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

Legal Aid NSW submission to the Children's Court of NSW

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Making the Rule more accessible

1. Do you think the language in the *Children's Court Rule 2000* (NSW) could be improved to make the Rule more comprehensible for all users?

Legal Aid NSW considers that there is scope to improve the language of the *Children's Court Rule 2000* (NSW) ('**the Rule'**) so that it is more accessible and easy for users to understand.

Access to court records

2. What guidelines should be in place regarding access to court records in the Children's Court?

There are a number of legislative provisions which govern disclosures and publication in Children's Court proceedings.[1] However, the *Children's Court Act 1987*, the Rule, and the *Children (Criminal Proceedings) Act 1987* (**CCPA**) and regulation are all silent on third-party access to court records. Section 314 of the *Criminal Procedure Act 1986* (**CPA**), which deals with media access to court records, applies by virtue of its application in children's criminal proceedings.[2]

Although the *Court Information Act 2010* (NSW) applies to Children's Court proceedings, it has not yet commenced, almost eight years after its assent on 26 May 2010. In our view, it is also not clear that its provisions adequately take into account the specific considerations that arise in children's criminal and care proceedings, which are closed proceedings. There is a need to balance the principle of open justice with the safety, welfare, well-being, privacy and other interests of children who are the subject of those proceedings. Given our role representing children in both the care and criminal jurisdiction of the court, we emphasise the need to ensure those interests are adequately taken into account in any policy or decisions regarding access to Children's Court records.

We note that other courts have either rules or practice notes governing access to court records.[3] We would support the Children's Court adopting either rules or a practice note on this issue.

We note that there is currently no legislative provision which allows a non party (other than the media) to access court records in criminal proceedings. Our position is that, in criminal

[1] See for example sections 105 and 254 of the *Children and Young Person (Care and Protection) Act 1998* ('the Care Act') and section 15A of the *Children (Criminal Proceedings) Act 1987* ('the CCPA').
[2] *Children (Criminal Proceedings) Act 1987*, s27(1).
[3] See for example Supreme Court Practice Note (SC Gen 2), rule 52.3(2) of the District Court Rules 1973, rule 8.10 of the Local Court Rules. The Children's Court of Victoria also has a *Media Access Protocol for Journalists in the Criminal Division of the Children's Court of Victoria*

proceedings, non-parties who are not the media should not be able to access Children's Court records.

Our preferred position is that there should be no access to Children's Court records by non-parties in care matters, or the media in criminal matters, without the leave of the Court. Although we recognise the principle of open justice, we consider that in Children's Court proceedings, this principle must always be balanced with the rights and interests of children who are the subject of those proceedings. In our view, that balancing exercise is appropriately undertaken by the presiding Children's Court Magistrate or Judge with knowledge of the matter (see our response to question 3, below).

As the Discussion Paper notes, the Rule would need to set out the process for applying for and determining applications for leave. In addition, the Rule should make provision for how and where non-parties can access documents, and should contain clear guidelines about the use of documents.

The Rule should expressly prohibit non-party access to documents to which a suppression order or non-publication order relates.

The Rule should also prohibit access to court records by persons who have not been allowed to remain in court during proceedings. If a person has not been present in court because they were not entitled to be there or because the court made a direction excluding them, that person should not be able to otherwise obtain information about the proceedings via an application for court records.

A practice note or guidelines could specify categories of documents which are not accessible (e.g. Children's Clinic reports, medical records, subpoena material not put into evidence).

A special approach may also be needed in relation to applications for information for research purposes.

The information in the Rule regarding access and use should be provided to both parties and non-parties in a way that is accessible and easy to understand. The fact that the Court is closed and proceedings are protected by non-publication and disclosure provisions in the Act could also be emphasised in practice more broadly, regularly and consistently.

3. Who should be delegated the responsibility of determining applications to access court documents?

We consider that applications for access to court records by a party should be determined by a Registrar. We note that self-represented parties can create a difficulty for the Court given the sensitive nature of material in care proceedings. Consideration could be given to including a power to restrict use in certain circumstances, such as access outside the Court precinct or in the presence of a Registrar.

The Rule may need to contemplate access by a self-represented young person. Currently there is a lack of clarity about the status of children in the Court as "parties" in care

proceedings. Given this, it is suggested that the Rule expressly refer to children and young people when referring to access to parties.

We consider that all non-party applications for access to court records should remain with the presiding Judge or Magistrate with knowledge of the matter. Although we note that section 314 of the CPA and some other court rules make provision for applications for access to be determined by a Registrar, we consider that the inherently sensitive nature of the material involved in Children's Court proceedings, and the children's interests at stake, warrant a decision of a judicial officer. There will often be a delicate balancing exercise required between the principle of open justice, and the interests of the children involved, including their privacy, safety, wellbeing and rehabilitation.[4]

The involvement of a judicial officer will also provide a safeguard to ensure that relevant legislation and case law is followed, any suppression/non publication order is taken into account, and parties to proceedings may make submissions regarding the application.

As noted above, the Rule or a Practice Note would need to set out the procedure for making and determining leave applications. The Rule should specify that parties to the proceedings should be made aware of any media application, such as by service of a written application, and should be given the opportunity to make submissions about the application.

In care proceedings, consideration could be given to referring non-party applications to a Registrar where the Registrar had presided over a Dispute Resolution Conference in the matter. The Registrar could consider the application, make enquiries and then make a recommendation to the presiding Judge with respect to the question of leave. In effect, the Registrar would administer the request on behalf of the presiding Judge or Magistrate, and free them up to hear matters.

4. Are there types of documents and/or certain information that should not be released?

In both care and criminal proceedings, the following documents should not be released to non-parties:

- information/documents relating to proceedings which were held in closed court and the applicant was not allowed in court
- information/documents subject to a suppression order, and
- information/documents subject to a non-publication order.

[4] In *AM v Department of Community Services (DOCS); ex parte Nationwide News Pty Ltd* [2008] NSWDC 16, Judge Johnstone undertook this balancing exercise in the context of an application to allow Nationwide News Pty Ltd with access to care proceedings. He stated that the exercise of a discretion to exclude media from proceedings "must be informed by the paramount concern; namely, the safety, welfare and wellbeing of these children" (at [11], but see discussion generally at [10]-[15]).

In terms of media access to Children's Court criminal proceedings, the documents able to be accessed must also be limited to those listed in section 314(2) of the CPA. This provision states that documents that a media representative is entitled to inspect are:

> "copies of the indictment, court attendance notice or other document commencing the proceedings, witnesses' statements tendered as evidence, brief of evidence, police fact sheet (in the case of a guilty plea), transcripts of evidence and any record of a conviction or an order".

This would **exclude** the following types of documents on a Children's Court file from media access, which we consider wholly appropriate:

- Juvenile Justice reports
- any Justice Health reports
- any psychological/psychiatric report
- any references
- transcript of anything other than admissible evidence (i.e. there is no provision for access to transcripts of voir dires, submissions, judgment or the court proceedings generally)
- any exhibit (e.g. CCTV or ERISP DVD) which is not a witness statement and is not tendered as part of a brief of evidence
- any correspondence to the court (e.g. by parties or non-parties such as FACS, Juvenile Justice etc)
- any application forms (e.g. applications to vacate, applications for annulment under section 4 of the *Crimes (Appeal and Review) Act 2001*, and bail applications)
- bench sheets
- any other document that has not been tendered in court.

For Children's Court criminal proceedings, documents that are not related to "criminal proceedings" as defined in the CPA should also not be provided because they fall outside the ambit of section 314 of the CPA.

Section 314 of the CPA also sets a limit on the time in which documents can be inspected by the media, which should be reflected in the Rule: A media representative can only inspect any document relating to criminal proceedings at any time from when the proceedings commence until the expiry of 2 working days after they are finally disposed of, for the purpose of compiling a fair report of the proceedings for publication.

From the care perspective, the following documents should not be released to non-parties, including the media:

- medical records and psychological/psychiatrist records

- experts reports
- clinic assessments
- references
- any exhibit which is not a witness statement and is not tendered as part of a brief of evidence
- JIRT material and interviews
- bench sheets
- any other document that has not been tendered in court.

We would see benefit in the Rule specifying the types of documents which can be accessed (with leave), and those that cannot be accessed.

We would also see benefit in the Rule or a guideline expressly reminding non-parties of the prohibition on publication of any information that may identify a child under section 15A of the CCPA.

The Rule should also provide that the court may decline to grant media access if it is impracticable for the Registry to facilitate the access. For example, access can be denied if granting access will require the Registry to redact information from documents and the Registry does not have adequate staff to undertake this task. This Rule would be consistent with the Federal Court Practice Note 4.10(e).

The Rule should also note that where access is granted to the media, the media are granted access to *inspect* the documents only.[5] Copies of the documents should not be provided. This provides a safeguard against Children's Court documents being disseminated outside of the court complex.

5. Should there be separate guidelines for the care jurisdiction and the crime jurisdiction?

Children in both jurisdictions need to be afforded protection from the release and misuse of sensitive material that could have serious implications for their futures. However, the different nature of proceedings and different policy considerations may mean that separate rules and guidelines will be necessary. Decisions on the specific categories of documents that should not be released (see question 4) may inform this issue. Further information on the nature and frequency of applications in each jurisdiction may also be relevant considerations.

[5] See section 314(2) of the CPA.

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?

As a broader matter of policy, we note our objection to the issuing of bench warrants to children and parents when they do not attend court for education matters. We recommend that this be removed from the legislation.

We note Practice Note 7 requires the appointment of a legal representative for a child before the listing of a matter. This is only complied with when the Department of Education serves Legal Aid NSW in time for a lawyer to be appointed, but this is not enforced by the Court in cases when it does not happen. Legal Aid NSW needs sufficient notice to arrange representation, particularly in the regions.

We question whether after filing, a compulsory schooling order should be referred to a lawyer assisted mediation akin to a Dispute Resolution Conference. If the mediation took place between the filing and first mention date it would have the following benefits:

- Focus the attention of the young person and parents, given that court action has become an imminent reality
- Allow the young person, parents and interested parties to be heard concerning the non-attendance
- Support the child to talk about what is going in a safe forum
- Identify any supports that might assist and assist with referrals
- Allow resolution of the matter without the need for contested litigation or, in the event the parent or child wish to oppose the order, the opportunity to:
    - (a) engage a lawyer who knows the case and
    - (b) put on evidence to rebut the case.
- Where appropriate, allow undertakings to be drafted and explained with the support of a legal representative.
- Where agreement is reached, terms can be drafted with the benefit of legal representation.

We have widespread feedback from our practising lawyers that the material filed in support of the compulsory schooling order needs to be more informative and helpful to the Court and duty lawyers, and provided in a more timely manner. Duty lawyers regularly complain that they are unable to give proper advice due the paucity of material they are provided with.

The application should include:

- the actual evidence of non-school attendance (i.e. a copy of the attendance records)
- the efforts made by the Department of Education to encourage attendance, and
- the reason why the Department has rejected the medical certificates etc.

The application does not need to be sworn but should annex primary source material. Clients often do not have the application with them, and when Court events happen there is no updating of information or evidence provided.

Given compulsory schooling orders are not urgent, we suggest that the following minimum practice directions should apply:

- The application should be filed 14 days before the next listing date and served (upon Legal Aid NSW) no less than 7 days before the next Court date.
- The application should be properly pleaded, with all documents relied upon by the Department annexed to the affidavit
- Where meetings have occurred between parents/students and school, the notes of the meeting should also be annexed to the application or supporting affidavit so there is a record as to what was discussed
- An update of the outcome of any conference that has taken place should also be annexed to the application or supporting affidavit.

In contested matters, the Rule should also provide a timetable for filing responses and evidence by parties.

7. Are there any procedural issues specific to compulsory schooling orders that you think the *Children's Court Rule 2000* (NSW) should address? If yes, what are they?

See comments in relation to question 6 above.

Procedural provisions for subpoenas

8. Should all rules regarding subpoenas be included in the *Children's Court Rule 2000* (NSW)? If yes, should there be separate rules for subpoenas in the care jurisdiction and subpoenas in the crime jurisdiction?

The matters addressed in the current Rule seem appropriate to be included in a Rule.

Whether a matter is dealt with by way of a practice note or included in the Rule depends on what the issue deals with. Purely procedural issues could be included in a practice

note, such as the need for parties to issue as soon as practicable, and practical arrangements for accessing subpoenaed material.

Another example might be access orders. The current Rule seems adequate but the practice note could specify the kind of access orders available. We consider that the standard access order is appropriately placed in the practice note. We question the direction in the practice note about first access to the issuing party and consider that if this is to continue, it is a matter for the Rule.

We consider that currently, the Rule and the practice note in relation to setting aside subpoenas complement each other, but note that the Rule does not provide any clarity about how the Court will deal with objections by the producer or a party and consider that this should be included in the Rule.

Paragraph 14.12 of the current practice note may be a matter for the Rule. Paragraph 14.14 seems appropriate.

9. Are there any specific subpoena related rules that require clarification? If yes, what are they?

The drafting of rule 30C(7) may benefit from further consideration and comparison with the equivalent provision for criminal proceedings (section 223 of the CPA).

There are no provisions relating to actions for non-compliance with a care subpoena. In comparison, see sections 229 and 231 of the CPA relating to non-compliance with criminal subpoena.

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?

In our view, the Registrar or Children's Court Magistrate should be able to refuse to issue a subpoena if it is an abuse of process or oppressive to the witness. We do not think it necessary for parties, including self-represented parties, to need leave.

A comparison with other jurisdictions is set out below:

- ***Local Court Rules 2009*** – Rule 6.2(2) provides that the Registrar can refuse to issue a subpoena if it is an abuse of process, oppressive to the witness or it is to give evidence on a day that the Court has not directed the hearing of oral evidence.
- ***District Court Rules 1973*** – Division 2, rule 18 is the same as Local Court Rules.
- ***Uniform Civil Procedure Rules 2005*** – Rule 7.3 provides that a subpoena may not be issued without leave of the Court, unless the party at whose request the subpoena is being issued is represented by a lawyer. Rule 33.2 provides that the issuing officer must not issue a subpoena if: there is an order, or the court has made a rule, requiring that the subpoena not be issued, or issued without leave or if the subpoena is for documents held by a court.
- ***Federal Circuit Court Rules 2001*** – No provision regarding when the Court can refuse to issue.
- ***Family Law Rules 2004*** – Rule 15.17 provides that all parties require the Court's leave to issue a subpoena, and notes that leave should be sought at a court event. A request for permission can be made orally or in writing, without notice to parties and can be determined in the absence of the parties.

11. Are there any additional subpoena related issues that should be addressed in the *Children's Court Rule 2000* (NSW)?

There is the issue of how subpoenas are put into evidence. Courts are inconsistent in the way this is managed. Subpoenas should not be annexed to affidavits but rather should be tendered in evidence in interim proceedings and ideally by way of a joint tender bundle for final hearings.

We consider this issue appropriate for a practice note not the Rule. It is a matter of preferred practice.

Electronic case management

12. Should the *Children's Court Rule 2000* (NSW) allow for the electronic service of documents? If yes, should there be any limitations regarding this rule?

Yes, but only if nominated by a solicitor or a party.

13. Are there any specific issues regarding electronic case management that you would like the *Children's Court Rule 2000* (NSW) to address?

The Rule should provide for electronic filing.

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?

Legal Aid NSW would be comfortable if the maximum age of the young representative were increased to 25 years.

15. Do you think there is a more effective selection mechanism for obtaining the young representative on the Children's Court Advisory Committee?

No comment.

16. Does the Children's Court Advisory Committee have representatives from all the agencies that ought to have representation on the Committee?

We suggest that there should be two representatives from Legal Aid NSW on the Committee: one from the criminal law jurisdiction and one from the care and protection jurisdiction. There are often issues that arise that are very specific to each jurisdiction and need specific knowledge of court practices in that jurisdiction.

From a care point of view, we suggest that the Aboriginal Legal Service NSW/ACT and the Department of Education should be on the Committee.

Establishing a Children's Court rule making power

17. Should the Children's Court have the power to make its own rules?

Yes, it is a specialist jurisdiction with unique requirements and needs to be able to make its own rules.

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?

Yes, the composition should be similar or identical because members of the Children's Court Advisory Committee have been identified as having the subject knowledge necessary to assist in the development of Children's Court rules.

The structure of the Rule

19. Can the structure of the *Children's Court Rule 2000* (NSW) be improved? If so, what is the best option for reform?

We consider that the answers to the questions above will inform the new structure. It is difficult to recommend reform without knowing the content.

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 'General practice and procedure'?

We consider of the three options, Option C is most appropriate but again note that the content will dictate the structure.

Other comments

We recommend either a deletion or redrafting of rule 32. The rule requires the court to adjourn criminal proceedings (unless it is impractical or inappropriate) if the child is unaccompanied by a parent/carer (the purpose of the adjournment being to allow the parent/carer to attend).

Many children who come to the Children's Court do not have reliable parents/carers. Many children will not want to be accompanied by a parent/carer. Some may be accompanied by another support person who is not a parent/carer.

Moreover, children have a right to participate in their own proceedings. They are entitled to legal representation in Children's Court criminal proceedings and legal aid is available for all. Such lawyers act on a direct representation principle.

While it is desirable that children be accompanied by a parent/carer, the legislation should not impose a requirement for this. The child should not be disadvantaged with a delay in their proceedings because of the absence of their parent/carer.

We recommend either that rule 32 be deleted or be redrafted so that there is no mandatory requirement for the adjournment but the court has a discretion to adjourn to allow a parent/carer's attendance.

We note that, in practice, the Rule is very seldom applied.