12 December 2018

The Hon Mark Speakman SC MP
Attorney-General
52 Martin Place
SYDNEY NSW 2000
By email: tim.smartt@minister.nsw.gov.au

Dear Attorney-General,

Re: Issues that undermine the principle of open justice in NSW

This letter 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, Fairfax Media, 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, SBS, SkyNews and The West Australian.

We write regarding the *Court Information Act 2010 (NSW)* and specific provisions of the *Children (Criminal Proceedings) Act 1987* that undermine the principle of open justice and/or infringe the ability to report in the public interest and where NSW is an outlier or out-of-step with other states.

Below is detailed analysis and recommendations:

ISSUE 1 – *Court Information Act 2010 (NSW)*

The *Court Information Act 2010* and the *Court Suppression and Non-Publication Orders Act 2010* were designed to be a two-stage process to provide access to court information.

The objectives of the *Court Information Act 2010* are enshrined in section 3 of the Act, and are:

- to promote consistency in the provision of access to court information across New South Wales courts;

- to provide for open access to the public to certain court information to promote transparency and a greater understanding of the justice system;
- ***to provide for additional access to the media to certain court information to facilitate fair and accurate reporting of proceedings*** [emphasis added]; and
- to ensure that access to court information does not compromise the fair conduct of court proceedings, the administration of justice, or the privacy and safety of participants in court proceedings, by restricting access to certain court information.

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.

It should be noted that the second part of the package, the *Court Suppression and Non-Publication Orders Act 2010*, commenced on 1 July 2011 and has been relied upon regularly ever since.

On 3 November 2011, the Attorney General's office issued a statement (reported in *The Australian*) saying:

> *'The Department of Attorney General and Justice is working through implementation issues…A number of concerns with the Act have been identified through this process, and the Department is currently advising the Attorney-General on them…A particular issue that has arisen is the question as to whom should be responsible for redacting personal identifying information from court information. It is unlikely that the Court Information Act 2010 will be commenced before 2012.'*

On 30 January 2014, the then Attorney-General responded to the following question about the Courts Information Act 2010:

> *(1) What is the current progress of the implementation of the Court Information Act 2010?*
> *(2) When is the Court of Information Act 2010 expected to be proclaimed?*
> *(3) What delays has the Department of Attorney General and Justice experienced in implementing the act?*
>
> ***Answer—***
> *(1) The Act has not commenced, and the Department of Attorney General and Justice (DAGJ) is currently advising me on options in relation to it. These options include amending the Act to address a range of practical concerns that have been identified.*
> *(2) Action is expected to be taken in relation to the Act in 2014.*
> *(3) DAGJ convened an Advisory Group to assist in implementing the Act, including in developing the necessary court rules, the regulation, and practices and procedures. The Advisory Group identified a number of concerns with the Act, and DAGJ has developed a package of proposed reforms to address them. A range of options has been identified in relation to the Act, and the Department is advising me in relation to these."*

On 10 September 2014, there was a debate about the *Courts Legislation Amendment (Broadcasting Judgments) Bill 2014* – during which Labor's Hon Adam Searle said:

> *'The Court Information Act 2010 has not been proclaimed. The shadow Attorney in the other place referred to an article in the Alternative Law Journal, Volume 39, No. 2, by Katherine Biber from the University of Technology, Sydney, who made some interesting points. She noted that the Court Information Act 2010 was an attempt to get a broader statutory scheme in place and provide statutory clarity. The legislation had bipartisan support at the time but it has never been proclaimed. Perhaps that matter could now be usefully revisited.'*

On 2 April 2015, the *Administrative Arrangements (Administration of Acts – General) Order 2015* confirmed that the administration of the Court Information Act is still allocated to the Attorney General.

During Budget Estimates 2016-17 the then Attorney-General Upton when asked why the Act had not been proclaimed, advised that *'a number of issues have been identified with the Act.'* Those issues have not been articulated.

In May 2017 the NSW Parliamentary Counsel's Office published a list of unproclaimed NSW Acts for tabling in the Legislative Council. It shows that the *Court Information Act 2010* is the oldest Act to remain *'wholly uncommenced'*.

We note that the lack of proclamation of this Act has resulted in the denial of access to court documents to media organisations, particularly in the District Court, that would otherwise have been available if the Act was in force.

Recommendation

We recommend that, in accordance with the principles of open justice, and due to the lack of articulation of 'issues' with the Act and any actions to deal with these claimed' issues', that the *Court Information Act 2010* be proclaimed.

ISSUE 2(a) – Subsections 15A(4)(b) and 15E of the *Children (Criminal Proceedings) Act 1987*

These provisions prohibit publishing the identity of deceased minors involved in criminal proceedings once charges are laid, regardless of the role the deceased minor plays in the criminal proceedings.

We recommend, in accordance with the principle of open justice that the presumption be in favour of identifying deceased minors unless the Court, on the basis of evidence put before it, decides to suppress the publication of the deceased minor's identity.

NSW is the only Australian jurisdiction that restricts the publishing of the identity of deceased minors. This makes NSW an outlier regarding this issue. All other jurisdictions do not restrict the identifying of deceased minors unless the Court orders that the identity be suppressed.

We offer the following additional reasons to support our recommendation below:

<u>The introduction of the prohibition</u>

The previous Government introduced the provision when the Act was amended in 2004, to extend the prohibition on publishing the names of victims who were minors to deceased minors.

- *Lack of consultation*
  As far as we are aware, the media was not consulted on the amendment to the Act that would prohibit deceased minors being identified. Additionally, very little was said in Parliament about the rationale for the amendments.

- *Conflation of two issues*
  The Second Reading speech for the amending Bill says: 'This amendment closes the gap to cover situations where the victim of the offence is deceased and extends that protection to include the siblings of child victims, including deceased child victims, in order to minimise the trauma to the family of the deceased.'

  This statement illustrates the problem with the amendment – that it conflates two issues, being protecting the siblings of victims who are minors and concealing the identity of deceased minors involved in criminal proceedings. The unfortunate reality is that deceased persons don't maintain

the legal rights and freedoms that pertained when living. This is the case regardless of the person being an adult or a minor.

'Senior available next of kin' – the practicalities

In 2007 the Government amended the Act to allow publication of the name of a deceased minor with the permission of the 'senior available next of kin.

- *Cumbersome and often complex and difficult*
  It must be said that in practice this process can be incredibly cumbersome in its complexity and difficulty to chart. To illustrate, that person or persons must be located and asked to consent. While in and of itself this is not a high threshold, discrepancies arise when various media outlets approach different person/s who are able to fulfil the legislative requirement of 'senior available next of kin'. Media outlets may receive different responses and therefore some will be able to publish and some will not be able to publish. This suggests that the ability to publish should be granted to all media or none – and communicated adequately to ensure a common approach.

- *Unintended consequences*
  It is also not uncommon for there to be no senior available next of kin, for example there are a number of well-known recent cases whereby both parents or the persons with parental responsibility, are charged with the death of the minor. In these circumstances the application of Division 3A can, in practice, primarily act to protect the identities of offenders rather than their victims – who in these cases are minors, and possibly their own children or those they have responsibility for.

The effect of discontinuity on reporting

Given that the prohibition is not triggered until charges are laid, the identity of the deceased minor can be published up until that point. Once criminal proceedings have commenced subsequent stories must not include the identity of the deceased minor.

In the context of hard copy publishing this is a curious occurrence. In the age of digital publishing this is even more curious given the grapevine effect. Take, for example, the current missing person case of minor William Tyrell. There has, and continues to be, much content available on digital platforms regarding this unsolved case. The grapevine effect has proliferated this content, much of it user-generated – far and wide. If this case were to develop such that the statutory prohibition on identification was triggered, the vast amount of content available from a range of sources (not only media) would highlight the anachronistic nature of the prohibition.

Further, the principle of open justice, where not only must justice be done but it must be seen to be done, would appear to be best served by the Australian public, and possibly those further afield, being able to inform themselves, through public interest reporting of the outcome of such cases.

Recommendation

In accordance with the principle of open justice we recommend the presumption be in favour of publishing the identity of deceased minors unless the Court, on the basis of evidence put before it, makes a decision to suppress the publication of the deceased minor's identity.

In which case, the Court would communicate the suppression order to the media by way of usual process, being via the Supreme Court media officers or the media officers of the Department of Justice.

Regarding specific amendments to the Act to support this recommendation, Section 15E of the Act would be deleted and reference to deceased minors removed from section 15A (4)(b).

Given this, subsection 15A(4)(a) should also be deleted as it is no longer necessary.

ISSUE 2(b) – Other issues with the *Children (Criminal Proceedings) Act 1987*

Subsections 15A(1)(c), 15A(1)(d) and 15A(1)(e) – prohibition on identifying minors with no relationship to the proceedings

Subsections 15A(1)(c), 15A(1)(d) and 15A(1)(e) prohibit the identification of minors who have no relationship to the proceedings (i.e. they are not victim, offender or witness).

These provisions prohibit publishing the identity of minors who have no relationship to the proceedings (i.e. they are not victim, offender or witness). We suggest that this constitutes legislative overreach.

We recommend, in accordance with the principles of open justice that the presumption be in favour of identification unless the Court, on the basis of evidence put before it, decides to suppress the identity.

NSW is the only Australian jurisdiction that applies such a restriction. This makes NSW an outlier regarding this issue.

Recommendation

In accordance with the principle of open justice we recommend subsections 15A(1)(c), 15A(1)(d) and 15A(1)(e) be deleted to minimise overreach of legislative restrictions.

We look forward to progressing these issues with you.

Kind regards

Georgia-Kate Schubert
On behalf of Australia's Right to Know coalition