

Open Justice Review

Legal Aid NSW submission to the
NSW Law Reform Commission
Terms of Reference

June 2019

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Legal Aid 
NEW SOUTH WALES

About Legal Aid NSW

The Legal Aid Commission of New South Wales (Legal Aid NSW) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW) to provide legal assistance, with a particular focus on the needs of people who are socially and economically disadvantaged.

Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and through grants of aid to private practitioners. Legal Aid NSW also manages funds to a number of services provided by non-government organisations, including 32 community legal centres and 29 Women's Domestic Violence Court Advocacy Services.

A range of Legal Aid NSW specialist services provide legal assistance to people who may be affected by changes in this area. Legal Aid NSW provides state-wide criminal law services through the in-house Criminal Law Division and private practitioners.

Legal Aid NSW provides civil law services to some of the most disadvantaged and vulnerable members of our society. Currently we have over 150 civil lawyers who provide advice across all areas of civil law.

The Coronial Inquest Unit (CIU) is also a statewide specialist service of Legal Aid NSW. The CIU provides free legal advice, assistance and representation to people at coronial inquests where the matter involves the 'public interest'.

The Legal Aid NSW Domestic Violence Unit (DVU) is a specialist unit helping clients

who have experienced domestic and family violence with both their legal and non-legal needs. The DVU is made up of specialist lawyers and social workers who connect with clients at crisis point. The DVU provides legal advice and representation in a range of civil and criminal law areas.

The Mental Health Advocacy Service (MHAS) advises in all areas of mental health law. The MHAS also provides representation before the Mental Health Review Tribunal and the Guardianship Division of the NSW Civil and Administrative Tribunal.

The Prisoners Legal Service (PLS) provides representation in hearings, including the State Parole Authority. The PLS also provide general legal advice and minor assistance to prisoners by way of a visiting advice service to most gaols and responding to letters and telephone calls from or on behalf of prisoners.

The Children's Legal Service (CLS) advises and represents children and young people involved in criminal cases in the Children's Court. CLS lawyers also visit juvenile detention centres and give free advice and assistance to young people in custody.

The Legal Aid NSW Children's Civil Law Service (CCLS), established in 2013, provides a targeted and holistic legal service to young people identified as having complex needs.

Should you require any information regarding this submission, please contact

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Introduction

Legal Aid NSW welcomes the opportunity to provide a preliminary submission to the NSW Law Reform Commission's Open Justice Review concerning *Court and tribunal information: access, disclosure and publication*.

Legal Aid NSW acknowledges the fundamental importance of the principle of open justice to ensuring a fair and transparent legal system. We support the principle of open justice. This objective needs to be balanced with other important considerations, including the right of an accused to a fair trial and the protection of vulnerable people involved in court or tribunal proceedings.

In particular, special protections for children in the criminal justice system are widely acknowledged as necessary to prevent harm and stigmatising of children and to avoid negatively impacting on rehabilitation and reintegration. Such protections are internationally accepted minimum standards for the administration of juvenile justice.¹ We would not support weakening suppression and non-publication provisions that relate to children, including the identification of adults convicted of offences committed as children.

Legal Aid NSW also notes the challenges posed by rapid advances in technology. Once material is posted online it can spread far and wide, very rapidly. In our experience, there is limited ability to obtain real and effective relief for people who are the subject of such publication. Thus, it is appropriate that the law is reviewed to ensure it protects the rights of those who participate in the justice system.

Legal Aid NSW supports identifying opportunities to simplify legislation in NSW which relate to open justice. We acknowledge that the accessibility of the law is important in maintaining public confidence in the integrity and independence of the courts.

Open justice crosses all areas of law and we hope that the breadth of experience of Legal Aid NSW practitioners will assist the NSW Law Reform Commission (LRC) in its inquiry.

We respond to the TOR as follows:

a) Consideration of NSW legislation that affects access to, and disclosure and publication of, court and tribunal information

Legal Aid NSW supports the fundamental principle of open justice. Open justice is essential, not only for a fair trial and public confidence in the justice system, but also to enable us to fulfil our role under the *Legal Aid Commission Act 1979* (NSW). In order to

¹ Rule 8 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules). The UN Convention on Rights of Child, Article 40(2)(vii).

give legal advice and make determinations about eligibility for legal aid we rely on access to court and tribunal information.

The objective of open justice needs to be balanced with other important considerations. This includes the right of an accused to a fair trial by a jury. In some cases, this will inevitably require non-publication and even suppression orders. In cases of suppression orders, it is important that the terms of the orders are clear and confined to what is necessary. This is supported by the recommendations of the Victorian review of the *Open Courts Act 2013* (VIC).²

Another important consideration is the protection of vulnerable people involved in the criminal justice system, for example, children; those with a cognitive or mental impairment; and forensic patients. We explore the issue of children and young people at TOR d) below.

There are also stages in proceedings that require a robust and considered framework to ensure the advancement of the interests of justice. We consider that in the early stages of criminal proceedings there should be exceptions to full access, dissemination and publication of court information. This is necessary to ensure that the ability to have a jury trial is not jeopardised by the publication of potentially prejudicial information. For example, the publication of evidence which is tendered in a bail application, but which is later excluded at or before a trial, might create problems proceeding with a jury trial.

There are also particular types of evidence that may require exceptions to an open justice approach. This could include certain types of sensitive images and video evidence, which have the potential to spread across internet sharing platforms, including social media. The sharing of such information has the potential to affect victims, witnesses and accused persons. The stigma that can flow from the dissemination of sensitive material can be significant and, in some cases, may result in risks to safety.

Court Suppression and Non-publication Orders Act 2010 (NSW)

Legal Aid NSW supports a review of the *Court Suppression and Non-publication Orders Act 2010* (NSW), particularly given that there is no statutory review built into the legislation.

In high-risk domestic violence matters, the process for complainants and victims to have their personal details suppressed is often complex. We support consideration of this issue by the LRC.

² Hon. Frank Vincent AO QC, 'Open Courts Act Review'. September 2017.
https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.vic-engage.files/9215/2211/1859/Review_of_the_Open_Courts_Act_2013_-_March_2018.pdf ; pp 4.

Court Information Act 2010 (NSW)

Legal Aid NSW supports a review of the appropriateness of the provisions of the uncommenced *Court Information Act 2010* (CIA), given the time that has elapsed since the CIA was passed by the NSW Parliament.

Legal Aid NSW often requires access to court information in order to determine applications for legal aid.

Access to court information also affects the work of Women's Domestic Violence Court Advocacy Services (WDVCASs). WDVCASs' ability to access relevant court information significantly affects the quality and efficiency of their service provision to victims of domestic and family violence. Relevant court information includes:

- Court lists for AVO mention days and other court sittings during which domestic and family violence matters are heard;
- Copies of ADVO applications and applications to vary or revoke ADVOs;
- Copies of provisional, interim and final ADVOs; and
- Court results, including in relation to ADVO and charge matters, and hearing dates.

An open justice approach may require practice changes for parties to court proceedings and court registries. Legal practitioners may be required to redact certain information before filing documents and to apply for non-publication orders. Similarly, there may be additional work for court registries.

Changes to legislation in relation to suppression and non-publication orders has the potential to increase the time spent in legal argument about closed courts and suppression/non-publication orders, as well as expand the number of interested parties in proceedings. Such changes could increase costs in particular matters and Legal Aid NSW may need to determine if aid is granted. These practical issues should be considered by the LRC.

Mental Health Act 2008 (NSW)

Legal Aid NSW considers that access to, disclosure and publication of information in the Guardianship Division of the NSW Civil and Administrative Tribunal (NCAT) and the Mental Health Review Tribunal (MHRT) is adequate, with the exception of when a person is subject to an application to extend their forensic status in the Supreme Court. In such proceedings, the forensic patient is identified and the decision and reasons published. This includes evidence given in the Supreme Court hearing, which necessarily includes evidence from past inquiries before the MHRT.

Section 162 of the *Mental Health Act 2008* (NSW) (MHA) provides a standard non-publication requirement to proceedings before the MHRT with the aim of protecting the patient. However, there are no provisions in either the MHA or the *Mental Health (Forensic Provisions) Act 1990* (NSW) that require non-publication of proceedings before the

Supreme Court, where applications to extend forensic status are heard. This creates an inconsistent situation where the forensic patient's identity is protected during proceedings before the MHRT, which may occur every 6 months for a number of years prior to the Supreme Court proceedings. The same forensic patient's identity, however, is not protected in proceedings before the Supreme Court.

We suggest that the LRC consider strengthening section 162 of the MHA so that it captures all forensic, correctional and involuntary patients in all proceedings, and not just those before the MHRT.

Coroners Act 2009 (NSW)

In our experience, the *Coroners Act 2009* (NSW) provisions which deal with disclosure and protection of information³ strike the right balance between open justice and the protection of information. These provisions, which are generally couched in terms of a "public interest" test, appear to work well in the particular circumstances of this jurisdiction. Given the sensitive nature of coronial matters, we support the preservation of the Coroner's powers in relation to disclosure of information, especially when matters relate to the death of a young person.

Legal Aid NSW made a submission about access to, dissemination and publication of court material in the statutory review of the *Coroners Act 2009* (NSW). We support provisions enhancing the deceased's family members' access to materials, regardless of whether coronial proceedings have been held. We also support an amendment to section 65 of the *Coroners Act 2009* (NSW) that would require consideration of the wishes of the deceased's family when considering whether to release or restrict access to material. We note that there may be instances where a deceased's family may wish to release information (including the identity of a deceased child) that may be in the public interest.

Access to court information by non-parties

There are inconsistent practices across different court jurisdictions in relation to access to court information by non-parties. There are various practice notes and rules which provide guidance in the Supreme, District and Local Courts.⁴ Legal Aid NSW suggests that there should similarly be some guidance provided in the Children's Court.⁵ Whilst the Children's Court may warrant special provisions, there may be merit in having more consistency and clarity about non-party access to court information across the different court jurisdictions. The CIA presents an opportunity to address inconsistent practices across jurisdictions and replace them with a consistent framework.

³ Sections 65, 74 and 75 of the *Coroners Act 2009* (NSW).

⁴ 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.

⁵ See Legal Aid NSW Submission to the review of the Children's Court Rule 2000. February 2018. https://www.legalaid.nsw.gov.au/__data/assets/pdf_file/0018/28503/Legal-Aid-NSW-submission-to-review-of-the-Childrens-Court-Rule-Feb-20.pdf

In addition, section 314 of the *Criminal Procedure Act 1986* (NSW) also governs access to court information by individuals who are not parties to criminal proceedings, including the media. We note that there is no similar provision in the *Civil Procedure Act 2005* (NSW) or the *Civil Procedure Regulation 2017* (NSW).

In our experience, registry staff are often unaware of how to apply section 314 of the *Criminal Procedure Act 1986* and of the limitations on information that can be obtained under that provision. There have been occasions where court registries have given the whole court file to media, without consideration of what material should be extracted or redacted. We suggest that there should be greater training of court staff and media on access to court information by non-parties.

We are also concerned about media access to information and evidence which is provided by the police. There have been occasions where the media has obtained material information which has not been tendered or raised in court, including CCTV, interviews, and information about a defendant's background. We are concerned that the provision of such information may impact upon parties' and witnesses' privacy and jeopardise a defendant's right to a fair trial. We recommend the LRC consider whether to impose restrictions upon parties about the provision to non-parties of information that may be used in court proceedings.

We are of the view that the principles and policies underpinning the law in relation to suppression and non-publication of court information are not well understood by the community. We suggest one of the challenges the LRC may consider is how to effectively and accurately communicate this to the wider public. We note that the County Court of Victoria established a Media and Communications Team to proactively engage with media and improve media access to court information, and in turn, increase the community's understanding of the court's work. While there are media roles in the different jurisdictions in NSW, we suggest that the LRC consider the most effective way to increase the community's understanding of the courts' work in NSW.

b) Whether the current arrangements strike the right balance

Suppression and Non-publication Orders

Subject to some minor exceptions, we are of the view that the current suppression and non-publication provisions strike the right balance between open justice, the proper administration of justice and the need to protect those who are vulnerable in the justice system.

In our experience, it is ordinarily quite difficult to obtain suppression and non-publication orders in cases involving adult accused and adult complainants. Courts do not make suppression or non-publication orders lightly, given the emphasis on open justice. This is consistent with the finding of the review of the Victorian *Open Courts Act 2013* (VIC) which found that Victorian courts and tribunals were compliant, to a substantial degree, with the

fundamental need for open justice.⁶ The review also showed a very small number of cases in which suppression orders had been made, compared to the overall caseload of courts and tribunals.⁷ We suggest that an analysis of comparable NSW data would be of assistance to reviewing law in this area.

Legal Aid NSW's Sexual Assault Communications Privilege Unit regularly deals with clients who are complainants in sexual offences. The automatic prohibition on publication that identifies victims of certain sexual offences is a protection that complainants highly value. Legal Aid NSW would be opposed to any weakening of current protections of the privacy of complainants and victims of sexual assault. The current protections ensure that there is no unnecessary exposure to distress and humiliation, and encourage the reporting of offences and participation of victims in the justice system.

Terrorism (High Risk Offenders) Act 2017 (NSW)

Legal Aid NSW is concerned about the prohibitions or restrictions on access to terrorism intelligence contained in provisions of the *Terrorism (High Risk Offenders) Act 2017* (NSW). We hold significant concerns about the impact on procedural fairness where relevant material is withheld from offenders and, in particular, unrepresented offenders. These provisions undermine the principle of open justice, the rule of law and the integrity of the court. In addition, it is difficult to provide legal advice and obtain instructions if an offender cannot view such material. Legal Aid NSW submits that these legislative prohibitions on the disclosure and access to information have not struck the appropriate balance. We would welcome the LRC's consideration of these provisions.

Crimes (Administration of Sentences) Act 1999 (NSW)

We have similar concerns about the withholding of information by the State Parole Authority (SPA). Under section 194 of the *Crimes (Administration of Sentences) Act 1999* (NSW), the SPA is permitted to withhold information in a wide range of circumstances. In our experience, this provision is often used in matters where the police seek to have information withheld, or where information relates to an ongoing internal investigation, or was information provided by members of the public. Without knowing what information is relied upon it is difficult and at times, impossible, for Legal Aid NSW solicitors to respond to the allegations. We are concerned that the discretion to not disclose information, or even provide a summary of information, has not struck the appropriate balance. We would welcome the LRC's consideration of this provision.

⁶ Hon. Frank Vincent AO QC, 'Open Courts Act Review'. September 2017. https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.vic-engage.files/9215/2211/1859/Review_of_the_Open_Courts_Act_2013_-_March_2018.pdf ; pp 4.

⁷ Ibid.

Sexual Assault Communication Privilege

The Sexual Assault Communication Privilege (SACP) is a protection that is highly valued by victims of sexual assault. However, in our experience, SACP protections can be overlooked by legal practitioners and material that should be protected is sometimes adduced at trial. As a result, we suggest that the LRC consider how to protect such information, should NSW embrace a more open approach to access to court information and files.

Harmonising and simplifying this area of law

Navigating the various legislative instruments that relate to suppression and non-publication is complex. Legal Aid NSW supports opportunities to harmonise legislation in NSW which relate to open justice. We also support the use of simple language which makes the provisions more accessible to the public.

c) Effectiveness of current enforcement provisions in achieving the right balance

Legal Aid NSW regularly writes to media outlets to draw their attention to potential breaches of suppression or non-publication orders, and request that they remove publications from the public sphere. In our experience, many breaches of suppression and non-publication orders do not result in prosecutions. As a result, we support a review of the enforcement of suppression/non-publication orders.

We suggest that the LRC consider the value in the creation of a register of suppression and non-publication orders in NSW. A register may assist avoiding erroneous publications and enforcement of orders where there is a breach. As well as monitoring the overall use of suppression and non-publication orders in NSW, such a register would be particularly useful in keeping account of matters where the very existence of a case is suppressed. A register was also recommended in the Victorian review of the *Open Courts Act 2013* (VIC).⁸

We also suggest the LRC consider the availability of relief for people who are the subject of publication or identification contrary to an order. In our experience, there is limited ability to obtain real and effective relief for people who are the subject of such publication, particularly where publication has occurred online and/or via social media.

⁸ Recommendation g; Hon. Frank Vincent AO QC, 'Open Courts Act Review'. September 2017. https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.vic-engage.files/9215/2211/1859/Review_of_the_Open_Courts_Act_2013_-_March_2018.pdf ; pp 7.

d) Identification of children and young people

Basis for the protection of children and young people

Legal Aid NSW supports upholding children's privacy and safety as a matter of priority in both criminal and care and protection proceedings. This is consistent with the principles governing the *Children and Young Persons (Care and Protection) Act 1998* (NSW) and the *Children's (Criminal Proceedings) Act 1987* (NSW) (CCPA), and the relevant non-publication provisions outlined within those Acts.

These protections are widely acknowledged as necessary to prevent harm and stigmatising of children, and to avoid negatively impacting on rehabilitation and reintegration.⁹ These protections acknowledge the vulnerability of children and their level of development and social and emotional immaturity. We recommend that the LRC consider internationally accepted minimum standards in relation to the administration of Juvenile Justice.¹⁰

The naming of children in civil or criminal proceedings can have irreversible, detrimental effects. Legal Aid NSW would be strongly opposed to any weakening of current protections of privacy of children. This includes identification of adults charged or convicted of offences committed as children.

Necessity for reform of protections for children

The 'naming and shaming' of juvenile offenders can be counterproductive to their rehabilitation and does not serve a purpose which cannot be achieved within current sentencing principles. Community safety is often referenced in support of naming juvenile offenders. However, community safety can be managed in different ways: for example, through sentencing, policing, the child sex offender register, working with children checks and high risk offender schemes. We are not aware of any evidence that shows that the naming of juvenile offenders is an effective measure to promote community safety.

The existing exceptions to the non-publication provision in ss 15B-15F of the CCPA, are sufficient to determine when the publication of the identity of a juvenile offender is necessary and in the interests of justice.

We hold concerns that the identification of child defendants puts them at risk of being targeted for vigilantism. With the growth of social media, it is a regular experience of our child clients that they are being identified by individuals through social media, despite non-publication provisions. The media may use a pixilated photograph of the child but the

⁹ New South Wales Parliament. Legislative Council Standing Committee on Law and Justice. 'The prohibition on the publication of names of children involved in criminal proceedings.' Report 35 – April 2008; pp ix.

¹⁰ Rule 8 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules). The UN Convention on Rights of Child, Article 40(2)(vii).

image may still show identifiable features, such as body shape, hair colour, or clothing. The photograph may be the child's profile photo on Facebook, a photo that can be well known and identifiable. Furthermore, it is not uncommon that images of the child's home, street or school may be used, and the combination of information is often enough to identify the child.

Legal Aid NSW has had to assist children to take out Apprehended Violence Orders after they have been identified, their home located and death threats made. In a recent matter, a media outlet shared potential evidence – a video depicting a child defendant– on its Facebook page. The child was identified and her personal Facebook page was named. This quickly escalated into thousands of comments on her Facebook page, including death threats directed towards her and her baby.

When reviewing the protections for children, we suggest that the LRC have regard to the evidence presented in, and the conclusions of, the Standing Committee on Law and Justice Report on *The prohibition on the publication of names of children involved in criminal proceedings*.¹¹ The Committee supported the continued prohibition of the publication of names of all children involved in criminal proceedings.¹² The Committee went further to recommend strengthening the provisions in relation to the non-publication of names of children and made a number of other recommendations to strengthen the operation of those provisions.¹³ These included the following:

- that section 11 of the CCPA be amended to extend the non-publication provisions to juveniles who are reasonably likely to be involved in criminal proceedings¹⁴; and
- that the NSW Police Force establish an office in charge of investigating breaches of section 11 of the CCP Act.¹⁵

Section 11 has now been replaced with Div 3A of the CCPA, but the above named recommendation has not been followed.

We note that there is currently a range of inconsistent legislative provisions which provide protections for children involved in court proceedings. For example, the closed court and non-publication provisions of the CCPA applies to a child witness giving evidence in the Children's Court. However, the same child giving evidence in an adult's proceedings does not have the same protections. Legal Aid NSW's submission to the Department of Justice's review of *Protections for certain witnesses giving evidence*, in June 2018,¹⁶ highlights some further inconsistencies.

¹¹ New South Wales Parliament. Legislative Council Standing Committee on Law and Justice. 'The prohibition on the publication of names of children involved in criminal proceedings.' Report 35 – April 2008; pp ix.

¹² Ibid.

¹³ Ibid; pp xv.

¹⁴ Recommendation 4.

¹⁵ Recommendation 2.

¹⁶ https://www.legalaid.nsw.gov.au/__data/assets/pdf_file/0009/28935/LAN-Protections-for-certain-witnesses-submission.pdf

We suggest that all protections should apply to all children under 18 years old, whether they are child defendants, complainants or witnesses. The protections should also apply to any court or tribunal and to any type of proceeding.

Court Information Act 2010 (NSW) and children

We hold some reservations about the application of provisions in the uncommenced *Court Information Act 2010* ('CIA') to children. Consideration of the need for special rules about access to Children's Court records should be taken into account when the LRC consider the CIA.

e) Effectiveness of suppression and non-publication orders in a digital environment

As identified above, Legal Aid NSW holds a concern about the effectiveness of suppression and non-publication orders in a digital environment. Given the rapid advances in technology, it is appropriate that the law is reviewed to ensure it is protecting the rights of those who participate in the justice system, including victims, witnesses, accused persons and offenders.

Once material is posted online it can spread far and wide, very rapidly. Given this environment we support the LRC giving consideration to:

- whether the wording of current legislation or orders needs to be strengthened to prevent identification; and
- educational opportunities to assist with the effectiveness of suppression and non-publication orders, including public and media education and the use of Media Liaison Officers.

g) Technology to facilitate access to court and tribunal information

We support the exploration of the use of technology to facilitate access to court and tribunal information. We suggest that the LRC explore ways in which an application or portal could be used to access more information about court proceedings.

Such technology could assist victims to understand when they are next required to attend court and why. Relevant information would include court dates, locations, the purpose of the court appearance, relevant court documents such as Apprehended Domestic Violence Orders, relevant forms and support services. Considerations of the privacy and safety of victims should be paramount. Such an application could also provide links to victim support. We recommend that any victim-focussed applications are developed collaboratively with domestic and family violence specialists. This will ensure best practice in the way that information is provided.

h) The findings of the Royal Commission

The Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission) referred to the public interest in identifying child sexual abuse and condemning the abuse. We acknowledge the need for increased awareness of the occurrence of child sexual abuse as well as deterrence. However, the references to these objectives do not specifically recommend the identification of individuals, whether they are defendants/offenders, complainants or witnesses. We note that the identification of individuals involved in child sexual abuse offences may impinge on the right to privacy of the victim, or pose a substantial risk to the offender. This is particularly so for offences which occur within non institutional settings, such as within the family. The public interest in engaging in discourse about child sexual abuse is not necessarily advanced by the naming of a defendant or offender.