Rape & Domestic Violence Services Australia

Formerly NSW Rape Crisis Centre

13 June 2019

Mr Alan Cameron AO
Chairperson
NSW Law Reform Commission
GPO Box 31
Sydney NSW 2001

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

Dear Mr Cameron AO,

Re: Preliminary Submission to the Review of Court and Tribunal Information: Access, Disclosure and Publication

Thank you for the opportunity to provide a preliminary submission to the NSW Law Reform Commission's Review of Court and Tribunal Information: Access, Disclosure and Publication.

Please find enclosed our preliminary submission. We appreciate the Commission providing us with an extension to prepare this submission.

If you have any questions or would like to discuss further, please do not hesitate to contact me on (02) 8585 0333 or by email at karenw@rape-dvservices.org.au.

Yours faithfully,

Rape and Domestic Violence Services Australia

Karen Willis

Executive Officer

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Funded by NSW Health, the Commonwealth Bank, and the Australian Government Department of Social Services.

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Counselling Services

24/7 NSW Rape Crisis 1800 424 017
CBA Domestic & Family Violence Line 1800 222 387
Sexual Assault Counselling Australia 1800 211 028

rape-dvservices.org.au

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Preliminary Submission to NSW Law Reform Commission

Court and Tribunal Information: Access, Disclosure and Publication

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Table of Contents

Summary of recommendations

Recommendation 1: That legislative prohibitions on the disclosure and publication of Court proceedings should prevent the disclosure of current sexual assault proceedings, sensitive pieces of evidence and if required, disclosure of information prior to the proceedings commencing.

Recommendation 2: That legislative prohibitions on the disclosure and publication of Court proceedings should respect the privacy of those who have experienced sexual violence, domestic or family violence.

Recommendation 3: That the Commission consider the wording of Sections 8 & 9 of *the Court Information Act 2010* (NSW) to limit the persons who can access information regarding Court proceedings, particularly in sexual, domestic or family violence proceedings ensuring that there are appropriate protections in place to uphold the rights of complainants and witnesses.

Recommendation 4: That legislative prohibitions should limit the publication of identifying material and/or information that may prejudice Court proceedings, particularly in sexual, domestic or family violence proceedings, without the expressed and informed consent of the complainant or witness.

Recommendation 5: That the Commission consider how NSW legislation could prevent access to information when the source of the digital information is not in the NSW jurisdiction.

Recommendation 6: That the Commission consider the impact that jury directions, including legislated directions, may have in combating jurors' reliance on information available in the media.

Recommendation 7: That the Commission consider avenues for better access to information for complainants and witnesses generally in Court proceedings, including complainants of sexual violence having independent legal representation.

Recommendation 8: That the Commission consider practical arrangements, such as access to an online portal or email notifications to ensure that all media outlets are aware that suppression and non-publications orders are in place.

Recommendation 9: That there be a further 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.

1. Background

1. Rape & Domestic Violence Services Australia ('**R&DVSA**') welcome the opportunity to contribute to the NSW Law Reform Commission's ('**the Commission**') Review of Court and Tribunal Information: access, disclosure and publication.
2. R&DVSA is a non-government organisation that provides a range of specialist trauma counselling services to people who have been impacted by sexual, domestic or family violence and their supporters. Our services include the NSW Rape Crisis counselling service for people in NSW who have been impacted by sexual violence and their professional or non-professional supporters; Sexual Assault Counselling Australia for people accessing the Redress Scheme resulting from the Royal Commission into Institutional Responses to Child Sexual Abuse; and the Domestic and Family Violence Counselling Service for Commonwealth Bank of Australia customers and staff who are seeking to escape domestic or family violence.
3. In making this submission, we do not propose to address each Term of Reference as set out by the Commission.

2. Language and Terminology

1. In this submission, R&DVSA use the term *sexual violence* as a broad descriptor for any unwanted acts of a sexual nature perpetrated by one or more persons against another. This term is designed to emphasise the violent nature of all sexual offences and is not limited to those offences that involve physical force and/or injury.
2. R&DVSA use the term *people who have experienced sexual assault/violence and/or domestic and family violence* to describe individuals who have suffered this type of violence, rather than the terms survivors or victims. This language acknowledges that, although experiences of violence are often very significant in a person's life, they nevertheless do not define that person. Moreover, the process of recovery from trauma is complex, multifaceted and non-linear and will often involve experiences of survival in combination with experiences of victimisation.
3. R&DVSA use gendered language when discussing sexual, family and domestic violence. This reflects the fact that sexual, family and domestic violence are predominantly perpetrated by men against women. However, we acknowledge that gendered language can exclude the experiences of some people impacted by sexual, domestic and family violence. We acknowledge that:
    a. Women can also be perpetrators of sexual, domestic and family violence.
    b. Sexual violence occurs within LGBTIQ+ relationships at a similar rate to sexual violence within heterosexual relationships.[1]
    c. Sexual violence is perpetrated against transgender and gender-diverse people at a higher rate than against cis gender people.[2]

[1] B. Fileborn 'Accounting for space, place and identity: GLBTIQ young adults' experiences and understandings of unwanted sexual attention in clubs and pubs' (2013) 22(1) *Critical Criminology* 81.
[2] K. O'Halloran, 'Family Violence in an LGBTIQ context' (2015) 2 *Royal Commission In Brief*, https://www.dvrcv.org.au/sites/default/files/Family-violence-in-an-LGBTIQ-context-Kate-OHalloran.pdf;

3. Introduction

R&DVSA understand there will always be a need to consider open justice within the NSW Court and Tribunal systems. However, when considering legislative prohibitions on the disclosure or publication of Court proceedings, there should always be careful consideration of the rights of complainants and witnesses, particularly those who have experienced sexual, domestic or family violence.

It is apparent that finding a balance between the public interest in Court proceedings and protecting the rights of those before the Court can be difficult. This is regardless of whether they are a complainant, witness or defendant. This submission focusses on R&DVSA's concern that where defendants are identified, complainants and witnesses may be identified by association. Further, we hold concerns as to access to information more generally regarding Court proceedings and any prejudicial effect this may have.

R&DVSA has had an opportunity to consider the preliminary submissions currently available on the Commission's website in response to this Review. We do not propose to attest to the rights of defendants, particularly in sexual assault proceedings. However, the use of suppression and non-publication orders should not be downplayed in protecting the identities of those who have experienced sexual violence by association; if the defendant is to be identified. We urge the Commission consider this when reviewing these legislative prohibitions.

4. Legislative prohibitions on the disclosure or publication of NSW Court and Tribunal information

Any legislative prohibition on the disclosure or publication of information and/or material from Court proceedings should uphold the rights of complainants and witnesses, particularly those who have experienced sexual, domestic or family violence. If a person who has experienced violence does not consent to information being disclosed, then their privacy should be respected. This is in keeping with the *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*.[3]

Do the current provisions strike the right balance?

One of the many impacts of trauma resulting from sexual violence is a sense of shame and embarrassment. One of the well identified trauma recovery requirements for those who have experienced this violence is regaining a sense of power and control. For this reason, the prohibitions on disclosure and the requirement for the complainant to consent to any disclosure and publication should go beyond the Court proceedings themselves. It is important that they include the disclosure of sensitive pieces of evidence, including personal information or graphic details of the violence perpetrated. In some cases, prohibitions should also be considered on the disclosure of information prior to the Court proceedings themselves.

Recommendation 1: That legislative prohibitions on the disclosure and publication of Court proceedings should prevent the disclosure of current sexual assault proceedings, sensitive pieces of evidence and if required, disclosure of information prior to the proceedings commencing.

[3] *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, Adopted by the General Assembly Resolution 40/34 on 29 November 1985, Article 6.

The exception of self-identification in sexual assault proceedings

Those who have experienced sexual violence who consent to publication of their story can do so under Section 578A of the *Crimes Act 1900* (NSW). They can consent to the publication of material from Court proceedings from the age of 14 years.[4]

R&DVSA state that the idea of allowing those who have experienced sexual violence to disclose their story can be a positive step in that person's trauma journey, and this is consistent with the recommendations made by the Commonwealth Royal Commission into Institutional Responses to Child Sexual Abuse in 2017.[5]

It has been the experience of R&DVSA that when there is a media report regarding a person who has experienced sexual violence, there is a spike in the calls to our organisation from people seeking to talk about the sexual violence they have experienced. Some of these calls come from those disclosing this violence for the first time.[6] R&DVSA recommend that legislative prohibitions on the disclosure and publication of Court proceedings, particularly in sexual assault proceedings, must not have the unintended consequence of decreasing complainants and/or witnesses coming forward, because of any fear that their privacy will not be respected.

Recommendation 2: That legislative prohibitions on the disclosure and publication of Court proceedings should respect the privacy of those who have experienced sexual violence, domestic or family violence.

5. NSW Court suppression and non-publication orders, and tribunal orders restricting disclosure of information

a) Any NSW legislation that affects access to, disclosure and publication of, Court and Tribunal information.

The *Court Suppression and Non-Publication Orders Act 2010* (NSW)

It is clear from the Agreement in Principle Speech when this legislation was debated in 2010 that there was a policy direction. This legislation was to be enacted in conjunction with the *Court Information Act 2010* (NSW) (although this did not occur as evidenced below). This policy direction was:

> *""To promote access to court information to the public, including the media" and that it was the Government's intention "to promote transparency and a greater understanding of the justice system" while, at the same time, ensuring "that the fair conduct of court proceedings, the administration of justice and the privacy and safety of participants in court proceedings are not unduly compromised."*[7]

[4] *Crimes Act 1900* (NSW), s. 578A(4)(b).
[5] Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report Recommendations,* (2017), 37.
[6] K. Willis, Executive Officer, Rape & Domestic Violence Services Australia 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.
[7] Agreement in Principle Speech, *Court Suppression and Non-publication Orders Bill,* Legislative Assembly, *Debates,* 29 October 2010, p 27195 in Justice Peter Johnson, 'The Court Suppression and Non-Publication

R&DVSA acknowledge that *"a primary objective"*[8] of this legislation is to safeguard public interest in open justice. We endorse this wording as safeguarding the public interest in open justice should not be *"the"* primary objective, as there will be other factors in Court proceedings to consider.

The *Court Information Act 2010* (NSW) – a review 3 years on

R&DVSA do not propose to provide significant commentary regarding the *Court Information Act 2010* (NSW). This is particularly given that this legislation did not come into effect until 8 December 2016. The key aim of this legislation was to make Court proceedings more accessible to the public and the media.

> *"'Open Justice' brings together the desirable qualities of accountability, transparency, free speech, and a public right to scrutinise court proceedings."*[9]

At the very least, R&DVSA would argue that all material and/or information used in sexual assault proceedings should always fall into the *"restricted access information"*[10] category provided for in Section 6 of this Act. The improper use of this information and concerns about the impact of personal or sensitive information being made available to the public are far too great, particularly in sexual assault proceedings. Legislative prohibitions on the disclosure or publication of information should uphold the rights of complainants and witnesses, and if they do not wish for this information to be disclosed, their privacy should be respected.

R&DVSA recommends that the Commission consider the wording of Sections 8 & 9 of this Act, dealing with access to *"open access information"*[11] and *"restricted access information."*[12] Each section states *"any person"*[13] or *"a person"*[14] can access information, and there should be a consideration of stricter categories here on who can access information.

Recommendation 3: That the Commission consider the wording of Sections 8 & 9 of *the Court Information Act 2010* (NSW) to limit the persons who can access information regarding Court proceedings, particularly in sexual, domestic or family violence proceedings ensuring that there are appropriate protections in place to uphold the rights of complainants and witnesses.

6. Access to information in NSW Courts and Tribunals

At common law, in NSW *"there is no inherent power of the court to exclude the public."*[15] The restrictions on access to information or the making of suppression or non-publication orders comes directly from statutes. R&DVSA is especially concerned about this in the context of sexual, domestic or family violence proceedings, and our concern is multi-faceted as evidenced below.

Orders Act 2010 One Year On- Some Legal and Practical Issues,' (Paper presented at Twilight Seminar, Supreme Court of NSW), 25 July 2012, 4.

[8] *Court Suppression and Non-Publication Orders Act 2010* (NSW), s. 6.

[9] K. Biber, 'Evidence from the Archive: Implementing the Court Information Act in NSW," (2011), Vol. 33, No. 1, *Sydney Law Review*, 575, 579.

[10] *Court Information Act 2010* (NSW), s. 6.

[11] *Ibid*, s. 8.

[12] *Ibid*, s. 9.

[13] *Ibid*, s. 8.

[14] *Ibid*, s. 9.

[15] *John Fairfax Publications Pty Ltd v District Court of NSW* (2004) 61 NSWLR 344 (CA) per Spigelman CJ at [18].

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

Striking the balance between the public interest in open justice and protecting the rights of those who have experienced sexual, domestic or family violence

The concept of public interest can often walk a fine line in sexual assault proceedings as the proceedings can be deeply personal and contain information and/or material that those who have experienced sexual violence may not want shared publicly. In fact, concerns of public disclosure without consent may be a powerful barrier to reporting. However, on the flip side, there will always be public interest regarding these matters, and a person who has had these experiences may wish to share their story.

The right to a fair trial

R&DVSA state that in the context of those who have experienced sexual, domestic or family violence, the law remains overly focussed on the right to a fair trial of the defendant. We recognise that it is a fundamental human right that all individuals are *"entitled to a fair and public hearing,"*[16] and that restricted access to Court and/or Tribunal information can aid this right. However, the rights of those who have experienced sexual, domestic or family violence and other vulnerable witness should always be paramount.

R&DVSA support legislation that limits the publication of any identifying material and/or information, including identification of the defendant that may be prejudice Court proceedings, particularly in the context of sexual, domestic or family violence.

Recommendation 4: That legislative prohibitions should limit the publication of identifying material and/or information that may prejudice Court proceedings, particularly in sexual, domestic or family violence proceedings, without the expressed and informed consent of the complainant or witness.

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

Can suppression and non-publication orders remain effective in this digital environment?

The digital environment has changed the way the community receive their news. It has changed the way the news media deliver news and has resulted in the emergence of 'citizen journalists'[17]. This term refers to those individuals blogging, tweeting, posting messages on Facebook or generally engaging in social media posts about Court proceedings.[18]

[16] *International Covenant on Civil and Political Rights*, Adopted by the General Assembly of the United Nations on 16 December 1966, Article 14(1).
[17] This phrase is coined by The Hon. Chief Justice Marilyn Warren AC in 'Open Justice in the Technological Age,' (2014), Vol 40, No. 1, *Monash University Law Review,* 45, 48.
[18] *Ibid*, 48.

> *"Open Justice now increasingly means the ability of the community to access information about the courts through the internet and social media."*[19]

The use of suppression and/or non-publication orders could be used to prevent an abuse or frustration of Court process. One intended purpose of an order in this context would be to prevent any mistrial occurring as a result of jury members being aware of information that may prejudice the defendant. The cost on complainants and witnesses of a mistrial can be cataphoric and extremely re-traumatising.

R&DVSA support the use of suppression and non-publication orders during Court proceedings to prevent any form of prejudice against the defendant resulting in a mistrial, and even longer protracted Court proceedings which will add to the emotional toil experienced by complainants and any other witnesses. The costs of mistrial on the community can also be significant with the reallocation of Court time, prosecution resources and a new jury being empanelled.

Good intentions may still not be enough in a digital age…

An example of the difficulties that a suppression and/or non-publication order poses regarding online content is where a Google alert service *"What's trending in New Zealand"* was sent in December 2018.

The service email contained the name of the 26-year-old man who was accused of murdering backpacker Grace Millane in New Zealand. There is evidence that this man's name was searched more than 100,000 times after the Google alert email was sent. At the time, this information had been suppressed by New Zealand Courts, however the email alert service had generated automatically from a Google server overseas.[20]

Given this alert email was generated automatically from a server outside of New Zealand, it is difficult to ascertain who would be held in contempt of the Court Order.[21] In recent times in Australia, this scenario has also played out given the media attention that Cardinal George Pell's trial received.

R&DVSA urge the Commission in this Review consider how NSW legislation could prevent or restrict access to the information in the above example. It can be difficult to ensure the legislation keeps up with the digital world, and there are complex legal and ethical issues around disclosure of Court proceedings in the media. Further, is it the responsibility of the Government or social media organisations such as Facebook, Twitter to restrict access to this information where suppression or non-publication orders are made?

> **Recommendation 5:** That the Commission consider how NSW legislation could prevent access to information when the source of the digital information is not in the NSW jurisdiction.

[19] *Ibid*, 45.
[20] Jewel Topsfield, 'Are suppression orders obsolete in the digital age?' *The Sydney Morning Herald (Online),* 22 December 2018, <https://www.smh.com.au/national/are-suppression-orders-obsolete-in-the-digital-age-20181220-p50nk1.html>
[21] *Ibid*.

The need for ongoing education on access to information, particularly in sexual, domestic or family violence proceedings

R&DVSA would welcome ongoing education for legal practitioners, judicial officers, jury members and the wider community as to the information that is available in the public forum. This would be especially relevant for jury members who may have seen information published in the media. Further Jury Directions or training could also be provided prior to jury members being involved in proceedings dealing with sexual, domestic or family violence.

Recommendation 6: That the Commission consider the impact that jury directions, including legislated directions, may have in combating jurors' reliance on information available in the media.

Better access to information for complainants and witnesses in general

In considering access to information from NSW Courts and Tribunals more generally, policy consideration should be given to further training and ongoing education to the Office of the Director of Public Prosecutions staff and Court staff generally. This should aim to ensure that complainants and witnesses in sexual, domestic or family violence proceedings are provided with timely access to information regarding the proceedings they are involved in.

R&DVSA are supportive of a dedicated solicitor for a complainant, particularly during sexual assault proceedings. This would be in keeping with a trauma-informed approach. Many submissions made to the Royal Commission into Institutional Responses to Child Sexual Abuse expressed support for complainants of sexual violence having independent legal representation.[22]

Recommendation 7: That the Commission consider avenues for better access to information for complainants and witnesses generally in Court proceedings, including complainants of sexual violence having independent legal representation.

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

Approaches used in other States and Territories that could be adopted in NSW

There are a variety of approaches that have been implemented in each state and territory regarding access to Court and Tribunal information. R&DVSA draw your attention to current legislation in Western Australia. All Courts in Western Australia have the power by way of statute in criminal proceedings to prohibit or restrict publication. This power can be made at any time after the defendant has been charged with an offence upon application by a party or on the Court's own motion.[23] The Commission should consider whether the inclusion of such a power in NSW legislation may be appropriate, particularly in the context of information and/or material being available publicly in sexual assault proceedings. The concern remains that if information has been published, particularly prior to Court proceedings, a jury member may have read this information which could invariably lead to a mistrial.

[22] Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report: Executive Summary and Parts I-II* (2017), 218.
[23] *Criminal Procedure Act 2004* (WA), s. 171(5).

Another approach used in Victoria is the use of *'broader suppression orders'* versus *'proceedings suppression orders*.' The use of broader suppression orders is grounded in Section 25 of the *Open Courts Act 2013* (Victoria). The power in this section goes beyond prohibiting publication, with the County Court *"doing any other thing,"*[24] required to ensure the fair and proper conduct of criminal proceedings. Section 3 in this Act contains the definition of *"publish"*. The definition includes *"the provision of access to information,"* which essentially means that the Court has the power to make injunctive orders forcing published material to be removed. It has colloquially been given the name *"internet take down orders."* R&DVSA recommend that the Commission consider the use and application of such an order as an *"internet take down order"* in its Review of access to information from Court and Tribunal proceedings.

Approaches used in other States and Territories to ensure the media are aware of suppression and non-publication orders

Suppression and Non-Publication Orders Registry available through eCourts Portal

Western Australia have implemented an online access system, where the media outlet can log into the eCourts Portal and confirm whether suppression orders are in place.[25] The media must apply to the Manager, Media & Public Liaison for this online access. Further to this, the Sheriff's Office also maintain a 'suppression order registry' and can be contacted by media outlets to obtain updated information from this register.[26]

South Australia also maintain a 'suppression order register' which is available through the Court's Media and Communications Office located in Adelaide.[27]

Email Notification when Suppression or Non-Publication Orders are made

Victoria has taken a step further than Western and South Australia; in that they send email notifications to registered media outlets when suppression orders are made. Under the Victorian legislation when a party requests a suppression order be made, they must provide 3-days' written notice of this intention. Email notifications are also sent to registered media outlets at this time which provides them with an opportunity to be heard on the suppression order application.[28]

The approaches, as above, demonstrate practical arrangements that other states have implemented, to try and ensure that media outlets are aware of when suppression orders are in place.

R&DVSA recommend that the Commission consider the above approaches, or other practical alternatives to combat the media being aware of suppression and non-publication orders being in place.

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[24] *Open Courts Act 2013* (Victoria), s. 25(1).
[25] Supreme Court of Western Australia, *Guidelines for Media – Reporting in Western Australian Courts* (2019), <https://www.supremecourt.wa.gov.au/_files/Guidelines%20for%20the%20Media.pdf>, 10.
[26] *Ibid,* 11.
[27] Courts Administration Authority of South Australia, Media and Communications Office, *Access to Evidence,* <http://www.courts.sa.gov.au/ForMedia/Pages/Access-to-Evidence.aspx>
[28] Magistrates' Court of Victoria, *Information for the Media,* <https://www.mcv.vic.gov.au/news-and-resources/information-media>

Recommendation 8: That the Commission consider practical arrangements, such as access to an online portal or email notifications to ensure that all media outlets are aware that suppression and non-publications orders are in place.

7. Conclusion

It is evident that striking the right balance between the public interest in open justice and protecting the rights of those who have experienced sexual, domestic or family violence remains difficult to overcome, but not impossible. The reality is that the digital environment and the way the community receive news will continue to evolve, and NSW will need to keep up with this, particularly in terms of accessing information from Court and/or Tribunal proceedings.

R&DVSA do recommend that if any changes are made to the existing legislation then there should always be a mechanism for ongoing monitoring and evaluation of these changes. This is particularly important in this context in dealing with an ever-evolving digital media space. The process for ongoing monitoring should include an opportunity to examine the effectiveness of any change to the legislation and ensure that there are no untended consequences that arise.

Recommendation 9: That there be a further 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.