THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: EEas: 1729983

31 May 2019

Mr Alan Cameron AO
NSW Law Reform Commission
GPO Box 31
SYDNEY NSW 2001

By email: nsw-lrc@justice.nsw.gov.au

Dear Mr Cameron,

Open Justice Review: Preliminary submission

Thank you for the opportunity to provide a preliminary submission to the NSW Law Reform Commission's Open Justice Review ("the NSWLRC Open Justice Review").

The Law Society's input is informed by a number of our policy and practice committees, and draws on previous submissions we have made related to the review's terms of reference.

1. NSW Legislation affecting access to, and disclosure and publication of, court and tribunal information.

1.1 *Court Suppression and Non-Publication Orders Act 2010* (NSW)

The Law Society notes that the *Court Suppression and Non-publication Orders Act 2010* (NSW) ("CSNPO") was introduced after a national project to develop consistent legislation across jurisdictions, and the model was also adopted federally and in Victoria.

Given the importance of open justice, the Law Society is of the view that an adult convicted of an offence should not be able to have their name suppressed purely to avoid causing them distress and embarrassment. However, suppression and non-publication orders to avoid distress and embarrassment to complainants and witnesses (who may themselves be victims of an offence) should be utilised where possible to support their engagement with the criminal justice system. Legislation regulating suppression and non-publication orders should also make it possible to protect children of a person convicted of an offence, even when they are not a victim or a witness.

Recommendation

The NSWLRC Open Justice Review should consider how to reconcile the principle of open justice with the need to avoid undue distress and embarrassment to victims, complainants, and the children of offenders.

THE LAW SOCIETY OF NEW SOUTH WALES
170 Phillip Street, Sydney NSW 2000, DX 362 Sydney T +61 2 9926 0333 F +61 2 9231 5809
ACN 000 000 699 ABN 98 696 304 966 www.lawsociety.com.au

1.2 *Court Information Act 2010* (NSW)

The Law Society notes that while the *Court Information Act 2010* (NSW) was amended in 2016, none of the provisions in the Act have commenced.

The Law Society has reservations about the provisions of the Act commencing, as they provide far greater access than current legislation allows, and contain no special requirements for children. Other concerns the Law Society has with the *Court Information Act 2010* (NSW) include the following:

- The Law Society does not support the special treatment afforded to news media organisations by s 10 of the Act, which provides a presumption in favour of news organisations accessing a range of restricted access information. Open justice principles should apply equally to all. Furthermore, if this section were to come into effect, the definition of "news media organisation" at s 10 of the Act would likely need revising, in light of rapid changes to the way news media is being produced and consumed.
- Regarding the charging of fees for access (s 15), while the Law Society accepts that a fee could be charged to cover the reasonable costs of providing access, we have concerns about whether such fees may inhibit open access.
- If it is to commence, the Act should be amended to require that parties to proceedings be notified of any request for access to restricted information, and be given a reasonable opportunity to be heard in relation to the application.
- The Law Society is concerned that the Act may require legal practitioners to redact information subject to a specific order. In addition to the time impost, it would be impractical for a legal practitioner representing a party to be required to redact information, particularly where a significant amount of time has elapsed between the hearing in which the information was produced and when the redaction order is made. In circumstances where a legal practitioner no longer represents a party, their ability to seek instructions in relation to redaction would be limited. The Law Society supports the court taking on the role of redacting relevant information. In the alternative, where redaction is required to be undertaken by a legal practitioner representing a party, the legal practitioner should be allowed to charge reasonable fees for the cost of redaction based on current costs principles under the legal profession regulatory framework.

Recommendation

Due to the significant period of time that has elapsed since the *Court Information Act 2010* (NSW) received assent, without its provisions having commenced, the Law Society recommends that the NSWLRC Open Justice Review consider whether this Act should be reconsidered and revised.

1.3 *Children (Criminal Proceedings) Act 1987* ("CCPA")

The Law Society is of the view that juvenile offenders and, importantly, children who have not yet been charged, should be entitled to special consideration to protect their privacy in line with s 15A of the CCPA, and in accordance with international obligations under the UN Convention on the Rights of the Child, specifically article 40(2)(b)(vii).

The Law Society further notes that s 6(b) of the CCPA provides that any court exercising criminal jurisdiction with respect to children must have regard to the principle that children who commit offences bear responsibility for their actions, but because of their state of dependency and immaturity, require guidance and assistance. A further principle that the court must have regard to is that it is desirable, wherever possible, to allow the education or employment of a child to proceed without interruption (s 6(c) of the CCPA).

Recommendations

The NSWLRC Open Justice Review should consider whether legislative amendments to the CCPA and/or the *Young Offenders Act 1997* (NSW) are required in order to protect the privacy of children who have been arrested and not yet charged.

1.4 General comments

The Law Society notes that there is an array of legislation, at both the state and federal level, regulating suppression and non-publication orders. Disparate legislation across various statutes and jurisdictions creates confusion and difficulties for practitioners, particularly in a digital environment where news media and other information flows freely across jurisdictions.

Recommendation

The Law Society recommends that the NSWLRC Open Justice Review consider the potential for harmonising legislation or establishing a set of uniform principles for regulating suppression and non-publication orders across different jurisdictions in Australia.

2. Do 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?

The Law Society strongly supports the principle of open justice and access to court information, while emphasising the need to balance this principle to ensure that access does not unduly prejudice the rights of parties to proceedings. In a prior submission on the consultation draft of the *Court Information Bill 2009* (NSW), the Law Society recommended four guiding principles that should govern any access to court information. We take the opportunity to restate those principles here.

1. There is a general public interest in ensuring the public has a right of access to court information.
2. The legislation must balance the interest of open and unfettered access to justice and other public interests e.g. interest in protecting privacy rights of individuals/national security/parties in litigation from unnecessary prejudicial impact etc. Some court information should not be publicly accessible.
3. Parties to proceedings may have an interest in restricting access to court information related to their proceedings. These parties should be heard before any related court information is disclosed.
4. Individuals' privacy and personal information should be protected from unwarranted disclosure. They should be heard prior to disclosure.

To ensure these principles are given appropriate weight in suppression and non-publication order proceedings, the Law Society recommends the NSWLRC consider the role of an independent Open Justice Advocate in NSW. In this regard, the Law Society notes the recommendation made by the Hon Frank Vincent AO QC in his 2017 review of the *Open Courts Act 2013* (Vic), about expanding the role and functions of Victoria's Public Interest Monitor as follows:

> 1. The Monitor should be empowered, if requested by the judge to appear as contradictor, to make submissions and ask questions when the judge is determining whether orders should be made under the Open Courts Act, on what grounds and the framing of their scope.

2. Orders, once made, can be referred to the Monitor for consideration by interested parties to enable the independent consideration of the need, terms and duration of the order while maintaining the security of the underlying information. The Monitor's decision whether or not to pursue the review of an order is final.

3. If it is considered necessary in the public interest to intervene, the Monitor should be able to seek the review of the order by the judge or prosecute an appeal.[1]

We note that while there is currently provision, for example in the CSNPO, for media organisations and other interested parties to be heard in relation to suppression and non-publication orders proceedings, these organisations do not always have the capacity, resources or appetite to intervene. The Law Society also notes the potential benefits of an independent, public-funded Open Justice Advocate, who could be called on to assist the court when required, or review orders once made, in the public interest, could provide. These include ensuring that the necessity for an order is properly considered and that its terms are unambiguous.

The Law Society further notes the recently-established position of Surveillance Devices Commissioner under the *Surveillance Devices Amendment (Statutory Review) Act 2018* (NSW) and suggests this position could serve as a model for the role of Open Justice Advocate in NSW, which could be a part-time appointment.

Recommendation:

The Law Society recommends the NSWLRC Open Justice Review consider the role of an independent position of Open Justice Advocate in NSW.

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

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

The Law Society has been advised by members of its policy committees that the process of enforcing non-publication orders in the digital environment is unwieldy, and often contingent on the goodwill of Internet Service Providers (ISPs) located outside Australia. Non-publication and suppression orders issued in NSW courts generally apply to content published overseas that can be accessed from Australia. In practice, however, prosecuting breaches that originate on overseas-based web pages is expensive, difficult and unreliable. In circumstances where a court issues a take-down order, following a breach of a non-publication order, the efficacy of the order depends on the cooperation of either the subject of the non-publication order or the ISP.

Notwithstanding the challenges presented by the digital environment in ensuring compliance with suppression and non-publication orders, and the issues associated with foreign jurisdictions circumventing such orders, the Law Society is of the view that suppression and non-publication orders remain a necessary and important tool, and courts should retain discretion to order them.

[1] The Hon. Frank Vincent AO QC, *Open Courts Act Review* (September 2017), 11.

Recommendation

The NSWLRC Open Justice review should consider means of adapting and enforcing suppression and non-publication orders to ensure compliance in the digital environment.

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

4.1 Legislative provisions prohibiting the identification of children and young people involved in criminal proceedings.

Division 3A of the CCPA contains a prohibition on publishing or broadcasting the name of a child in connection with a criminal proceeding – albeit with some exceptions. This reflects the different treatment of children and young people in the criminal justice system, in recognition of their cognitive and emotional immaturity, and increased vulnerability and impulsivity, compared to adults. The policy objective behind the prohibition is to reduce the stigma associated with the child's association with crime, and to allow reintegration into the community with a view to full rehabilitation.

The current position in NSW reflects Australia's endorsement of various United Nations instruments including:

- the United Nations Declaration on the Rights of the Child 1959;
- the United Nations Convention on the Rights of the Child 1989;
- the United Nations International Covenant on Civil and Political Rights;
- the United Nations Standard Minimum Rules for the Administration of Juvenile Justice 1985 (Beijing Rules), and
- the United Guidelines for the Prevention of Juvenile Delinquency 1990 (Riyadh Guidelines).

We note that the NSW Legislative Council Standing Committee on Law and Justice's 2008 report, *The prohibition on the publication of names of children involved in criminal proceedings*, concluded that the prohibition in the CCPA should not be relaxed. In fact, the report found that the weight of evidence warranted the extension of the prohibition to cover the period prior to the official commencement of criminal proceedings and the inclusion of any child with a reasonable likelihood of becoming involved in criminal proceedings.[2]

The impact of naming on juvenile offenders was given extensive consideration in the report.[3] The Standing Committee noted evidence that "publicly naming juvenile offenders is likely to lead to stigmatisation resulting in prejudice from other people and the formation of negative self-identity." The Standing Committee found that:

> [T]his [stigmatisation] would have a negative impact on the rehabilitation of juvenile offenders and could potentially lead to increased recidivism by strengthening a juvenile's bonds with criminal subcultures and their self-identity as a 'criminal' or 'deviant,' and undermining attempts to address the underlying causes of offending.[4]

---

[2] NSW Legislative Council Standing Committee on Law and Justice, *The Prohibition on the Publication of Names of Children Involved in Criminal Proceedings* (April 2008), 80.
[3] Ibid 21-42.
[4] Ibid 41.

The Law Society is of the view that the factors set out in s 15C(3) of the CCPA appear to be appropriate. Section 15C(3) incorporates the list of factors set out in *Application by John Fairfax Publications Pty Ltd re MSK,MAK, MMK and MRK* [2006] NSWCCA 386 that the court must have regard to in deciding whether to make an order authorising the publishing or broadcasting to the public of the name of a child who has been convicted of a serious indictable offence. The factors achieve a balance between maintaining a broad judicial discretion and providing some legislative guidance on the factors relevant to determining the interests of justice.

4.2 Legislative provisions prohibiting the identification of adults convicted as children.

Rehabilitation is a primary consideration in the sentencing of child offenders. In *C S & T*, Gleeson CJ articulated this principle, accepting a submission that:

> In sentencing young people... the consideration of general deterrence is not as important as it would be in the case of sentencing an adult and considerations of rehabilitation should always be regarded as very important indeed.[5]

A criminal record impedes children's prospects of rehabilitation by limiting employment. In recognition of this, several legislative provisions allow a court to deal with a child offender without conviction, including the CCPA, the *Young Offenders Act 1997* (NSW), and the *Criminal Records Act 1991* (NSW).

The issue of identification of adults convicted as children is particularly salient with regard to Working With Children Checks ("WWCC"). As one example, children who have been in care (e.g. in a group home or in the care of an authorised foster carer) may find themselves being subject to a WWCC once they turn 18 in order to continue living in accommodation with other children. If this child has accumulated a criminal record, this can lead to them leaving stable accommodation once they turn 18.

Recommendations

The NSWLRC Open Justice Review should consider:
a) Whether and what type of juvenile records should be subject to a WWCC, noting the importance of maximising a child's prospects of rehabilitation.
b) Recommendation 17 of the Royal Commission into Institutional Responses to Child Sexual Abuse *Working With Children Checks Report*, which stated that "State and territory governments should amend their WWCC laws to include a standard definition of criminal history, for WWCC purposes".

5. The findings of the Royal Commission into Institutional Responses to Child Sexual Abuse regarding the public interest in exposing child sexual abuse offending.

One of the recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse was that the that the Australian Government and state and territory governments establish a national information exchange scheme that would:

> [E]nable direct exchange of relevant information between a range of prescribed

[5] Unreported, NSW Court of Criminal Appeal, 12 October 1989. Cited in L Fernandez, 'The place of rehabilitation in the sentencing of children for serious offences (May 2004), *Legal Aid NSW Children's Legal Service Bulletin*. Available at: https://www.legalaid.nsw.gov.au/__data/assets/pdf_file/0018/6507/Place-of-rehabilitation-in-the-sentencing-of-children-for-serious-offences.pdf

bodies, including service providers, government and non-government agencies, law enforcement agencies, and regulatory and oversight bodies, which have responsibilities related to children's safety and wellbeing.[6]

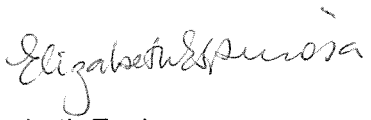
The Law Society believes it is vital that there are effective information flows between prescribed bodies. This is particularly true in respect of information sharing between child protection authorities and Indigenous community-controlled agencies, given the overrepresentation of Indigenous children and families in this jurisdiction.

Recommendation

The NSWLRC Open Justice Review should consider how exchange of relevant information between prescribed child protection bodies can be improved, in order to ensure the best interest of the child are met.

If you have any queries about the above, or would like further information, please contact Andrew Small, Policy Lawyer, on (02) 9926 0256 or andrew.small@lawsociety.com.au.

Yours sincerely,



Elizabeth Espinosa
President

[6] Attorney General's Department, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report recommendations* (2017), Recommendation 8.7, 24.