

18 February 2021

NSW Law Reform Commission
GPO Box 31
SYDNEY NSW 2001

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

Dear Commissioner

Consultation Paper 22: Open Justice Court and tribunal information: access, disclosure and publication

Introduction

1. Rape & Domestic Violence Services Australia (“**RDVSA**”) welcomes the opportunity to participate in the NSW Law Reform Commission’s review on Open Justice - Court and tribunal information: access, disclosure and publication, following the release of Consultation Paper 22.
2. RDVSA is a non-government organisation that provides a range of trauma specialised counselling services for those who have experienced sexual, domestic or family violence and their supporters. Our services include the NSW Rape Crisis counselling service for people in NSW whose lives have been impacted by sexual violence; Sexual Assault Counselling Australia for people accessing the Redress Scheme resulting from the Royal Commission into Institutional Responses to Child Sexual Abuse; the counselling service and support for people experiencing domestic and family violence across Australia and the LGBTIQ+ violence counselling service.
3. In the 2019/20 financial year, RDVSA provided 27,793 occasions of service to 10,218 clients nationally. 88% of callers identified as female, and 90% identified as someone who had experienced sexual, domestic and/or family violence.
4. RDVSA does not propose to answer all questions in the Consultation Paper in this submission. Our focus is on the impact of the law concerning access, disclosure and publication on people who have experienced sexual assault and/or domestic and family

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Counselling Services

24/7 NSW Rape Crisis:	1800 424 017
Domestic Violence Services:	1800 943 539
Sexual Assault Counselling Australia:	1800 211 028
LGBTIQ+ Violence Service:	1800 497 212
rape-dvservices.org.au	

violence.¹ We note that there is considerable overlap in the questions raised across the different chapters in the Consultation Paper, which reflects the different contexts in which the issues arise. We therefore address selected questions in the Consultation Paper along the following themes, relevant to our areas of concern:

- A. Closed courts (questions 2.1, 8.2 and 9.2)
 - B. Statutory (self-executing) prohibitions of publication (questions 3.1, 3.2, 3.7, 8.2, 9.1)
 - C. Suppression and non-publication orders (questions 4.8, 4.9)
 - D. Support for victim-survivors (questions 8.4, Chapter 13)
 - E. Researcher access to information (question 11.1).
5. The safety of victim-survivors should be a paramount consideration in legislative provisions and policies concerning open justice. Raising awareness and understanding of sexual, domestic and family violence is crucial, but must be achieved without compromising the safety and well-being of individuals who have experienced it.

A: Closed courts

Question 2.1: Statutory requirements to hold proceedings in private

Question 8.2: Current protections for specific types of victims and witnesses

Question 9.2: Closing courts during sexual offence proceedings

6. RDVSA supports the presumption of closed courts while complainants and tendency witnesses in prescribed sexual offence proceedings² and complainants in domestic violence offence proceedings³ provide evidence.
7. However, RDVSA recommends that this protection should be extended to evidence given by the person in need of protection in stand-alone proceedings for an Apprehended Domestic Violence Order (“ADVO”). Currently, this only applies to children in proceedings for an Apprehended Violence Order.⁴
8. The Australian Capital Territory, Queensland and Victoria each have legislation specifically enabling courts to be closed to the public while evidence is given by the person in need of protection in proceedings for a protection order. In the ACT, the default position is that proceedings for a Family Violence Order are in public.⁵ This is

¹ RDVSA prefers the term *people who have experienced sexual assault and/or domestic and family violence* to describe individuals who have experienced this type of violence, rather than the terms survivors or victims. This is in acknowledgement that, although experiences of sexual assault and/or domestic and family violence are very significant in a person’s life, they nevertheless do not define that person. However, in this submission, RDVSA will utilise the terms “complainant” or “victim-survivor” in the context of criminal proceedings.

² *Criminal Procedure Act 1986* (NSW), ss.291, 294D.

³ *Criminal Procedure Act 1986* (NSW), s.289U.

⁴ *Crimes (Domestic and Personal Violence) Act 2007* (NSW), s.41.

⁵ *Family Violence Act 2016* (ACT), s.58.

subject to the court's power to close the court "in the interests of safety, justice or the public."⁶ Similarly, proceedings for a Family Violence Intervention Order in Victoria may be closed to the public to prevent an affected family member, protected person or witness from being caused undue distress or embarrassment.⁷ In Queensland, the default position is that proceedings for a Domestic Violence Order are closed, but the court may open the proceeding or part of the proceeding to the public or to specific persons.⁸

9. Closed courts should be the default position when any person in need of protection is giving evidence in ADVO proceedings, even if not accompanied by criminal proceedings for a domestic violence offence. Closing the court in these circumstances should not place a significant burden on the courts. The benefits include encouragement of reporting and a reduction in the stress associated with giving evidence.

B: Statutory (self-executing) prohibitions on publication

Question 3.1: Statutory prohibitions on publishing or disclosing certain information

Question 3.2: Current statutory prohibitions on publishing or disclosing certain information

Question 3.7: When publication or disclosure of information should be permitted

Question 8.2: Current protections for specific types of victims and witnesses

Question 9.1: Prohibition on publishing the identities of sexual offence complainants

10. RDVSA generally supports the retention of the statutory prohibition on publishing the names of sexual assault complainants in s.578A of the *Crimes Act 1900*.
11. Section 578A reflects the desirability of encouraging reporting of sexual violence and the notion that sexual assault complainants should be shielded from the stigmatisation associated with being a victim-survivor of sexual violence.⁹ The New Zealand Law Commission recognised sexual offences as a special category because of their "highly personal and sensitive nature", adding:¹⁰

There are real concerns about the low reporting rates for sexual crimes because of the ordeal associated with the trial process. Publication of victims' names would provide a further disincentive to reporting. Automatic name suppression is appropriate, subject to the power of the court to permit publication at the victim's request.

⁶ *Family Violence Act 2016* (ACT), s.60.

⁷ *Family Violence Protection Act 2008* (VIC), s.68.

⁸ *Domestic and Family Violence Protection Act 2012* (QLD), s.158(1)-(2).

⁹ New Zealand Law Commission, *Report 109: Suppressing Names and Evidence*, October 2009, 11; Victorian Law Reform Commission, *Report: Contempt of Court*, February 2020, [12.51].

¹⁰ New Zealand Law Commission, *Report 109: Suppressing Names and Evidence*, October 2009, 35.

12. Many victim-survivors feel the shame that should be borne solely by the perpetrators and fear the exposure of intimate details of their personal lives that accompanies the reporting of the abuse to the authorities and the legal process that entails. The Royal Commission into Institutional Responses to Child Sexual Abuse recognised that the feeling of shame or embarrassment is one of the most common barriers to disclosing child sexual abuse.¹¹
13. This issue was discussed by the Tasmania Law Reform Institute (“the TLRI”) in its report, *Protecting the Anonymity of Victims of Sexual Crimes*.¹²

But there is a compelling argument that the existence of the stigma – because of historical community prejudice against sexual assault victims based on the notions of victim blaming – is the problem that needs to be addressed. Arguably, when the complainant consents, there is a strong public interest in publishing their identity as it may help to overcome the shame that seems to attach to sexual assault complainants.

14. The TLRI quoted from a submission made by Women’s Legal Service Tasmania:¹³

Victims have no need to be ashamed and should not be kept hidden if this is not their wish. In our practice, many victims of sexual crime feel a strong need to have their story heard, and for others to know what happened to them.

15. RDVSA endorses these sentiments. It was recently highlighted in the “Let her speak” and “Let us speak” campaigns that the ability to speak out about sexual violence can be crucial to individual recovery, empowering victim-survivors, addressing barriers to justice and fostering community understanding about the nature of sexual abuse. In the words of Australian of the Year, Grace Tame:¹⁴

This year and beyond my focus is on empowering survivors and education as a primary means of prevention. It starts with conversation. We're all welcome at this table. Communication breeds understanding and understanding is the foundation of progress. Lived experience informs structural and social change. When we share, we heal.

Yes, discussion of child sexual abuse is uncomfortable. But nothing is more uncomfortable than the abuse itself. So let us redirect this discomfort to where it belongs: at the feet of perpetrators of these crimes. Together we can redefine

¹¹ Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report: Identifying and disclosing child sexual abuse*, Volume 4, Commonwealth of Australia, 2017, 10.

¹² Tasmania Law Reform Institute, *Final Report Np. 19: Protecting the Anonymity of Victims of Sexual Crimes*, November 2013 [3.4.2].

¹³ Tasmania Law Reform Institute, [3.4.2].

¹⁴ ABC News, “‘Hear me now’: Australian of the Year Grace Tame's speech in full”: <https://www.abc.net.au/news/2021-01-26/grace-tame-australian-of-the-year-speech-in-full/13091710>.

what it means to be a survivor. Together we can end child sexual abuse; survivors be proud, our voices are changing history.

...

I remember him saying, 'Don't tell anybody.' I remember him saying, 'Don't make a sound.' Well hear me now. Using my voice, amongst a growing chorus of voices that will not be silenced.

16. Publishing their identity may not only give the individual a voice; it may also encourage other victim-survivors to come forward.¹⁵ RDVSA recognises the importance of media coverage of sexual, domestic and family violence, including child sexual abuse. The Royal Commission into Institutional Responses to Child Sexual Abuse recognised that media coverage may facilitate disclosure of child sexual abuse, particularly for adults, and that there were peaks in reporting around the time of major inquiries.¹⁶ It has been the experience of RDVSA that media reports regarding sexual violence are followed by a spike in the calls to our counselling services and that some of these calls come from those disclosing this violence for the first time.¹⁷
17. It was also recognised by the Royal Commission that public campaigns and media reporting can be triggering for some victim-survivors and their families.¹⁸ This highlights the need for reporting to be done in a sensitive and respectful manner, with deference to the wishes of individual victim-survivors. Ultimately, identification of the victim-survivor should be subject to that person's consent.

Extending the protections under s.578A

18. There are important and compelling public policy reasons for s.578A: principally to encourage those who experience sexual violence to report their experiences, and to minimise the distress associated with engaging in an otherwise public process. These reasons also apply to people who experience non-sexual forms of domestic and family violence. This protection should be extended to complainants in domestic violence offence proceedings and persons in need of protection in proceedings for an Apprehended Domestic Violence Order.

¹⁵ Tasmania Law Reform Institute, [3.4.3].

¹⁶ Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report: Identifying and disclosing child sexual abuse*, Volume 4, Commonwealth of Australia, 2017, 154167, 169, 170; J. Cashmore, A. Taylor, R. Shackel & P. Parkinson, *The impact of delayed reporting on the prosecution and outcomes of child sexual abuse cases, report prepared for the Royal Commission into Institutional Responses to Child Sexual Abuse*, Sydney, 2016, 66, 69, 135.

¹⁷ K. Willis, Executive Officer, RDVSA, quoted in End Rape on Campus Australia and Marque Lawyers' submission to the Tasmanian Department of Justice, *Discussion Paper on Section 194K of the Evidence Act 2001 (Tasmania)*, May 2019, 13.

¹⁸ Royal Commission into Institutional Responses to Child Sexual Abuse, *Ibid*, 168.

19. We note that the Victorian Law Reform Commission recommended against extending this protection to domestic and family violence offences.¹⁹ We appreciate the need to report on domestic and family violence proceedings to raise awareness about this issue, but it is possible to report on a matter without identifying the individual complainant. This would also be subject to the exceptions in the provision, including by way of court order or where the complainant consents.
20. Currently, a court can make an order directing that the identity of a sexual offence “tendency witness” not be publicly disclosed, which effectively extends the protection under s.578A to that witness.²⁰ However, the protection is not automatic; it requires the making of an order by the court. For consistency with other protective measures, RDVSA recommends an amendment to automatically extend the protection under s.578A to tendency witnesses in sexual assault proceedings.

Publication after death

21. We query the exception in s.578A(4) to publications made after the complainant’s death. We note the reference in the preliminary submission of the NSW Office of the Director of Public Prosecutions concerning a complainant who did not wish to be identified as a sexual assault victim-survivor after her death.²¹ We believe that any wish expressed by the complainant not to be identified after death should be respected, subject to the other exceptions available under s.578A(4).
22. Furthermore, consideration should be given to repealing the exception in s.578A(4) altogether. Little benefit is derived from being able to identify a deceased victim-survivor after death when the complainant has not, during life, consented to publication. Indigenous people, for example, may be particularly troubled by the prospect of identification as a sexual assault complainant after death. The purposes of the legislation - to encourage reporting and to spare complainants from the stigma associated with being a victim-survivor – continue to operate after that person’s death, and the prospect of the automatic removal of protection after death may be a source of distress. In the case of a homicide victim, it would be open to the court to order the identification under s.578A(4)(a).

C: Non-disclosure and suppression: discretionary orders

Question 4.8: The “necessary” test for making orders

Question 4.9: Grounds for making orders

23. One of the grounds listed in s.8 of the *Court Suppression and Non-publication Orders Act 2010* for the making of an order is that the order is “necessary to avoid causing

¹⁹ Victorian Law Reform Commission, Report: Contempt of Court, February 2020, recommendation 106.

²⁰ *Criminal Procedure Act 1986* (NSW), s.294D(4)-(5).

²¹ Office of the Director of Public Prosecutions, *Preliminary Submission to the Law Reform Commission – Open Justice Review*, May 2019, 7.

undue distress or embarrassment to a party to or witness in criminal proceedings involving an offence of a sexual nature.”²² Domestic and family violence is another category of offence where publication or disclosure may cause the complainant or another witness to experience undue distress or embarrassment. We note that there is a broad ground available for making an order where it is “otherwise necessary in the public interest for the order to be made” if that public interest “significantly outweighs the public interest in open justice.”²³ However, a specific reference to domestic violence matters in s.8(1) would more readily bring the issue to the court’s attention. We make this recommendation in addition to our primary recommendation that the statutory (self-executing) prohibition in s.578A be extended to domestic and family violence complainants.

24. While s.578A(4)(b) allows for a complainant over the age of 14 years to consent to publication, a suppression or non-publication order may be made in criminal proceedings under s.8 regardless of the views of the victim-survivor. The views of the victim-survivor should be taken into account in the court’s determination of whether to make a suppression or non-publication order, and in determining the scope of any such order.

D: Support for victim-survivors

Question 8.4: Access to court information by victims

Chapter 13: Other proposals for change

25. As non-parties to proceedings, complainants have no particular status when it comes to accessing material concerning them on court files. In addition, the information available on the Victims Services website is difficult to locate. It is not prominently displayed, nor are there links to the relevant policies in different jurisdictions.²⁴ As acknowledged in the Consultation Paper, “Procedures for accessing information are not always clear, consistent or easy to find. This may deter people with a genuine and proper interest from accessing information.”²⁵
26. The Charter of Victims Rights provides that a victim who is a witness in criminal proceedings will be informed about the trial process and the role of the victim as a witness in the prosecution of the accused.²⁶ RDVSA recommends an express requirement to inform the victim about:
 - the types of protections available to them in the form of closed courts and statutory prohibitions against publication,

²² *Court Suppression and Non-publication Orders Act 2010* (NSW), s.8(d).

²³ *Court Suppression and Non-publication Orders Act 2010* (NSW), s.8(e).

²⁴ Victims Services, “Access to court documents: Information for victims of crime”: https://www.victimsservices.justice.nsw.gov.au/Documents/fs01_access-court-docs.pdf

²⁵ Consultation Paper, [6.128]; see also [8.75]-[8.77].

²⁶ *Victims Rights and Support Act 2013* (NSW), s.6.6.

- their right to consent to identification,
 - their right to make an application or to be heard in an application under the *Court Suppression and Non-publication Order Act*,
 - how to access court documents relating to their case.
27. Not being a party to criminal proceedings, victim-survivors often do not have clear and ready access to this information or advice about their options. This is despite the extension of the definition of a “party” in s.3 of the *Court Suppression and Non-Publication Orders Act* to a “complainant or victim (or alleged victim) in criminal proceedings.” In the context of the review of the *Open Courts Act 2013* (Vic), it was submitted by representatives of the Victims of Crime Consultative Committee that victims were given little information about suppression orders and their implications and they were rarely consulted as to whether they wanted their identities to be suppressed.²⁷
28. The obligation to inform victim-survivors about these specific matters should be recognised in the legislation and reflected in the policies of NSW Police Force and the NSW Director of Public Prosecutions so that there is a positive requirement to inform victim-survivors about the protections available to them.
29. Resources should be allocated to ensure that this information is made available in accessible formats and that organisations have the necessary resources to provide information and advice.

E: Researcher access to information

Question 11.1: Researcher access to information

30. Academic research plays an important role in law reform by providing rigorous, systematic and impartial qualitative and quantitative analyses of how the justice system operates. This is particularly crucial in the areas of sexual, domestic and family violence, where under-reporting persists and where the attrition rate of sexual assault prosecutions is high compared to prosecutions for other serious offences.²⁸
31. RDVSA notes the absence of particular provisions for people to access court documents for the purpose of academic research; researchers do not enjoy the same access to court document as the media under s.314 of the *Criminal Procedure Act 1986*. Scholars have reported mixed experiences in using existing processes to access court information for research purposes, as well as “discretionary and inconsistent decision-

²⁷ The Hon. Frank Vincent AO QC, *Open Courts Act Review*, September 2017, 70 [2.68].

²⁸ Patrick Tidmarsh and Gemma Hamilton (2020) ‘Misconceptions of sexual crimes against adult victims: Barriers to justice’, *Trends & Issues in Crime and Criminal Justice*, No. 611, Australian Institute of Criminology, November 2020, 9-10; Australian Law Reform Commission and NSW Law Reform Commission (2010) *Report 114 / 128: Family Violence – A National Legal Response*, [26.11]-[26.17], [26.50]-[26.55], NSW Law Reform Commission (2020) *Report 148: Consent in relation to sexual offences*, [2.7]-[2.43], [2.68].

making, time consuming decision-making and ... commercialisation of court transcription services."²⁹

32. RDVSA supports enhanced access by academic and other approved researchers to court files for research purposes. Researchers should be entitled to access court information, subject to suppression and non-publication restrictions and ethics approval. There should be a clear, consistent and publicly available policy or set of rules to facilitate applications and fees for access to court records should either be waived or significantly reduced.

Conclusion

33. The principle of open justice is crucial to the transparency of the justice system and the scrutiny of judicial proceedings. Open justice plays a particularly important role in proceedings involving sexual, domestic and family violence which are notoriously under-reported and where (especially in the area of sexual assault), conviction rates are low. However, reporting rates are also notoriously low, and protections are necessary to encourage reporting and safeguard the well-being of victim-survivors. These protective measures should be subject to the consent of the victim-survivor in a particular case.

34. RDVSA makes the following recommendations:

A: Closed courts:

- maintaining the presumption of closed courts for complainants and tendency witnesses in sexual assault proceedings and complainants in domestic violence offence proceedings under the *Criminal Procedure Act 1986* (ss 291, 294D and 289U)
- extending these provisions to complainants in stand-alone ADVO proceedings

B: Statutory (self-executing) non-publication orders:

- maintaining the prohibition against identification of complainants in sexual assault proceedings under s.578A of the *Crimes Act 1900*
- extending this provision to complainants in domestic violence offence proceedings and persons in need of protection in Apprehended Domestic Violence Order proceedings
- repealing s.578A(4)(f) which excludes the prohibition upon the death of the complainant

C: Suppression and non-publication orders:

²⁹ Professor Katherine Biber, UTS, Preliminary submission to the NSW Law Reform Commission Open Justice Review, 17, see also 21-223 and Dr Luke McNamara and Dr Julia Quilter, Preliminary submission to the NSW Law Reform Commission's Open Justice Review.

- extending the availability of orders on the ground set out in s.8(1)(d) of the *Court Suppression and Non-publication Orders Act 2010* to domestic violence offences
- including a specific consideration of the views of the complainant or victim-survivor in the court's determination of whether to make a suppression or non-publication order, and in determining the scope of any such order

D: Support for victim-survivors

- recognising the rights of victims to be informed about:
 - the types of protections available to them in the form of closed courts and statutory prohibitions against publication,
 - their right to consent to identification,
 - their right to make an application or to be heard in an application under the *Court Suppression and Non-publication Order Act*,
 - how to access court documents relating to their case.
- funding for the development of accessible resources and services to assist victims in exercising these rights

E: Researcher access to information

- improving access by academic and other approved researchers to court files for research purposes.
- providing a clear, consistent and publicly available policy or set of rules to facilitate applications and fees for access to court records should either be waived or significantly reduced.

35. RDVSA also recommends a legislative mechanism for ongoing monitoring and evaluation of any changes to law and legal processes, with an opportunity to examine the effectiveness of any such changes, including seeking to address any unintended consequences.

36. If you have any questions or would like to discuss further, please do not hesitate to contact me on [REDACTED] or by email at [REDACTED]

Yours faithfully,

Rape & Domestic Violence Services Australia

[REDACTED]

Eleanor Campbell
Acting Operations Manager

(Document prepared by Natalie Gouda; Legal and Policy Officer)