:

> 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.[24]

Proceeding suppression orders

I.18 To make a proceeding suppression order, there are further grounds of which courts or tribunals (other than the Coroners Court) must be satisfied.[25] Specifically, the order must be 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
- 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
- avoid causing undue distress or embarrassment to a child who is a witness in any criminal proceeding, or
- in the case of the Victorian Civil and Administrative Tribunal:

22. F Vincent, *Open Courts Act Review* (2017) [138].
23. F Vincent, *Open Courts Act Review* (2017) [479]–[480], rec 10.
24. *Open Courts Act 2013* (Vic) s 4.
25. *Open Courts Act 2013* (Vic) s 18(1).

- avoid the publication of confidential information or information the subject of a certificate under s 53 or s 54 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic), or
- for any other reason in the interests of justice.[26]

I.19 The Coroners Court may make orders in certain cases if it "reasonably believes that an order is necessary because disclosure would … be likely to prejudice the fair trial of a person ... or be contrary to the public interest".[27]

Broad suppression orders

I.20 The County Court has the same jurisdiction as the Supreme Court to make broad suppression orders, and can:

> grant an injunction in a criminal proceeding restraining a person from publishing any material or doing any other thing to ensure the fair and proper conduct of the proceeding.[28]

I.21 In contrast, the Magistrates' Court has a more limited statutory discretion to make a broad suppression order prohibiting publication of material relevant to a pending proceeding if it is satisfied that 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, or
- protect the safety of any person.[29]

General procedural provisions

I.22 The *Open Courts Act* also contains a set of overarching provisions relating to the administration of suppression orders. These provisions:

- require parties seeking suppression orders to provide notice to other parties and the court or tribunal, and, further, require courts or tribunals to take reasonable steps to notify relevant news media organisations[30]
- require suppression orders to be made for a fixed or ascertainable period, or with reference to a specified future event and, if such event is uncertain, require that they must expire after five years[31]

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26. *Open Courts Act 2013* (Vic) s 18(1).
27. *Open Courts Act 2013* (Vic) s 18(2).
28. *Open Courts Act 2013* (Vic) s 25.
29. *Open Courts Act 2013* (Vic) s 26.
30. *Open Courts Act 2013* (Vic) s 10(1), s 11.

- provide that suppression orders, unless a court specifies otherwise, expire at the end of any appeal period for the proceedings, or at the determination of the appeal[32]
- require that courts and tribunals ensure that a suppression order operates no longer than is reasonably necessary to achieve its purpose,[33] and that the order is sufficiently particular to ensure that it has the minimum necessary scope[34]
- require courts and tribunals to provide reasons for substantive orders,[35] and
- create mechanisms for the review of orders on the court or tribunal's own motion, or the application of the original applicants, parties to proceedings (including victims in some cases), the Attorney General of Victoria or another Australian jurisdiction, news media organisations, and other parties with a sufficient interest.[36]

16.68 **Closed court orders**

I.23 The *Open Courts Act* also contains provisions for closed court orders. As is the case for suppression orders generally, courts and tribunals must have regard to the primacy of open justice and only make a closed court order if the specific circumstances make it necessary to displace the principle.[37]

I.24 Closed court orders can be made if a court is satisfied it is necessary on specific grounds.[38] If a closed court order is made, a notice must be posted physically.[39]

Enforcement of orders

I.25 It is a statutory offence to engage in conduct which contravenes proceeding suppression orders,[40] broad suppression orders made by the Magistrates' Court,[41] and closed court orders.[42] For each offence, either knowledge that the order is in force, or recklessness as to whether the order is in force, is required.

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31. *Open Courts Act 2013* (Vic) s 12(2)–(3).
32. *Open Courts Act 2013* (Vic) s 12(3A).
33. *Open Courts Act 2013* (Vic) s 12(4).
34. *Open Courts Act 2013* (Vic) s 13.
35. *Open Courts Act 2013* (Vic) s 14A.
36. *Open Courts Act 2013* (Vic) s 15.
37. *Open Courts Act 2013* (Vic) s 28.
38. *Open Courts Act 2013* (Vic) s 30(2).
39. *Open Courts Act 2013* (Vic) s 31.
40. *Open Courts Act 2013* (Vic) s 23.
41. *Open Courts Act 2013* (Vic) s 27, s 26(1).
42. *Open Courts Act 2013* (Vic) s 32.

Other legislation governing exceptions to open justice

I.26 In addition to the *Open Courts Act* in Victoria, other legislation includes subject-specific prohibitions on publishing or disclosing information and powers to make orders.[43]

Regimes for accessing court information

I.27 In the Victorian Supreme Court, anyone can access a document filed in civil proceedings on payment of a fee. However, a person must have leave of the court to inspect a document that the court has ordered should remain confidential or, in the opinion of the prothonotary (principal registrar), should remain confidential to the parties.[44]

I.28 In relation to criminal proceedings in the Supreme Court, documents are not open for inspection unless the court, prothonotary or registrar so directs.[45]

I.29 In the County Court, documents filed in commercial and common law cases are available for the public to inspect on payment of a fee.[46] Documents filed in criminal or appeal cases are not open for inspection unless directed by the court or registrar.[47]

South Australia

I.30 In South Australia (SA), general provisions relating to "suppression orders" and orders for "clearing the court" are contained in the *Evidence Act 1929* (SA) (*Evidence Act*). The Act also preserves courts' other powers, whether arising at common law or from statute.[48]

Suppression orders

I.31 Under the Act, a "suppression order" is an order forbidding the publication of:

- specified evidence or of any account or report of specified evidence, or
- the name of, or any other material tending to identify, a party, witness or person alluded to in court.[49]

I.32 SA courts have a discretion to make an order if they are satisfied that it "should be made" to prevent:

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43. See, eg, *Adoption Act 1984* (Vic) s 121; *Children, Youth and Families Act 2005* (Vic) s 534–534B; *Family Violence Protection Act 2008* (Vic) s 166–167; *Mental Health Act 2014* (Vic) s 194; *Status of Children Act 1974* (Vic) s 32–33.
44. *Supreme Court (General Civil Procedure Rules) 2015* (Vic) r 28.05.
45. *Supreme Court (Criminal Procedure) Rules 2017* (Vic) r 1.11(4), r 1A.03(6)–(7).
46. *County Court Civil Procedure Rules 2018* (Vic) r 28.05(1).
47. *County Court Criminal Procedure Rules 2009* (Vic) r 1.08.1.
48. *Evidence Act 1929* (SA) s 5.
49. *Evidence Act 1929* (SA) s 68 definition of "suppression order".

- prejudice to the proper administration of justice, or
- undue hardship to:
  - an alleged victim of crime
  - a witness or potential witness in civil or criminal proceedings who is not a party to those proceedings, or
  - a child.[50]

I.33 The Act provides an additional ground for suppression orders on evidence given by a defendant if:

- the defendant asserts that an offence with which the defendant is charged occurred in circumstances of family violence
- the evidence relates to those circumstances of family violence, and
- the evidence is of a humiliating or degrading nature (whether to the defendant or another person).[51]

I.34 In considering whether to make a suppression order under the Act, SA courts:

- 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.[52]

Administration of suppression orders

I.35 In addition to the applicant, other parties in proceedings, representatives of the media, and other people with a proper interest in the opinion of the court, have standing to be heard in both the initial application,[53] any appeals,[54] and the review of suppression orders.[55]

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50. *Evidence Act 1929* (SA) s 69A(1).
51. *Evidence Act 1929* (SA) s 69A(1a).
52. *Evidence Act 1929* (SA) s 69A(2).
53. *Evidence Act 1929* (SA) s 69A(5).
54. *Evidence Act 1929* (SA) s 69AC(2).
55. *Evidence Act 1929* (SA) s 69AB(3).

I.36 Unlike other jurisdictions, the Act contains provisions for the mandatory review of suppression orders at the conclusion of proceedings.[56] The registrar must maintain a register of suppression orders and notify nominated news media representatives when orders are made.[57] Courts must also provide the Attorney General with details of orders that the Attorney General is responsible for including in an annual report.[58]

Orders for clearing the court

I.37 The Act also gives courts a discretion to exclude specified people, or all persons except those specified, for the whole or any part of proceedings.[59] The court must "consider it desirable in the interests of the administration of justice, or in order to prevent hardship or embarrassment to any person".[60] There is a requirement to make an order while children who are alleged victims of sexual offences are giving evidence, and while child exploitation material is being adduced.[61]

Enforcement of suppression orders

I.38 Orders are enforced by breaches being treated as contempt of court where the court which made the order has the power, or otherwise as a statutory offence.[62] In addition, where a report of proceedings is published before the proceedings have concluded, and the report identifies, or tends to identify, the defendant, there is an obligation on publishers to publish a "fair and accurate" report of the result of proceedings and give it reasonable prominence.[63]

Other legislation governing exceptions to open justice

I.39 In addition to the general provisions under the *Evidence Act*, SA has a variety of subject-specific legislation governing exceptions to open justice.[64]

Regimes for accessing court information

I.40 In SA, the regimes for accessing court information are consistent across the Supreme Court, District Court and Magistrates Court. A person can inspect or copy certain documents as of right, such as:

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56. *Evidence Act 1929* (SA) s 69AB(1)–(2).
57. *Evidence Act 1929* (SA) s 69A(8)–(13).
58. *Evidence Act 1929* (SA) s 69A(8)(b), s 71.
59. *Evidence Act 1929* (SA) s 69(1).
60. *Evidence Act 1929* (SA) s 69(1).
61. *Evidence Act 1929* (SA) s 69(1a)–(1b).
62. *Evidence Act 1929* (SA) s 70.
63. *Evidence Act 1929* (SA) s 71B.
64. See, eg, *Criminal Law Consolidation Act 1935* (SA) s 246; *Guardianship and Administration Act 1993* (SA) s 81; *Mental Health Act 2009* (SA) s 106; *Witness Protection Act 1996* (SA) s 25.

- a transcript of evidence, submissions by counsel, the judge's summing up or directions to the jury, and reasons for judgment (including sentencing remarks)
- any documentary material admitted into evidence, and
- a judgment or order of the court.[65]

I.41 Other material may only be accessed with the court's permission, including:

- material that was not taken or received in open court
- material suppressed from publication, and
- photographs, slides, film, video, audio or any other form of recording from which a visual image or sound can be produced.[66]

I.42 The court may impose conditions, including that the material be examined under supervision, limitations on publication or use, and any other condition considered appropriate. The court may also charge a fee, fixed by regulation, for inspection or copying of material.[67]

Australian Capital Territory

General powers to make orders

I.43 In the Australian Capital Territory (ACT), s 111 of the *Evidence (Miscellaneous Provisions) Act 1991* (ACT) (*Evidence (Miscellaneous Provisions) Act*) is the general provision allowing allows courts to make an exception to open justice.[68] In addition to s 111, the ACT Supreme Court retains an inherent power to make orders that limit the principle of open justice.[69] Due to its generality, s 111 has been interpreted as a "statutory modification to the principle of open justice" and courts have referred to common law principles in previous decisions about the inherent power of courts to limit open justice.[70]

I.44 Section 111 gives courts a discretion to make orders forbidding the publication of evidence, reports of evidence, or names of parties or witnesses on the grounds that:

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65. *Supreme Court Act 1935* (SA) s 131(1); *District Court Act 1991* (SA) s 54(1); *Magistrates Court Act 1991* (SA) s 51(1).
66. *Supreme Court Act 1935* (SA) s 131(2); *District Court Act 1991* (SA) s 54(2); *Magistrates Court Act 1991* (SA) s 51(2).
67. *Supreme Court Act 1935* (SA) s 131(3), s 131(5); *District Court Act 1991* (SA) s 54(3), s 54(5); *Magistrates Court Act 1991* (SA) s 51(3), s 51(5).
68. *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 111.
69. *R v Meegan* [2014] ACTSC 263 [16].
70. *R v Meegan* [2014] ACTSC 263 [60]–[61].

- the publication of evidence is likely to prejudice the administration of justice; or
- it is in the interest of the administration of justice that the name of a party to the proceeding or a witness should not be published.[71]

I.45 The court has a general discretion to apply conditions or durations to orders.[72]

I.46 Once a court has made a non-publication order under s 111(2), it may supplement this with a direction excluding stated people, or everyone except stated people, from the courtroom for a stated period.[73]

Enforcement of orders

I.47 It is an offence not to comply with an order or direction under s 111,[74] and as there is no explicit fault element, recklessness as to the order is required.[75]

Other legislation governing exceptions to open justice

I.48 The ACT has a variety of subject-specific legislation governing exceptions to open justice.[76]

Regimes for accessing court information

I.49 The *Court Procedure Rules 2006* (ACT) govern access to court records in civil and criminal proceedings in the Supreme Court and Magistrates Court. In general, anyone is entitled to search for, inspect and take a copy of any document filed in the registry.[77]

I.50 Certain documents are only accessible to a non-party if they demonstrate "sufficient interest" to the registrar or the court.[78] In relation to civil proceedings, these documents include:

- any document that the court has ordered to be kept confidential
- affidavits, admissions, interrogatories and statements that have not been read out in court or have been deemed inadmissible, and
- unsworn statements of evidence.[79]

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71. *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 111(1).
72. *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 111(3).
73. *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 111(4).
74. *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 112.
75. *Criminal Code 2002* (ACT) s 22(2).
76. See, eg, *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 39, s 40, s 74; *Criminal Code 2002* (ACT) s 712A; *Juries Act 1967* (ACT) s 42C; *Witness Protection Act 1996* (ACT) s 16.
77. *Court Procedure Rules 2006* (ACT) r 4(1), r 2903(1), r 4053(1).
78. *Court Procedure Rules 2006* (ACT) r 2903(2), r 4053(2).

I.51 In relation to criminal proceedings, these documents include:

- an order, transcript or other document that the court has ordered be kept confidential
- affidavits or parts of affidavits that have not been read out in court or have been deemed inadmissible
- an indictment on which the accused person has not yet been arraigned, and
- a case statement filed by the prosecution that has not yet been read in court.[80]

Northern Territory

General powers to make orders

I.52 Northern Territory (NT) courts have a discretion to make an exception to the principle of open justice under s 57 of the *Evidence Act 1939* (NT). The NT Court of Appeal has held that s 57 is distinct from the Supreme Court's inherent power.[81]

I.53 Although not identical, s 57 closely resembles the equivalent legislation of the ACT (referred to above).[82] The NT Court of Appeal has adopted a similar approach to s 57 as courts in the ACT have adopted in relation to s 111 of the *Evidence (Miscellaneous Provisions) Act*, concluding that common law principles are still relevant but must be considered in light of the statute.[83]

I.54 Under s 57, courts may make an order "before or during the course of proceedings or thereafter":

- directing persons specified, or persons other than those specified, to leave the courtroom while evidence is being given
- forbidding the publication of evidence, or
- forbidding the publication of the names of parties or witnesses.

I.55 An order can be made on the grounds that:

- the publication of any evidence is "likely to offend against public decency", or

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79. *Court Procedure Rules 2006* (ACT) r 2903(2).
80. *Court Procedure Rules 2006* (ACT) r 4053(2).
81. *Australian Broadcasting Corporation v L* [2005] NTCA 7, 16 NTLR 186 [25].
82. *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 111.
83. *Nationwide News Pty Ltd v Binsaris* [2019] NTCA 4, 170 NTR 69 [35].

- it is desirable to prohibit the publication of the name of a party or witness "for the furtherance of, or… in the interests of, the administration of justice."[84]

Enforcement of orders

I.56 It is an offence if a person intentionally engages in conduct that results in a contravention of s 57, and a person is reckless as to the result.[85]

Other legislation governing exceptions to open justice

I.57 In addition to the general provisions under the *Evidence Act 1939* (NT), there is a variety of subject-specific legislation governing exceptions to open justice.[86]

Regimes for accessing court information

I.58 In the NT Supreme Court:

- A person is entitled to inspect and obtain a copy of a document filed in civil proceedings, on payment of the proper fee. The exceptions are where the court has ordered that a document remain confidential or a registrar considers it should remain confidential to the parties.[87]

- A person may inspect and obtain a copy of a document filed in a proceeding that is part of the "record" of criminal proceedings.[88] The "record" is defined as the indictment, the official tape recording of the proceedings, and the official transcript.[89]

I.59 In the Local Court:

- Non-parties can apply to access all or part of the case file, other than judgments given or orders made by the court.[90]

- Any person may inspect or obtain a copy of a judgment given or order made by the court, unless the court has made an order restricting access to it. If the judgment was given or the order was made when the court was closed to the public, a person must be granted access to the judgment or order.[91]

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84. *Evidence Act 1939* (NT) s 57.
85. *Evidence Act 1939* (NT) s 59.
86. See, eg, *Guardianship of Adults Act 2016* (NT) s 80(2); *Juries Act 1962* (NT) s 49B; *Mental Health and Related Services Act 1998* (NT) s 138; *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 6.
87. *Supreme Court Rules 1987* (NT) r 28.05.
88. *Supreme Court Rules 1987* (NT) r 81A.09.
89. *Supreme Court Rules 1987* (NT) r 81A.39(1).
90. *Local Court Act 2015* (NT) s 28, s 29(2).
91. *Local Court Act 2015* (NT) s 30.

- Non-parties can apply for access to an exhibit admitted into evidence.[92] The court may grant access on any conditions the court thinks fit.[93]

Western Australia

General powers to make orders

I.60 In Western Australia (WA), s 171 of the *Criminal Procedure Act 2004* (WA) provides that proceedings in all criminal cases must be in open court, unless otherwise required by statute or the rules of court.[94] In other cases WA courts rely on their inherent power,[95] or in the case of lower courts, a civil equivalent to s 171.[96]

I.61 Section 171 allows the court to depart from the general principle regarding criminal proceedings in several ways, including:

- to control witnesses, other than the accused,[97] and
- by making exclusion orders or non-publication orders for the proceedings, or non-publication orders for the identity of victims, if the court is satisfied it is in the interests of justice to do so.[98]

I.62 The WA Court of Appeal has held that exceptions to the principle of "open court" require exceptional circumstances.[99]

Enforcement of orders

I.63 It is an offence to contravene an order made under s 171.[100] If they are capable of consenting, consent to publication by the victim, functions as a defence to the statutory offence.[101]

Other legislation governing exceptions to open justice

I.64 Like other jurisdictions, WA has a variety of subject-specific provisions governing exceptions to open justice.[102]

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92. *Local Court Act 2015* (NT) s 31(2).
93. *Local Court Act 2015* (NT) s 31(3).
94. *Criminal Procedure Act 2004* (WA) s 171(2).
95. See, eg, *Rayney v State of Western Australia [No 8]* [2017] WASC 66.
96. *Magistrates Court (Civil Proceedings) Act 2004* (WA) s 45(1).
97. *Criminal Procedure Act 2004* (WA) s 171(3).
98. *Criminal Procedure Act 2004* (WA) s 171(4).
99. See *Hopley v Western Australia* [2014] WASCA 30 [21]–[22] quoting *West Australian Newspapers Ltd v Western Australia* [2010] WASCA 10.
100. *Criminal Procedure Act 2004* (WA) s 171(10).
101. *Criminal Procedure Act 2004* (WA) s 171(11).

Regimes for accessing court information

I.65 In relation to criminal proceedings in the WA Supreme Court, non-parties "may apply to the court for leave" to access:

- the record, or the certified transcript of the record, of any proceedings
- any other record in the possession of the court in relation to the case, including documents (including those in electronic form) and other things tendered in evidence.[103]

I.66 A non-party may make an oral access application to the media manager if they are an employee of a media organisation and the court has already granted permission to another such person to access the record. The media manager may grant the application if satisfied that the court has already granted permission (on a written application) to another employee of a media organisation to inspect or obtain a copy of the record, but must otherwise refuse the application.[104]

I.67 In relation to civil proceedings in the Supreme Court, the rules for non-party access differ depending on whether the person seeking access is a media representative, and whether the proceeding was commenced before 1 March 2018, or on or after 1 March 2018:

- Where the proceedings commenced before 1 March 2018, a non-party is entitled, (where no legislation prevents it and upon payment of any prescribed fee) to access and be given a copy of certain documents, including a writ, a statement of claim and an appeal notice. Any other filed document may only be accessed with the leave of the court or a registrar.[105]
- Where the proceedings commenced on or after 1 March 2018, a non-party is entitled to access a broad range of information, unless their access is restricted by legislation or an order made by a court in Australia.[106] Additional information can only be accessed if the court or media manager gives permission.[107]
- Where a non-party applicant is a media representative, they may apply orally to the media manager to access information available to non-parties as of right. If one media representative has been given permission, and another media representative

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102. See, eg, *Guardianship and Administration Act 1990* (WA) sch 1 cl 12; *Juries Act 1957* (WA) s 56A–56D, s 57; *Terrorism (Preventative Detention) Act 2006* (WA) s 53; *Witness Protection (Western Australia) Act 1996* (WA) s 32; *Young Offenders Act 1994* (WA) s 40.
103. *Criminal Procedure Rules 2005* (WA) r 51(1).
104. *Criminal Procedure Rules 2005* (WA) r 51(1)–(2A), s 51(2).
105. *Rules of the Supreme Court 1971* (WA) o 67B r 16.
106. *Rules of the Supreme Court 1971* (WA) o 67B r 6.
107. *Rules of the Supreme Court 1971* (WA) o 67B div 4.

subsequently makes an application, the media manager must grant permission on the same terms and conditions.[108]

I.68 In the WA Magistrates Court, certain information about a criminal case (such as the name of the accused) is available to any person.[109] Media organisations may access a transcript or exhibit with leave.[110]

I.69 In the WA Children's Court, non-parties may, with leave of the court, inspect or obtain a copy of:

- any document that is part of the court record, and
- any thing (other than a document) received by the Court in proceedings, on which information is recorded or stored, such as a photograph, tape or disc.[111]

I.70 With leave of the Children's Court a person may also listen to or view a recording of proceedings. When giving leave, the Court may impose any conditions on the person's access to information, including a condition prohibiting or limiting the publication or use of the information.[112]

Queensland

General powers to make orders

I.71 Unlike other jurisdictions,[113] Queensland has no general statutory scheme governing exceptions to open justice. The various Acts establishing Queensland courts provide that "if the public interest or the interests of justice require",[114] courts may make orders limiting the extent to which the business of the court is open to the public. This has been interpreted as a statutory codification, and possible expansion, of courts' inherent power to control the conduct of proceedings for the purpose of administering justice.[115]

I.72 Queensland courts have recognised a limited power to prohibit publication of proceedings conducted in open court in order to secure the administration of justice in

108. *Rules of the Supreme Court 1971* (WA) o 67B r 10(3)–(4).
109. *Magistrates Court Act 2004* (WA) s 33(9)(b); *Magistrates Court (General) Rules 2005* (WA) r 40.
110. *Magistrates Court Act 2004* (WA) s 33(9)(b); *Magistrates Court (General) Rules 2005* (WA) r 40B.
111. *Children's Court of Western Australia Act 1988* (WA) s 51A(5)–(6).
112. *Children's Court of Western Australia Act 1988* (WA) s 51A(7)–(8).
113. See, eg, *Open Courts Act 2013* (Vic); *Court Suppression and Non-publication Orders Act 2010* (NSW).
114. See, eg, *Supreme Court of Queensland Act 1991* (Qld) s 8(2); *District Court of Queensland Act 1967* (Qld) s 126(2); *Magistrates Courts Act 1921* (Qld) s 14A(2).
115. See, eg, *Emanate Legal Services Pty Ltd v Hood* [2021] QCA 94, 7 QR 575 [32]; *Velocity Frequent Flyer Pty Ltd v BP Australia Pty Ltd* [2019] QSC 29 [13].

proceedings before them.[116] It is unclear whether such orders bind the public as a whole, as opposed to just those inside the courtroom,[117] or whether they simply serve as a warning that publication, regardless of the order, may constitute contempt of court by interfering with the administration of justice.[118]

Other legislation governing exceptions to open justice

I.73 Supplementing this, Queensland has a variety of subject-specific statutory provisions governing exceptions to open justice.[119]

Regimes for accessing court information

I.74 In Queensland, a person can obtain a copy of a document filed in civil proceedings in any court, on payment of any prescribed fee.[120] A person can also search for and inspect a document in the court file for civil proceedings, unless certain exceptions apply (for example, a court order restricting access to the file or document).[121]

I.75 In relation to criminal proceedings, a person may, on payment of the prescribed fee, search for, obtain a copy or certified copy of, or inspect all or part of a document on the court file.[122] The "court file" consists of particular documents, such as:

- the indictment
- affidavits or written submissions filed or provided to the court, and
- an order or draft order of a judge or magistrate.[123]

I.76 It does not include certain documents, such as transcripts or pre-sentence reports, unless they have been directed to be placed on the file held by the registry.[124]

I.77 A person may inspect or obtain, other than for the purpose of publication, a copy or certified copy of an exhibit tendered at trial, unless certain exceptions apply (including

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116. See, eg, *Emanate Legal Services Pty Ltd v Hood* [2021] QCA 94, 7 QR 575 [33]; *Ex parte Queensland Law Society* [1984] 1 Qd R 166,170 quoted in *Hogan v Hinch* [2011] HCA 4, 243 CLR 506 [25].
117. *Hogan v Hinch* [2011] HCA 4, 243 CLR 506 [25].
118. *Emanate Legal Services Pty Ltd v Hood* [2021] QCA 94, 7 QR 575 [49]–[50].
119. See, eg, *Criminal Law (Sexual Offences) Act 1978* (Qld) s 5–6; *Terrorism (Preventative Detention) Act 2005* (Qld) s 76; *Domestic and Family Violence Protection Act 2012* (Qld) s 158–9; *Jury Act 1995* (Qld) s 70; *Mental Health Act 2016* (Qld) s 791.
120. *Uniform Civil Procedure Rules 1999* (Qld) r 980.
121. *Uniform Civil Procedure Rules 1999* (Qld) r 981.
122. *Criminal Practice Rules 1999* (Qld) r 57(3).
123. *Criminal Practice Rules 1999* (Qld) r 57(1).
124. *Criminal Practice Rules 1999* (Qld) r 57(2).

where it could risk the exhibit's security, or a person's safety or wellbeing).[125] Non-parties may also, on payment of a prescribed fee, apply to the trial judge (during or after the trial) for an order permitting the copying of an exhibit tendered at trial, for publication.[126]

I.78 In the Queensland Children's Court, the chief executive may authorise a person to access a court record, or information from a record, to allow them to carry out research. The chief executive must be satisfied that the record of information will not be used or published in a way that could identify any individual to which it relates, and it is appropriate to authorise access in all the circumstances.[127]

Tasmania

General powers to make orders

I.79 Tasmanian courts generally rely upon the court's inherent power to regulate the proceedings for the purpose of administering justice, in order to make suppression and non-publication orders.[128] Section 194J of the *Evidence Act 2001* (Tas) gives courts a discretion to prohibit the publication of evidence, argument or particulars, which may prejudice the fair trial of a case.[129] However, Tasmanian courts have interpreted this narrowly.[130]

I.80 The Supreme Court of Tasmania maintains a registry of suppression and non-publication orders.[131]

Other legislation governing exceptions to open justice

I.81 Tasmania, like other states and territories, has a number of subject-specific statutory provisions.[132]

Regimes for accessing court information

I.82 In the Tasmanian Supreme Court, any person may make a request to the registrar to search the index or register. On receipt of the request and the prescribed fee, the

125. *Criminal Practice Rules 1999* (Qld) r 56(1).
126. *Criminal Practice Rules 1999* (Qld) r 56A.
127. *Childrens Court Act 1992* (Qld) s 28A(1)–(2).
128. See, eg, *Brooks v Easther (No 2)* [2017] TASSC 47, 29 Tas R 364 [19]; *Tasmania v G* [2014] TASSC 71 [6]–[7].
129. *Evidence Act 2001* (Tas) s 194J(1).
130. See, eg, *Tasmania v G* [2014] TASSC 71 [6].
131. Supreme Court of Tasmania, "Suppression Orders and Non-Publication Orders", <www.supremecourt.tas.gov.au/the-court/media/suppression-orders/> (retrieved 6 May 2022).
132. See, eg, *Evidence Act 2001* (Tas) s 194K, s 194L, s 195; *Tasmanian Civil and Administrative Tribunal Act 2020* (Tas) s 81(3); *Juries Act 2003* (Tas) s 57; *Terrorism (Preventative Detention) Act 2005* (Tas) s 50; *Witness (Identity Protection) Act 2006* (Tas) s 11.

registrar must organise a search of the index or register, and issue a certificate certifying the results of the search.[133]

I.83 Non-parties must have leave of the court to access certain documents, including:

- any affidavit, interrogatories, answers to interrogatories, and a list of documents given on discovery, and
- any document which the registrar considers ought to remain confidential to the parties.[134]

I.84 In relation to civil proceedings in the Magistrates Court, any person can, on payment of a prescribed fee, inspect:

- a transcript of evidence, submissions by counsel and reasons for judgment
- any documentary material admitted into evidence, and
- any judgment entered or order made under the *Magistrates Court (Civil Division) Rules 1998* (Tas).[135]

I.85 A person cannot inspect evidentiary material:

- that was not given or produced in open court
- was suppressed from publication, or
- where the court has determined that the evidence or evidentiary material should not be available.[136]

I.86 Non-parties must have leave of the court to access other kinds of documents, including:

- any judgment, order, transcript of a proceeding or other document that the court has ordered to remain confidential, and
- any affidavit.[137]

133. *Supreme Court Rules 2000* (Tas) r 33(1)–(3).
134. *Supreme Court Rules 2000* (Tas) r 33(4).
135. *Magistrates Court (Civil Division) Rules 1998* (Tas) r 155(1)–(2).
136. *Magistrates Court (Civil Division) Rules 1998* (Tas) r 155(3).
137. *Magistrates Court (Civil Division) Rules 1998* (Tas) r 155(4).

Laws in certain overseas jurisdictions

United Kingdom

General powers to make orders

I.87 Under s 4 of the *Contempt of Court Act 1981* (UK) (*Contempt of Court Act*), courts in the United Kingdom (UK) can make orders postponing publication of a report of proceedings, or any part of the proceedings, if:

> it appears to be necessary for avoiding a substantial risk of prejudice to the administration of justice in those proceedings, or in any other proceedings pending or imminent.[138]

I.88 A court may make such an order for as long as it considers necessary to avoid the risk of prejudice to the administration of justice.[139]

I.89 Under s 11 of the Act, where a court allows a name or other matter to be withheld from the public, the court can give:

> such directions prohibiting the publication of that name or matter in connection with the proceedings as appear to the court to be necessary for the purpose for which it was so withheld.[140]

I.90 It is uncertain whether UK courts retain any inherent or implied powers to make orders limiting open justice.[141] It has been held that:

- there is no inherent jurisdiction to make non-publication orders outside the powers contained in the *Contempt of Court Act*, and
- the general rule that the administration of justice should be done in public can only be departed from in the specific circumstances stated in the Act.[142]

I.91 However, the *Criminal Procedure Rules 2020* (UK) (*Criminal Procedure Rules*) provide that the court has an "inherent power, in exceptional circumstances":

> (a) to allow information, for example a name or address, to be withheld from the public at a public hearing;

138. *Contempt of Court Act 1981* (UK) s 4(2).
139. *Contempt of Court Act 1981* (UK) s 4(2).
140. *Contempt of Court Act 1981* (UK) s 11.
141. F Vincent, *Open Courts Act Review* (2017) [236].
142. *Re Belfast Telegraph Newspapers Ltd's Application* [1997] NI 309, 315.

(b) to restrict public access to what otherwise would be a public hearing, for example to control disorder;

(c) to hear a trial in private, for example for reasons of national security.[143]

Other legislation governing exceptions to open justice

I.92 In the UK, there are many provisions in subject-specific legislation governing exceptions to open justice.[144] The *Criminal Procedure Rules* also set out certain procedures and requirements for courts when exercising their powers to limit open justice.[145] The requirements include:

- the court must have regard to the importance of dealing with criminal cases in public and allowing a public hearing to be reported to the public, and
- the court must not exercise a power unless each party and any other person directly affected is present, or has an opportunity to attend to make representations.[146]

Regimes governing access to court information

I.93 In the UK, anyone can apply for a transcript of a court or tribunal hearing if the hearing was recorded. The court can refuse to provide all or part of a transcript (for example, if the details of the hearing are confidential).[147]

I.94 In relation to civil proceedings, a non-party may obtain from the court records a copy of:

- a statement of case (but not any documents filed with or attached to the statement of case, or intended by the party whose statement it is to be served with it), and
- a judgment or order given or made in public (whether made at a hearing or without a hearing).[148]

I.95 This is subject to some limitations, including that the claim has been listed for a hearing or judgment has been entered in the claim.[149] A non-party can also obtain a copy of any

143. *Criminal Procedure Rules 2020* (UK) r 6.1 Note.

144. See, eg, *Children and Young Persons Act 1933* (UK) s 37, s 39; *Serious Organised Crime and Police Act 2005* (UK) s 75; *Sexual Offences (Amendment) Act 1992* (UK) s 1; *Youth Justice and Criminal Evidence Act 1999* (UK) s 25, s 45, 45A, s 46.

145. *Criminal Procedure Rules 2020* (UK) r 6.4–6.6.

146. *Criminal Procedure Rules 2020* (UK) r 6.2.

147. Her Majesty's Courts and Tribunals Service, "Apply for a Transcript of a Court or Tribunal Hearing" <www.gov.uk/apply-transcript-court-tribunal-hearing> (retrieved 7 May 2022).

148. *Civil Procedure Rules 1998* (UK) r 5.4C(1).

149. *Civil Procedure Rules 1998* (UK) r 5.4C(3).

other document filed by a party, or communication between the court and a party or another person, if the court gives permission.[150]

I.96 A non-party must pay any prescribed fee for the supply of documents from court records.[151]

I.97 In relation to criminal proceedings, the UK Crown Prosecution Service has a protocol for the release of prosecution material to the media. Prosecution material that has been relied on in court, and which is normally released to the media, includes:

- videos showing scenes of crime as recorded by police after the event
- sections of transcripts of interviews or statements as read out in court
- videos or photographs showing reconstructions of the crime, and
- closed-circuit television footage of the defendant (subject to any copyright issues).[152]

I.98 The protocol also provides certain material that may be released in consultation with the police and relevant victims, witnesses and family members, including:

- closed-circuit television footage or photographs showing the defendant and victim, or the victim alone, that has been viewed by the jury and public in court (subject to any copyright issues)
- video and audio tapes of police interviews with defendants, victims and witnesses, and
- victim and witness statements.[153]

New Zealand

Orders to clear the court

I.99 Under s 197 of the *Criminal Procedure Act 2011* (NZ) (*Criminal Procedure Act*), a court can make an order excluding all people from the whole or any part of any criminal proceeding, other than certain people (such as the presiding judicial officer and jury, the prosecutor and defendant, and any court officer). The court can only make such an order if satisfied that:

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150. *Civil Procedure Rules 1998* (UK) r 5.4C(2).
151. *Civil Procedure Rules 1998* (UK) r 5.4D(1).
152. United Kingdom, Crown Prosecution Service, "Media Access to Prosecution Materials" (1 October 2005) *Publicity and the Criminal Justice System* [2] <https://www.cps.gov.uk/publication/publicity-and-criminal-justice-system> (retrieved 8 May 2022).
153. United Kingdom, Crown Prosecution Service, "Media Access to Prosecution Materials" (1 October 2005) *Publicity and the Criminal Justice System* [3] <https://www.cps.gov.uk/publication/publicity-and-criminal-justice-system> (retrieved 8 May 2022).

(a) the order is necessary to avoid—

(i) undue disruption to the conduct of the proceedings; or

(ii) prejudicing the security or defence of New Zealand; or

(iii) a real risk of prejudice to a fair trial; or

(iv) endangering the safety of any person; or

(v) prejudicing the maintenance of the law, including the prevention, investigation and detection of offences; and

(b) a suppression order is not sufficient to avoid that risk.[154]

I.100 The power in s 197 substitutes "any power to clear the court that a court may have had under any inherent jurisdiction".[155] An order made under s 197 may not exclude members of the media, unless it is made for security or defence purposes.[156]

Suppression orders

I.101 Under s 199C of the *Criminal Procedure Act*, a court can make an interim order that temporarily suppresses (prohibits publication of) certain trial-related information. The court must be "satisfied that publication of the information would be likely to create a real risk of prejudice to a fair trial".[157] To "limit the effect" of an interim order, a court can order a person to take down or disable access to information under their control.[158]

I.102 Further, courts can make interim suppression orders pending the determination of an appeal.[159]

I.103 The *Criminal Procedure Act* also allows courts to "suppress" (make orders prohibiting publication of):

- identifying information of defendants, witnesses, victims and any person connected with the proceedings,[160] and
- evidence or submissions in a criminal proceeding.[161]

154. *Criminal Procedure Act 2011* (NZ) s 197(1)–(2).
155. *Criminal Procedure Act 2011* (NZ) s 197(4).
156. *Criminal Procedure Act 2011* (NZ) s 198(1).
157. *Criminal Procedure Act 2011* (NZ) s 199C(1).
158. *Criminal Procedure Act 2011* (NZ) s 199D(2).
159. *Criminal Procedure Act 2011* (NZ) s 286, s 292.
160. *Criminal Procedure Act 2011* (NZ) s 200(1), s 202(1).
161. *Criminal Procedure Act 2011* (NZ) s 205(1).

I.104 The grounds for making such orders include where the court is satisfied that publication would be likely to:

- cause undue hardship to a victim of the offence
- create a real risk of prejudice to a fair trial
- endanger the safety of any person
- lead to the identification of a person whose name is suppressed by an order or by law
- prejudice the maintenance of the law, including the prevention, investigation and detection of offences, or
- prejudice the security or defence of New Zealand.[162]

I.105 Under the Act, members of the media have standing to initiate, and be heard in relation to, any application for a suppression order, and any application to renew, vary or revoke a suppression order.[163]

Automatic suppression

I.106 The *Criminal Procedure Act* contains provisions that "automatically suppress" (prohibit the publication of) certain information. Section 199A automatically suppresses details of the previous convictions of a defendant during the proceedings for a particular offence unless the court lifts or varies the suppression.[164] A court can also order a person to take down or disable access to details of the defendant's previous convictions under their control.[165]

I.107 In addition, the *Criminal Procedure Act* automatically suppresses information identifying a defendant in specified sexual offence cases, a complainant in specified sexual offence cases, and child complainants and witnesses.[166] The court can permit publication of the information in certain circumstances.[167]

Enforcement of suppression provisions and orders

I.108 Section 211(1) of the *Criminal Procedure Act* makes it an offence to knowingly or recklessly publish information in breach of a suppression order, an automatic

162. *Criminal Procedure Act 2011* (NZ) s 200(2)(c)–(h), s 202(2), s 205(2).
163. *Criminal Procedure Act 2011* (NZ) s 210(2).
164. *Criminal Procedure Act 2011* (NZ) s 199A.
165. *Criminal Procedure Act 2011* (NZ) s 199B(1).
166. *Criminal Procedure Act 2011* (NZ) s 201(1), s 203(1), s 204(1).
167. *Criminal Procedure Act 2011* (NZ) s 201(3)–(4), s 203(3)–(4), s 204(2)–(4).

suppression provision,[168] or an interim order pending determination of an appeal.[169] The maximum penalty for this offence is:

- in the case of an individual, a term of imprisonment not exceeding six months, and
- in the case of a body corporate, a fine not exceeding $100,000.[170]

I.109 Under s 211(2) of the *Criminal Procedure Act*, it is an offence to publish information in breach of an order or automatic suppression provision. The prosecution does not have to provide that the defendant intended to commit an offence.[171] The maximum penalty is:

- in the case of an individual, a fine not exceeding $25,000, and
- in the case of a body corporate, a fine not exceeding $50,000.[172]

I.110 The offence in s 211(2) does not apply to a person who hosts material on a website or other electronic retrieval system that can be accessed by a user, unless they place or enter the specific information on the site or system themselves.[173] A defendant has defence to the offence in s 211(2) if they prove that they:

- did not know or could not reasonably have known that the information published was suppressed, and
- remove the suppressed material as soon as practicable after becoming aware of the breach.[174]

Other legislation governing exceptions to open justice

I.111 Like other jurisdictions, New Zealand has many provisions in subject-specific legislation that govern exceptions to open justice.[175]

Regimes governing access to court information

I.112 In New Zealand, the rules for accessing information in the Supreme Court, Court of Appeal and the High Court are set out in the *Senior Courts (Access to Court*

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168. *Criminal Procedure Act 2011* (NZ) s 199A, s 201, s 203–204.
169. *Criminal Procedure Act 2011* (NZ) s 286, s 292.
170. *Criminal Procedure Act 2011* (NZ) s 211(4).
171. *Criminal Procedure Act 2011* (NZ) s 211(6).
172. *Criminal Procedure Act 2011* (NZ) s 211(5).
173. *Criminal Procedure Act 2011* (NZ) s 211(3).
174. *Criminal Procedure Act 2011* (NZ) s 211(7).
175. See, eg, *Bail Act 2000* (NZ) s 19; *Criminal Investigations (Bodily Samples) Act 1995* (NZ) s 14, s 19; *Evidence Act 2006* (NZ) s 110, s 112; *Children's and Young People's Well-being Act 1989* (NZ) s 438.

Documents) Rules 2017 (NZ). The public have the right to access the formal court record relating to civil proceedings or an appeal.[176] The "formal court record" includes:

- a register or index
- a published list that gives notice of a hearing, and
- a judgment, or order minute of the court, including any record of the reasons given by a judge.[177]

I.113 The public also have the right to access any document or court file relating to an application for a grant of administration, or an action for a recall of a grant of administration, under the *Administration Act 1969* (NZ).[178]

I.114 In relation to criminal proceedings, the public:

- have a right to access specified documents (such as a judicial officer's sentencing notes), and
- can access other documents with the judge's permission such as a document that identifies, or enables the identification of, a person whose identity must not be published pursuant to an enactment or order.[179]

I.115 Non-parties cannot access a document, court file or any judgment or order that relates to proceedings under certain Acts (such as the *Adoption Act 1955* (NZ), the *Care of Children Act 2004* (NZ) and the *Family Violence Act 2018* (NZ)) unless the judge is satisfied there is "good reason" for permitting access.[180]

Canada

General powers to make orders

I.116 Canadian courts have a common law power to make orders restricting the publication of information. The requirements for making an order include:

- the order must be "necessary" to "prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk", and
- the "salutary effects" of publication must "outweigh the deleterious effects on the rights and interests of the parties and the public", which include the right to free

176. *Senior Courts (Access to Court Documents) Rules 2017* (NZ) r 8(1), r 8(5).
177. *Senior Courts (Access to Court Documents) Rules 2017* (NZ) r 4 definition of "formal court record".
178. *Senior Courts (Access to Court Documents) Rules 2017* (NZ) r 8(2).
179. *Senior Courts (Access to Court Documents) Rules 2017* (NZ) r 8(3)–(4).
180. *Senior Courts (Access to Court Documents) Rules 2017* (NZ) r 7.

expression, "the right of the accused to a fair and public trial, and the efficacy of the administration of justice".[181]

I.117 The *Criminal Code* (Can) also contains several provisions allowing courts to make non-publication orders in certain circumstances.[182] For example, a court can make an order restricting publication of:

- information that could identify a complainant or witness of a sexual offence,[183] or
- the names of victims, witnesses and participants in the justice system, where the order is considered necessary for the proper administration of justice.[184]

I.118 A court must make a non-publication order if a victim who is under 18 requests one.[185]

Other legislation governing exceptions to open justice

I.119 In Canada, there are also provisions in subject-specific legislation governing exceptions to open justice.[186]

Regimes governing access to court information

I.120 Public access to court records in Canada is a common law right. The presumption of access applies to both pre-trial court records and documents and evidence provided at trial.[187]

I.121 The presumption of access is rebuttable, and access can be denied "when the ends of justice would be subverted by disclosure or the judicial documents might be used for an improper purpose". The onus is on the person seeking to prohibit access to establish sufficient countervailing interests.[188]

I.122 The Supreme Court of Canada has a policy governing access to court records. Among other things, the policy provides:

- access to any court record is subject to any applicable court order, statutory or common law provision or practice, rule or direction that seals the court record or limits or restricts the right of access to court records

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181. *R v Mentuck* [2001] SCC 76, 3 SCR 442 [32].
182. See, eg, *Criminal Code* (Can) s 278.95(1), s 278.9, s 517(1), s 539(1)–(2), s 542(2), s 631(6), s 648(1).
183. *Criminal Code* (Can) s 486.4(1).
184. *Criminal Code* (Can) s 486.5(1).
185. *Criminal Code* (Can) s 486.4(2.2).
186. See, eg, *Youth Criminal Justice Act 2002* (Can) s 110–111; *Children and Family Services Act 1990* (Nova Scotia) s 94(1); *Child, Youth and Family Services Act 2017* (Ontario) s 87(4).
187. *Attorney General of Nova Scotia v MacIntyre* [1982] 1 SCR 175, 175–176, 189–190.
188. *Attorney General of Nova Scotia v MacIntyre* [1982] 1 SCR 175, 189.

- where a court record or case file is subject to a restriction or limitation on access, access to the record or file may be prohibited entirely or limited to redacted versions of court records (if available), and
- even if they may be accessed, court records containing personal information, may be subject to publication bans or other limitations on use.[189]

International law relating to open justice

Public hearings and judgments

I.123 The *International Covenant on Civil and Political Rights* (ICCPR) recognises that the determination of civil and criminal proceedings should be by public hearing and allows exclusion of the media and the public in certain cases. Article 14(1) provides:

> In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.[190]

I.124 While article 14(1) refers to a range of exceptions to public hearings, it makes special provision in the case of judgments, requiring that they be made public except where:

- the interest of "juvenile persons" otherwise requires, or
- the proceedings concern matrimonial disputes or the guardianship of children.[191]

I.125 The United Nations Human Rights Committee has commented that this requirement applies even where the public is excluded from a trial, so that "the judgment, including the essential findings, evidence and legal reasoning must be made public".[192]

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189. Supreme Court of Canada, "Policy for Access to Supreme Court of Canada Court Records" (31 January 2017) <https://www.scc-csc.ca/case-dossier/rec-doc/pol-eng.aspx> (retrieved 9 May 2022) [3.2.1], [3.2.3]–[3.2.4].
190. *International Covenant on Civil and Political Rights*, 999 UNTS 171 (entered into force 23 March 1976) art 14(1).
191. *International Covenant on Civil and Political Rights*, 999 UNTS 171 (entered into force 23 March 1976) art 14(1).

I.126 It does not apparently recognise cases where a judgment may need to be suppressed, completely or for a limited time, for example, where it may prejudice the safety of a person, or a future criminal hearing.[193] In the case of the exceptions listed, NSW courts often publish judgments, but with anonymisation of some or all of the parties' names, or redaction of some of the contents.

Protections for children involved in court proceedings

I.127 The United Nations *Convention on the Rights of the Child* (CROC) and the ICCPR recognise that children involved in court proceedings are entitled to certain protections.[194] The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) are also relevant, as they assist states in interpreting their obligations under the CROC.

I.128 The CROC and ICCPR contain a range of articles that support protecting the identity of children involved in court proceedings. For example, article 3 of the CROC provides that in all actions concerning children, including those in courts of law, "the best interests of the child shall be a primary consideration". Article 16 recognises that a child's privacy should be protected from arbitrary or unlawful interference.[195]

I.129 Article 40 of the CROC provides that:

> 1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.
>
> 2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:
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> …
>
> (b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:

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192. United Nations, Human Rights Committee, *General Comment No 32: Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial*, 90th session UN Doc CCPR/C/GC/32 (23 August 2007) 9.

193. NSW Society of Labor Lawyers, *Submission CI52*, 2.

194. *Convention on the Rights of the Child*, 1577 UNTS 3 (entered into force 2 September 1990) art 3(1), art 40(1); *International Covenant on Civil and Political Rights*, 999 UNTS 171 (entered into force 23 March 1976) art 14(1).

195. *Convention on the Rights of the Child*, 1577 UNTS 3 (entered into force 2 September 1990) art 3(1), art 16.

…

(vii) To have his or her privacy fully respected at all stages of the proceedings.[196]

I.130 Rule 8 of the Beijing Rules provides:

8.1 The juvenile's right to privacy shall be respected at all stages in order to avoid harm being caused to her or him by undue publicity or by the process of labelling.

8.2 In principle, no information that may lead to the identification of a juvenile offender shall be published.[197]

I.131 The commentary to rule 8 explains:

Rule 8 stresses the importance of the protection of the juvenile's right to privacy. Young persons are particularly susceptible to stigmatization. Criminological research into labelling processes has provided evidence of the detrimental effects (of different kinds) resulting from the permanent identification of young persons as "delinquent" or "criminal".

Rule 8 stresses the importance of protecting the juvenile from the adverse effects that may result from the publication in the mass media of information about the case (for example the names of young offenders, alleged or convicted). The interest of the individual should be protected and upheld, at least in principle.[198]

I.132 The ICCPR also provides that:

- child offenders should "be accorded treatment appropriate to their age and legal status", and
- the procedure for dealing with child offenders should "take account of their age and the desirability of promoting their rehabilitation".[199]

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196. *Convention on the Rights of the Child*, 1577 UNTS 3 (entered into force 2 September 1990) art 40(1), art 40(2)(b)(vii).
197. *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*, GA Res 40/33, UN GAOR, 40th sess, 96th plenary meeting, UN Doc A/RES/40/33 (adopted 29 November 1985) ("Beijing Rules") art 8.
198. *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*, GA Res 40/33, UN GAOR, 40th sess, 96th plenary meeting, UN Doc A/RES/40/33 (adopted 29 November 1985) art 8 commentary.
199. *International Covenant on Civil and Political Rights*, 999 UNTS 171 (entered into force 23 March 1976) art 10(3), art 14(4).

I.133 As outlined above, the ICCPR recognises that judgments need not be made public "where the interest of juvenile persons otherwise requires".[200]

200. *International Covenant on Civil and Political Rights*, 999 UNTS 171 (entered into force 23 March 1976) art 10(3), art 14(1).