



**NEW SOUTH WALES LAW REFORM COMMISSION'S
OPEN JUSTICE REVIEW – COURT AND TRIBUNAL INFORMATION: ACCESS, DISCLOSURE AND
PUBLICATION**

28 MAY 2019

This submission is provided by Australia’s Right to Know (ARTK) coalition of media companies. Members of ARTK are AAP, ABC, Australian Subscription Television and Radio Association (ASTRA), Bauer Media, Commercial Radio Australia (CRA) – representing Australia’s commercial radio broadcasters, Community Broadcasting Association of Australia (CBAA) – representing community radio and TV, Free TV – representing all of Australia’s commercial free-to-air TV networks, Guardian Australia, HT&E, Media Entertainment and Arts Alliance (MEAA), News Corp Australia, Nine, SBS and The West Australian.

We welcome the opportunity to participate in the New South Wales Law reform Commission’s (NSWLRC) *Open Justice Review – Court and tribunal information: access, disclosure and publication* (the Review).

Particularly, this submission is made in response to the invitation for preliminary submissions to help the NSWLRC frame the issues that should be addressed in consultations. Therefore this submission ‘fleshes out’ the Terms of Reference. We look forward to making a detailed submission to the next round on consultation later in 2019.

Below are the Terms of Reference for the Review and ARTK comments.

Pursuant to section 10 of the Law Reform Commission Act 1967, the NSW Law Reform Commission is to review and report on the operation of:

- 1. legislative prohibitions on the disclosure or publication of NSW court and tribunal information,**
- 2. NSW court suppression and non-publication orders, and tribunal orders restricting disclosure of information, and**
- 3. access to information in NSW courts and tribunals.**

In particular, the Commission is to consider:

- a) Any NSW legislation that affects access to, and disclosure and publication of, court and tribunal information, including:**
 - The Court Suppression and Non-Publication Orders Act 2010 (NSW);**

- **The Court Information Act 2010 (NSW); and**
- **The Children (Criminal Proceedings) Act 1987.**

ARTK agrees the three laws above require specific consideration by the Review.

Court Information Act 2010

The *Court Information Act 2010* and the *Court Suppression and Non-Publication Orders Act 2010* were drafted as a duo of complementary legislation to provide access to court information.

One of the objectives of the *Court Information Act 2010* is to provide for additional access to the media to certain court information to facilitate fair and accurate reporting of proceedings.

While the *Court Information Act 2010* was passed by both Houses – with bipartisan support – and assented to on 26 May 2010, the Act remains unproclaimed. We believe this makes it an important element of the review.

It should be noted the second part of that package, the *Court Suppression and Non-Publication Orders Act 2010*, commenced on 1 July 2011.

Court Suppression and Non-Publication Orders Act 2010 & Children (Criminal Proceedings) Act 1987

Both of these Acts have been operating for some years. It is timely to review both the law and the application of the law, particularly as it applies in real situations. A focus should be placed the practical application of the law and the outcomes for open justice.

Regarding the *Court Suppression and Non-Publication Orders Act*, it is important to consider the application of the law by all levels of NSW courts and tribunals.

Additional legislation for the NSWLRC to incorporate into the review

For similar reasons to the two Acts directly above, we also recommend the following legislation – and the application of such – be specifically considered by the Review:

- Section 578A of the *Crimes Act 1900* (the prohibition on identification of complainants in sexual offence cases);
- Section 105 of the *Children and Young Persons (Care and Protection) Act 1998*;
- Section 74 of the *Coroners Act 2009*;
- Section 162 of the *Mental Health Act 2007*;
- Sections 17 and 65 of the *Young Offenders Act 1997*; and
- Section 64 of the *Civil and Administrative Tribunal Act 2013*.

- b) Whether the current arrangements strike the right balance between the proper administration of justice, the rights of victims and witnesses, privacy, confidentiality, public safety, the right to a fair trial, national security, commercial/business interests, and the public interest in open justice.**

ARTK agrees with this term of reference.

- c) The effectiveness of current enforcement provisions in achieving the right balance, including appeal rights.**

ARTK requests that the Review clarify and/or expand what is being examined under this term of reference to help potential submitters understand what is being sought.

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

ARTK references here subsections 15A(1)(c), (d) and (e) of the *Children (Criminal Proceedings) Act 1987*, all of which create limitations on reporting which are not found in any other Australian jurisdiction.

ARTK also considers that the appropriateness of exceptions to these legislative prohibitions should be included within this term of reference.

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

ARTK appreciates the inclusion of suppression and non-publication orders in the Review. While it is timely for the Review to consider the effectiveness of such orders in the digital environment, we recommend that the Review apply a laser-like focus on the application and effect of the suppression and non-publication order regime in NSW.

ARTK recommends the NSWLRC should specifically consider and seek comment from those making submissions about:

- i. The frequency at which such orders are made in NSW (in all courts and tribunals);
- ii. The frequency at which such orders are made in NSW as compared to other Australian jurisdictions;
- iii. How often the test of necessity is correctly applied, or applied at all, and on what evidentiary basis;
- iv. How often the ground or grounds for making an order are specified, as required under s 8(2) of the Act;
- v. Whether care is taken by the court is to ensure that the order operates for no longer than is reasonably necessary to achieve the purpose for which it is made, as required under s 12(2) of the Act, and whether the section should expressly prohibit orders being made “until further order”;
- vi. The understanding of court staff as to the effect of suppression or non-publication orders and how that affects reporting of otherwise open court proceedings;
- vii. The frequency at which orders made overlap with existing statutory restrictions;
- viii. The frequency with which orders are not communicated to the media or are inaccurately communicated to the media;
- ix. The process for seeking a review of orders, including whether a formal motion and oral submissions are required;
- x. Whether undue distress or embarrassment “to a party” (meaning the defendant) to criminal proceedings involving an offence of a sexual nature, should be a ground for such orders in section 8 of the Act;
- xi. Whether being “otherwise necessary in the public interest” should be a ground for such orders in section 8 of the Act;
- xii. Whether section 6 of the Act titled “safeguarding public interest in open justice” should be amended to add the principle of free communication of information, a presumption in favour of disclosure of information, and recognition of the consequential right of the news media to publish information relating to court proceedings;
- xiii. Whether a requirement for prior notice to the media should be added to the Act;
- xiv. Whether a requirement of satisfactory evidence or sufficient credible information should be added to the Act;
- xv. Whether the establishment of a register of all such orders should be added to the Act;

- xvi. Whether a requirement of the Attorney-General tabling an annual report on such orders should be added to the Act;
- xvii. Whether the powers as to costs should be expressly stated in the Act; and
- xviii. Improvements to the current system processes.

f) The impact of any information access regime on the operation of NSW courts and tribunals.

ARTK agrees with this term of reference, although it notes that the consideration may need to be the impact of *not having* a consistent information access regime in NSW courts and tribunals, given that the *Court Information Act 2010* remains unproclaimed such that its impact cannot be assessed.

g) Whether, and to what extent, technology can be used to facilitate access to court and tribunal information.

ARTK notes that, in particular, submissions should be invited as to how technology can be deployed to reduce the *tyranny* of distance to allow the media and/or other interested parties to provide an opposing voice when suppression or non-publication orders are sought in regional courtrooms and when access to court document/s is denied to journalists operating in regional areas. This is particularly relevant to courts and tribunal locations outside of the Sydney CBD.

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

i) Comparable legal and practical arrangements elsewhere in Australia and overseas.

j) Any other relevant matters.