



THE LAW SOCIETY
OF NEW SOUTH WALES

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23 February 2018

Ms Rosemary Davidson
Executive Officer
Children's Court of NSW
2 George Street
Parramatta NSW 2123

By email: rosemary.davidson@justice.nsw.gov.au

Dear Ms Davidson,

Review of the *Children's Court Rule 2000 (NSW)* ("Discussion Paper")

Thank you for the opportunity to provide comments and review the *Children's Court Rule 2000 (NSW)* ('the Rule'). The Law Society's Children Legal Issues Committee has contributed to this submission.

The Law Society supports the review of the Rule to streamline and modernise the court's procedures. Our responses to the questions raised in the Discussion Paper are set out in the **attached** table. In our response, we suggest amendments to the following key areas:

1. Simplifying the language to make it more comprehensible for all users;
2. Establishing guidelines to specify who has access to court records and who can authorise access;
3. Incorporating substantive provisions that relate to subpoenas in the Rule;
4. Clarifying specific subpoena related rules;
5. Introducing an electronic case management system which allows for the electronic filing and service of documents;
6. Modifying the Children's Court Advisory Committee to increase the maximum age of the young representative to 25 and to include a representative from the Aboriginal Legal Service;
7. Consideration of a Children's Court rule-making power;
8. Redrafting clause 32 of the Rule to make it more accessible for young litigants to participate in legal proceedings without a parent or carer.

Thank you for considering this submission. Should you have any questions or require further information, please contact Amelia Jenner, Policy Lawyer on (02) 9926 0275 or email amelia.jenner@lawsociety.com.au.

Yours sincerely,

Doug Humphreys OAM
President

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Review of the *Children's Court Rule 2000* (NSW)

Submission of the Law Society of NSW

No.	Question	Comments
Making the Rule more accessible		
1.	Do you think the language in the <i>Children's Court Rule 2000</i> (NSW) could be improved to make the Rule more comprehensible for all users?	<ul style="list-style-type: none"> • The Law Society submits that the language in the <i>Children's Court Rule 2000</i> (NSW) could be improved to make the rules more comprehensible for all users. The complex legal language in which the rules are presently drafted inhibits accessibility of court processes. As a matter of fairness and practicality, the rules should be drafted in a manner that is comprehensible for all users, including self-represented litigants. • We endorse the suggestion outlined in the discussion paper that the rules should be drafted in plain English. A common complaint among the community is the lack of transparency of the Children's Court processes, particularly given that the Children's Court is a closed court. Improving the rules to be more comprehensible for all users is likely to be beneficial in contributing to greater transparency of court processes.
Access to court records		
2.	What guidelines should be in place regarding access to court records in the Children's Court?	<p>Introduction</p> <ul style="list-style-type: none"> • The Law Society considers that the introduction of guidelines regarding access to court records is paramount to the efficiency and accessibility of the Children's Court and ensuring that the rights of children are protected. • There is a need for a Children's Court rule in relation to access to Children's Court records for the following reasons: <ol style="list-style-type: none"> 1) Currently, there is no, apparent, unified approach to how the Children's Court deals with this issue. For example, there is no Practice Note. 2) There are various disparate sources of authority and guidance about the rights of parties and non-parties to access court records, including: <ol style="list-style-type: none"> A. Legislation; B. Case law; and C. Practice Notes from other jurisdictions. 3) There are particular provisions which apply to children which increase the need for

No.	Question	Comments
		<p>special rules about access to Children's Court records.</p> <p>4) The UN Convention on the Rights of the Child¹ (for example, Article 40(2)(vii) regarding a child's right to have their privacy respected at all stages of the proceedings) draw attention to the particular need to protect children's privacy and facilitate rehabilitation.</p> <p>Parties to the proceedings</p> <ul style="list-style-type: none"> • Access to court records in the Children's Court should be allowed to parties in the legal proceedings. Currently, in the care jurisdiction, parents and authorised carers can obtain information about the placement of a child from a designated agency responsible for the child or young person (for example, care plans and final orders).² • The Law Society are aware of anecdotal reports of difficulties and delays when seeking care plans and final orders from the Department of Family and Community Services. It would be beneficial if court documents were directly available from the court. • Parties to proceedings should be able to access court records even after a matter is finalised. <p>Non-Parties to the proceedings</p> <ul style="list-style-type: none"> • In relation to criminal matters, the Law Society's view is that a non-party (except for the media, with the court's leave) should not be entitled to any document in the proceedings. However, in relation to care and protection matters, we take a different view as there are circumstances where it is appropriate that a non-party be granted access to a document in a proceeding (for example, where a grandparent who was not a party to care proceedings needs documents from those proceedings in support of an adoption application); however, this should be subject to the court's leave. • Requests for the release of court documents by a non-party (including the media) should be determined by the Children's Court Magistrate. When granting a disclosure order, the Magistrate should consider current legislation and case law such as whether: <ol style="list-style-type: none"> 1) There is a current suppression order, such as an order made under the <i>Court Suppression and Non Publications Orders Act 2010</i> (NSW). 2) There is a non-publication order, such as an order made under the <i>Children (Criminal Proceedings) Act 1987</i> (NSW).

¹ Convention on the Rights of the Child, opened for signature 20 November 1989, 44 UNTS 25 (2 September 1990).

² *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 149C.

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		<p>3) The request is from the media. Media authorities can only inspect the documents for fair reporting, if there is no suppression or non-publication order in place (See <i>R(Cth) v Mohamed Ali Elomar (No 3)</i> [2008] NSWSC 1443).</p> <p>4) The documents would lead to the identification of children. This may include, name, date of birth, address, photo, family or schools (see, for example, s 15A of the <i>Children's (Criminal Proceedings) Act 1987</i> NSW and s 105 of the <i>Children and Young Persons (Care and Protection Act 1998</i> (NSW)).</p> <ul style="list-style-type: none"> • We emphasise that for both criminal and care and protection proceedings it is critical that children's privacy and safety are upheld as a matter of priority, consistent with the paramount principles governing the <i>Children and Young Persons (Care and Protection) Act 1998</i> (NSW) and the <i>Children's (Criminal Proceedings) Act 1987</i> (NSW), and in particular the relevant non-publication provisions. • Any request or application for the release of court documents by a non-party (including the media) should be subject to the court's leave and determined by a Children's Court Magistrate. <p>Request by media may result in undue burden</p> <ul style="list-style-type: none"> • The <i>Children's Court Rule 2000</i> (NSW) should also give the Children's Court the ability to consider and refuse an application for access to court records by the media on the basis that granting the request would result in an undue burden on the court (for example, it would be unduly burdensome for court staff to provide a redacted version of the document showing only those parts that are in evidence or have been read out).³ We note that the Federal Court Practice Note 'Access to Documents and Transcripts Practice Note' allows the court to consider factors including whether the request for access may result in an undue burden on the court.⁴ <p>Court Information Act 2010 (NSW)</p> <ul style="list-style-type: none"> • The Law Society would like to express its reservations should the Children's Court decide to adopt the provisions in the <i>Court Information Act 2010</i> (NSW) ('CIA') when reviewing the <i>Children's Court Rules 2000</i> (NSW) and any accompanying guidelines.

³ See discussion at page 132, Sharon Roderick, "Open Justice, the Media and Avenues of Access to Documents on the Court Record" [2006] UNSWLJ 40, also available at: <http://www.austlii.edu.au/au/journals/UNSWLJ/2006/40.html>

⁴ Federal Court of Australia, 'Access to Documents and Transcripts Practice Note' (25 October 2016), Practice Note 4.10(e), available at: <http://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/gpn-accs>

No.	Question	Comments
		<ul style="list-style-type: none"> • Our concerns are that the provisions in the CIA provide much greater access to documents than is available under current legislation relevant to Children’s Court matters and that there are no specific provisions regarding the special requirements required for children. • We also note that while the CIA was assented to 8 years ago, it has not yet commenced. Given the passage of time, should the Children’s Court decide to adopt the CIA, we submit that consideration should be given to which provisions of the CIA remain relevant.
3.	Who should be delegated the responsibility of determining applications to access court documents?	<ul style="list-style-type: none"> • The Law Society submits that the responsibility for determining applications to access court records should be delegated to the Registrar of the Children’s Court if requested by a party of the legal proceedings or the Children’s Court Magistrate if requested by a non-party. • The delegation to the appropriate court officer will ensure that the relevant laws are followed and suppression and non-publication orders are considered carefully. • We would also support the inclusion of a rule that requires the parties to proceedings to be informed about an application for access and to be given an opportunity to make submissions.
4.	Are there types of documents and/or certain information that should not be released?	<ul style="list-style-type: none"> • It is suggested that the best way to ensure that sensitive information is not released inappropriately is by way of clear guidelines concerning who has the authority to release specified documents and information, and to whom. Information not to be disclosed should include: <ol style="list-style-type: none"> 1) Documents relating to proceedings held in closed court where the applicant was not allowed in court; 2) Documents subject to a suppression order; 3) Documents subject to a non-publication order. • In relation to media access to court records in criminal proceedings, we note that s 314 of the <i>Criminal Procedure Act 1986</i> (NSW) provides for media access to court documents in limited circumstances. We submit that the <i>Children’s Court Rule 2000</i> (NSW) should allow for no greater access than that provided by s 314. Because of the sensitive nature of Children’s Court proceedings, we submit that the <i>Children’s Court Rule 2000</i> (NSW) can be and should be more restrictive than the provisions of s 314. Information that should not be disclosed should include documents relating to proceedings if the application by the

No.	Question	Comments
		<p>media is made more than two days after the proceedings are finalised, as per the CPA.</p> <ul style="list-style-type: none"> • The Law Society submits that documents which are not related to criminal proceedings, as defined by s 3 of the <i>Criminal Procedure Act 1986</i> (NSW) should not be accessible, as they fall outside the ambit of s 314.⁵ • We note that the media are restricted to applications for leave to access <i>only</i> classes of documents specified in s 314(2). • In relation to s 314(2), we recommend that the <i>Children's Court Rule 2000</i> (NSW) specifically state that records of convictions should not be made available where a child has not received a conviction by virtue of the operation of s 14 of the <i>Children (Criminal Proceedings) Act 1987</i> (NSW) (i.e. where the child was under 16 or where the Children's Court exercised its discretion to not record a conviction). We submit the purpose of s 14 of the <i>Children (Criminal Proceedings) Act 1987</i> (NSW) is to facilitate a child's rehabilitation by ensuring that they are not adversely affected by the disclosure of a conviction (for example, for employment purposes). We therefore consider that the same principle should apply to prevent disclosures to the media for publication. • We also note that s 314(2) only refers to police fact sheets tendered upon a guilty plea. Police fact sheets tendered for any other purpose should not be accessible, including police fact sheets tendered upon an admission under the <i>Young Offenders Act 1997</i> (NSW). • Noting that they are not included within s 314(2), the following documents should not be accessible by media: <ol style="list-style-type: none"> 1) Any Juvenile Justice reports. 2) Any Justice Health reports. 3) Any psychological/psychiatric report. 4) Transcript of anything other than admissible evidence. That is, there is no provision for access to transcripts of voir dices, submissions, judgment or the court proceedings generally. 5) Any exhibit (eg CCTV, ERISP DVD) which is not a witness statement. 6) Any correspondence to the court (eg by parties or non-parties such as FACS, Juvenile Justice etc). 7) Any character references. 8) Any application forms (eg applications to vacate hearings, applications for s 4

⁵ We note that criminal proceedings as defined in the *Criminal Procedure Act 1986* do not include preliminary criminal proceedings such as committal proceedings and proceedings related to bail. We also note that forensic procedure applications are not criminal proceedings.

No.	Question	Comments
		<p>annulments under the <i>Crimes (Appeal and Review) Act 2001</i> (NSW), bail applications).</p> <p>9) Bench sheets.</p> <p>10) Any other document that has not been tendered in court.</p>
5.	Should there be separate guidelines for the care jurisdiction and the crime jurisdiction?	<ul style="list-style-type: none"> The Law Society recommends that separate guidelines should apply to the care and crime jurisdiction as there are substantive differences in practice and procedure.
Compulsory schooling orders		
6.	Is there a more efficient procedure for dealing with compulsory schooling orders? If so, what do you think the procedure should be?	<ul style="list-style-type: none"> No comments.
7.	Are there any procedural issues specific to compulsory schooling orders that you think the <i>Children's Court Rule 2000</i> (NSW) should address? If yes, what are they?	<ul style="list-style-type: none"> No comments.
Procedural provisions for subpoenas		
8.	Should all rules regarding subpoenas be included in the <i>Children's Court Rule 2000</i> (NSW)? If yes, should there be separate rules for subpoenas in the care jurisdiction and subpoenas in the crime jurisdiction?	<ul style="list-style-type: none"> The Law Society submits that the consolidation of substantive practice directions regarding subpoenas in the <i>Children's Court Rule 2000</i> (NSW) would increase consistency, clarity and transparency. The Law Society suggests that the provisions 15.2, 15.4 to 15.14 and 17.8.2 and 17.8.3 in Practice Note No. 5 of the Children's Court <u>should</u> be incorporated in the <i>Children's Court Rule 2000</i> (NSW) as these particular sections contain substantive directions to be followed in the Children's Court. The Law Society suggests that the provisions 15.1, 15.3, 15.15 and 15.16 <u>should not</u> be included in the <i>Children's Court Rule 2000</i> (NSW) as these provisions are administrative and are in the form of a practice direction, rather than a rule. The Law Society submits that the court could consider making separate rules for subpoenas in the care jurisdiction and the crime jurisdiction as there are substantive differences in practice and procedure.
9.	Are there any specific subpoena related rules that require clarification? If yes,	<ul style="list-style-type: none"> The Law Society submits that the following rules and provisions contained in the <i>Children's Court Rule 2000</i> (NSW) and Practice Note No. 5 require further clarification:

No.	Question	Comments
	what are they?	<ol style="list-style-type: none"> 1) <u>Rule 30A(7)</u> requires clarification as to whether five days means five days (including public holidays and weekends) or five working days. We also prefer the inclusion of simpler wording in this section (see, for example, s 223(1) of the <i>Criminal Procedure Act 1986</i> (NSW) regarding the time for service of subpoenas). 2) <u>Rule 30C(1)</u> does not define “conduct money”. Conduct money should be defined, to make the rules more user-friendly and clear, and to ensure that adequate conduct money is provided to enable compliance with subpoenas. 3) <u>Rule 30C(2)</u> states that an addressee does not need to comply with the requirements of a subpoena if service was not completed by the last day stated on the subpoena. As mentioned above, the Law Society recommends that the provision be redrafted to mimic s 223 of the <i>Criminal Procedure Act 1986</i> (NSW). The provision should be rewritten to stipulate the period the subpoena should be served by. 4) <u>Rule 30C(4)(b)</u> states “...so that they are received not less than 2 clear days before the date specified...” The expression “clear” days is not defined. 5) <u>17.8.2 and 17.8.3 of Practice Note No. 5</u> contain directions, which apply in all contested hearings, for the production and service by the parties of a subpoena bundle on which they intend to rely. We suggest that it may be helpful to include sections 17.8.2 and 17.8.3 in the <i>Children’s Court Rule 2000</i> (NSW) so that the requirements are clearly set out. We have received anecdotal reports that there are some legal practitioners who do not appear to be aware of (or are not complying with) the requirement to serve a subpoena bundle prior to a hearing.
10.	Should the Children’s Court have the power to refuse to issue subpoenas in certain situations? If so, who should be making these decisions?	<ul style="list-style-type: none"> • The Law Society submits that the Children’s Court Magistrate should have the power to refuse subpoenas. • We recommend the power to refuse to issue subpoenas should be similarly drafted to the powers set out in the <i>Local Court Rules 2009</i> (NSW), where refusal could be based on an abuse of process or where it would be oppressive on the person named.⁶ • Where there are powers to allow a party (or any person having a sufficient interest) to make an application to set aside a subpoena in whole or in part, we also submit that a Children’s Court Magistrate should be the only person with the power to make such decisions.
11.	Are there any additional subpoena related issues that should be addressed	<ul style="list-style-type: none"> • No comments.

⁶ *Local Court Rules 2009* (NSW), rule 6.2.

No.	Question	Comments
	in the <i>Children's Court Rule 2000</i> (NSW)?	
Electronic case management		
12.	Should the <i>Children's Court Rule 2000</i> (NSW) allow for the electronic service of documents? If yes, should there be any limitations regarding this rule?	<ul style="list-style-type: none"> • The Law Society submits that the <i>Children's Court Rule 2000</i> (NSW) should allow for the electronic service of documents as it will facilitate the timely service of documents. • The Law Society notes that consideration could be given to whether limitations should exist in the following contexts: <ol style="list-style-type: none"> 1) Where a party does not have access to a reliable internet connection; for example, parties in rural and regional areas may not be able to access documents served electronically; 2) Self-represented litigants: the appropriateness of electronic service should be considered in the context of self-represented litigants depending on their circumstances and resources; 3) Documents exceeding a certain specified limit should be provided by hard copy; and 4) Hard copies should be provided to a party upon request.
13.	Are there any specific issues regarding electronic case management that you would like the <i>Children's Court Rule 2000</i> (NSW) to address?	<ul style="list-style-type: none"> • Electronic filing should not be limited to the Department of Family and Community Services. The electronic exchange of information should be made available to all parties. Practitioners report that this would save significant time in not having to physically attend court to file documents, which is impractical and costly.
Composition of the Children's Court Advisory Committee		
14.	Should the maximum age of the young representative on the Children's Court Advisory Committee be increased? If yes, what age is appropriate?	<ul style="list-style-type: none"> • The Law Society submits that clause 37 of the <i>Children's Court Rule 2000</i> (NSW) should be amended to increase the maximum age of the young representative to 25. The Law Society further suggests that it is preferable that the young representative should have some experience with the care or criminal jurisdictions of the Children's Court. • The Law Society also suggests that it may be beneficial to appoint more than one young representative.
15.	Do you think there is a more effective selection mechanism for obtaining the young representative on the Children's Court Advisory Committee?	<ul style="list-style-type: none"> • No comments.
16.	Does the Children's Court Advisory	<ul style="list-style-type: none"> • To address the issue of disproportionate over-representation of Indigenous children in the

No.	Question	Comments
	Committee have representatives from all the agencies that ought to have representation on the Committee?	<p>care and crime jurisdiction, the Law Society suggests that the <i>Children's Court Rule 2000</i> (NSW) be amended so that it explicitly states in clause 37(1)(c) that a representative from the Aboriginal Legal Service should be appointed by the Attorney General to the Children's Court Advisory Committee.</p> <ul style="list-style-type: none"> The composition of the Children's Court Advisory Committee should reflect and embody the principles of Aboriginal participation in decision making and Aboriginal self-determination, as outlined in the <i>Children and Young Persons (Care and Protection Act 1998)</i> (NSW).
Establishing a Children's Court rule making power		
17.	Should the Children's Court have the power to make its own rules?	<ul style="list-style-type: none"> The Law Society suggests that there may be benefit to the court having the power to make its own rules. However, we suggest that a rules committee with proper representation be established. Granting such powers may streamline the process of updating rules as policy and legislative changes occur over time.
18.	If you agree that the Children's Court should have a rules committee, what should the composition of the rules committee be? Should the composition be similar or identical to the Children's Court Advisory Committee?	<ul style="list-style-type: none"> No comments.
The structure of the Rule		
19.	Can the structure of the <i>Children's Court Rule 2000</i> (NSW) be improved? If so, what is the best option for reform?	<ul style="list-style-type: none"> The Law Society recommends that rules which relate to all matters before the Children's Court should be contained in the same 'general' part, and that thereafter rules specific to the crime and care jurisdictions are separately outlined.
20.	Given the options for a structural reform to the Rule outlined in this Discussion Paper, if option C were adopted, do you think general provisions relating to care, criminal and application proceedings should be replicated in each Part or do you think such provisions should be included in a separate Part titled	<ul style="list-style-type: none"> No comments.

No.	Question	Comments
	'General practice and procedure'?	
Other Matters		
21.	Should clause 32 of <i>Children's Court Rule 2000</i> (NSW) be redrafted to be less restrictive?	<ul style="list-style-type: none"> <li data-bbox="840 323 2058 624">• The Law Society suggests that clause 32 of the <i>Children's Court Rule 2000</i> (NSW) should be redrafted or deleted due to its restrictive nature. Currently, the provision provides for the adjournment of court proceedings in the Children's Court if a child or young person is unaccompanied by a parent or carer. Members of the Children's Legal Issues Committee have raised concerns regarding the practicality or inappropriateness of the provision as many children who attend the Children's Court do not have reliable parents or carers, or are accompanied by another support person. Children have a right to participate in their own proceedings and are entitled to legal representation and therefore should not be disadvantaged if they are not accompanied by a parent or carer. <li data-bbox="840 663 2058 727">• The Law Society recommends that clause 32 should be deleted or redrafted to allow the court discretion to adjourn a matter.