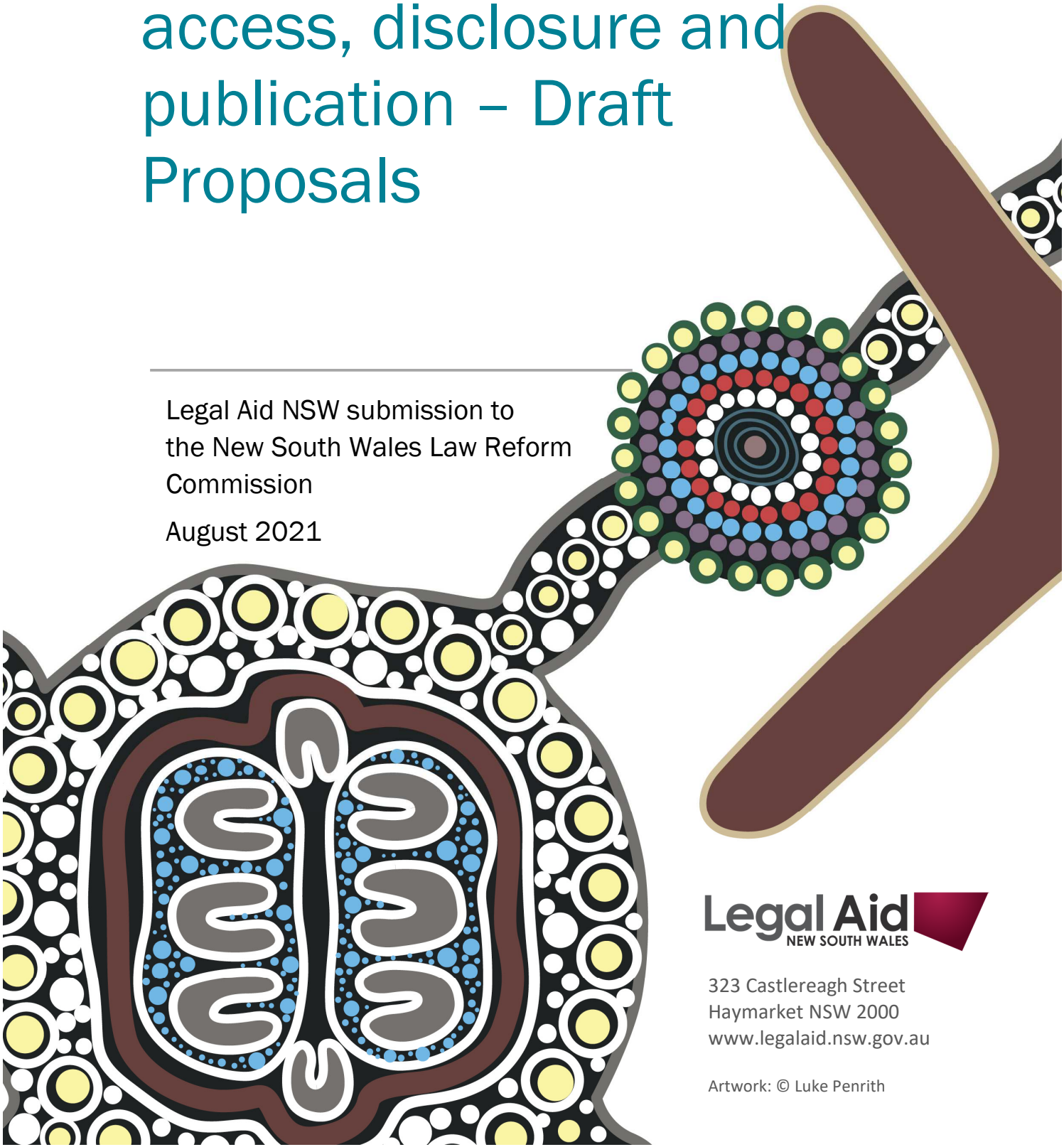
Open Justice Court and tribunal information: access, disclosure and publication – Draft Proposals

Legal Aid NSW submission to the New South Wales Law Reform Commission

August 2021



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Acknowledgement

We acknowledge the traditional owners of the land we live and work on within New South Wales. We recognise continuing connection to land, water and community.

We pay our respects to Elders both past and present and extend that respect to all Aboriginal and Torres Strait Islander people.

Legal Aid NSW is committed to working in partnership with community and providing culturally competent services to Aboriginal and Torres Strait Islander people.

1. 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). We provide legal services across New South Wales through a state-wide network of 25 offices and 243 regular outreach locations, with a particular focus on the needs of people who are socially and economically disadvantaged. We offer telephone advice through our free legal helpline LawAccess NSW.

We assist with legal problems through a comprehensive suite of services across criminal, family and civil law. Our services range from legal information, education, advice, minor assistance, dispute resolution and duty services, through to an extensive litigation practice. We work in partnership with private lawyers who receive funding from Legal Aid NSW to represent legally aided clients.

We also work in close partnership with community legal centres, the Aboriginal Legal Service (NSW/ACT) Limited and pro bono legal services. Our community partnerships include 27 Women's Domestic Violence Court Advocacy Services, and health services with a range of Health Justice Partnerships.

The Legal Aid NSW Family Law Division provides services in Commonwealth family law and state child protection law. Specialist services focus on the provision of Family Dispute Resolution Services, family violence services through the specialist, multidisciplinary Domestic Violence Unit (DVU) and the early triaging of clients with legal problems through the Family Law Early Intervention Unit. Legal Aid NSW provides duty services at a range of courts, including the Parramatta, Sydney, Newcastle and Wollongong Family Law Courts, all six specialist Children's Courts and in some Local Courts alongside the Apprehended Domestic Violence Order (ADVO or 'protection order') lists. Legal Aid NSW also provides specialist representation for children in both the family law and care and protection jurisdictions.

The Criminal Law Division assists people charged with criminal offences appearing before the Local Court, Children's Court, District Court, Supreme Court, Court of Criminal Appeal and the High Court. 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 Civil Law Division provides advice, minor assistance, duty and casework services from the Central Sydney office and 20 regional offices. It focuses on legal problems that impact on the everyday lives of disadvantaged clients and communities in areas such as housing, social security, financial hardship, consumer protection, employment, immigration, mental health, discrimination and fines. The Civil Law practice includes dedicated services for Aboriginal communities, children, refugees, prisoners, older people experiencing elder abuse, coronial law matters and mental health and related areas of disability law.

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2. Executive Summary

Legal Aid NSW welcomes the opportunity to provide a submission to the NSW Law Reform Commission Draft Proposals on *Open Justice Court and tribunal information: access, disclosure and publication* (**Draft Proposals**). We note that we have also provided a preliminary submission to the Terms of Reference for this inquiry, as well as a submission to the Consultation Paper.

Legal Aid NSW maintains that open justice is a fundamental principle of our legal system and that any departures from open justice must be carefully considered. Nevertheless, the principle of open justice must also be carefully balanced against 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.

Legal Aid NSW notes that the current framework regulating departures from the principle of open justice is complex and difficult to apply, at times yielding inconsistent or illogical results. We acknowledge and welcome proposals which seek to harmonise and simplify the rules and procedures which place limits on the principle of open justice.

Legal Aid NSW also strongly supports proposals that enhance existing protections for victims and complainants, children and young persons and vulnerable individuals involved in legal proceedings in various capacities, as well as those which give individuals for whose protection orders are made, the autonomy to consent to disclosure or publication of their identities, enabling them to be in control of their own stories.

While we broadly support the guiding principles of the new Act as set out in the Draft Proposals, we consider that they do not go far enough in acknowledging the primacy of the principle of open justice, which should guide the court's decision-making. We strongly support the primacy of the principle of open justice to be reflected in the principles of the new Act in NSW, which is also consistent with the approach taken in Victoria.[1]

In particular, given the significant departure from the principle of open justice under the proposed closed court orders, we suggest that the principle of open justice be given clear primacy under those provisions and that the scope of the orders made with respect to Commonwealth, state or territory national or international security interests be clarified.

We also raise some concerns around journalists' access to court records and suggest further consideration of the type of documents which could be accessed without leave of the court and processes which would ensure that potentially sensitive documents can only be accessed with leave. In our earlier submission in response to the Consultation Paper, we raised concerns about victims' and complainants' difficulties in accessing

[1] *Open Courts Act 2013* (Vic) s 4.

court records and note that these concerns have not been addressed by the proposed new framework dealing with access to court records.

Finally, we maintain our concerns about inconsistent prohibitions on the publication and disclosure of the same evidence and information before tribunals and courts, given that tribunals are excluded from the operation of the new Act and no specific recommendations are made in response to the issues we raised.

We respond to the specific questions in the Draft Proposals below.

3. Uniform definitions

Proposal 3.1: Uniform definitions of "non-publication order", "suppression order", "exclusion order" and "closed court order"

Legal Aid NSW supports the introduction of the proposed definitions, acknowledging that the definitions will provide better clarity and consistency around the nature and effect of different types of prohibitions, regardless of the forum in which they are imposed. Our only concern is around the possible exclusion of victims' support person/s under the definition of "closed court" orders. Whether the presence of the support person is "required for the purposes of the proceedings" is open to debate. Accordingly, we welcome clarification that victims' support persons are not intended to be excluded under these orders.

Proposal 3.2: New, uniform definitions of "publish", "publish or broadcast", or "disclose"

Legal Aid NSW welcomes clear definitions of the above-mentioned terms and their consistent application under existing subject-specific legislation. As stated in our earlier submission, we particularly welcome uniform definitions extending to the *Mental Health Act 2007* (NSW) (**Mental Health Act**) in order to clarify the scope and purpose of the prohibitions.[2]

Proposal 3.3: A uniform definition of "party", similar to s 3 of the CSNPO Act

Legal Aid NSW also welcomes the expansion of the term "party" under the new Act to include "complainant or victim" in criminal proceedings or "protected person" giving them standing in proceedings relating to non-publication, suppression, exclusion, or closed court orders.

We note that this definition is not intended to be included in the legislative framework governing access to court records. While we support strict controls over accessing court records, we are concerned about the impact of the proposal on victims or complainants who may need to access certain documents on the court records in order to understand their legal rights or protections or to apply for supports or compensation. We discuss this concern further in relation to Proposal 10.3 below.

Proposal 3.4: Uniform definitions of "complainant", "victim", "protected person", "prescribed sexual offence" and "domestic violence offence"

Legal Aid supports the proposed approach of adopting existing definitions of the above-mentioned terms and referencing the legislation where those definitions are found,

[2] Legal Aid NSW submission to the New South Wales Law Reform Commission, *Open Justice: Court and tribunal information: access, disclosure and publication*, (March 2021), 8

instead of replicating them in the new Act. We agree that while this approach may cause slight inconvenience in terms of having to refer to another Act to find the definition, it is likely to avoid inconsistencies, particularly where those definitions are amended in the original Act. We also see value in clarifying the term "victim" to include "a person against whom an offence is alleged to have been committed but the offence has not been formally proven" to address situations where criminal proceedings are ongoing.

Proposal 3.5: The provisions should use the term "information likely to lead to the identification of a person" instead of a person's "name"

Legal Aid NSW welcomes the use of the term "information likely to lead to the identification of a person" instead of a person's "name". We raised concerns in our earlier submission about complainants in domestic and family violence proceedings being identified because information about their cultural affiliations or location was not accurately suppressed.[3] We support the inclusion of a non-exhaustive list of information likely to lead to the identification of the person as outlined in the Draft Proposals. [4]

[3] Legal Aid NSW submission to the New South Wales Law Reform Commission, *Open Justice: Court and tribunal information: access, disclosure and publication*, (March 2021), 10

[4] New South Wales Law Reform Commission, *Open Justice: Court and tribunal information: access, disclosure and publication*, Draft Proposals, (June 2021), 17.

4. A new Act

Proposal 4.1: Definitions in the new Act

As discussed in our earlier submission, given the unique nature of the Coroner's Court's jurisdiction, we agree that the Coroner's Court should be excluded from the provisions of the new Act.

Proposals 4.2, 4.3, 4.4, 4.5 and 4.6

Legal Aid NSW broadly supports the Draft Proposals setting out the principles and powers of the new Act. However, in our view, the principles of the new Act (set out in Draft Proposal 4.2), do not go far enough in acknowledging the primacy of the principle of open justice, which should guide the court's decision-making. We consider that the principle in section 6 of the current *Court Suppression and Non-publication Orders Act 2010* (NSW) (**CSNPO Act**), which requires a court, when deciding whether to make a non-publication or suppression order, to "take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice" is critical and should be maintained. The primacy of the principle of open justice is reflected in the equivalent *Open Courts Act 2013* (Vic), which states the following:

> **Principle of open justice prevails unless circumstances require displacement**
>
> (1) A court or tribunal is to have regard to the primacy of the principle of open justice and the free communication and disclosure of information in determining whether to make a suppression order.
>
> (2) A court or tribunal is only to make a suppression order if satisfied that the specific circumstances of a case make it necessary to override or displace the principle of open justice and the free communication and disclosure of information.[5]

We strongly support the primacy of the principle of open justice to be reflected in the principles of the new Act in NSW.

Proposals 4.7, 4.8 and 4.9

Legal Aid NSW submits that provisions giving "the government (or an agency of the government) of the Commonwealth or of a state or territory" standing to seek an order, request reasons for an order or appeal against an order, should be confined to situations where their interests are materially impacted by the order. The current wording of these provisions is very broad and gives governments or their agencies standing to intervene in any proceedings irrespective of whether their interests are impacted by those proceedings or the orders sought. Legal Aid NSW otherwise supports these proposals.

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[5] *Open Courts Act 2013* (Vic) s 4.

Proposal 4.11: Consequences of breaching an order

Legal Aid NSW does not oppose increasing the penalty for breaching an order from 12 months, under the current CSNPO Act, to two years under the new Act, in circumstances where the person engages in conduct which breaches the order knowing of the existence of the order.

Proposal 4.14: Grounds for making a non-publication or suppression order

Legal Aid NSW welcomes the Draft Proposals outlined in Proposal 4.14. We agree that an order should not be expressly made on the ground that it is necessary to avoid causing undue distress or embarrassment to the defendant in sexual offence proceedings, and acknowledge that this ground can be used to silence victims of sexual offences from speaking about their experiences.[6] However, we support courts being able to make an order in relation to the defendant on other grounds, including to prevent prejudice to the proper administration of justice, or to protect the safety of the defendant.

Legal Aid NSW also welcomes the proposal to allow an order to be made where it is necessary to avoid causing undue distress or embarrassment to complainants and witnesses in "any legal proceeding that involves, or relates to, a prescribed sexual offence", "domestic violence offence" or civil proceeding. We agree that the proposal not only recognises that domestic violence complainants also experience stigma, distress, and humiliation, but that release of personal information during court proceedings can pose a significant risk to a victim's safety and the use of these provisions can indeed enhance the victim's safety. While these proposals will undoubtedly go some way to better protecting victims, we repeat our earlier concerns about the accessibility of these enhanced protections to persons who are ordinarily not legally represented. We reiterate that greater assistance and practical guidance should also be provided to victims to make an application for a suppression or non-publication order. In the experience of our solicitors, many victims are not aware of these provisions, and would find it difficult to complete the form without legal advice. Additional training for judicial officers, to notify victims that they are able to make an application under the CSNPO Act, would also be of great assistance.[7]

We also welcome the proposed protections for children who are parties or witnesses in any civil proceedings.

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[6] Victim is used in this submission to denote a person who is the victim or complainant or alleged victim of domestic and family violence or sexual violence. Some people who experience violence prefer the term 'victim' and others prefer the term 'survivor'. In this submission, the term 'victim' is intended to be inclusive of both victims and survivors. This submission acknowledges every person's experience is unique and individual to their circumstances.

[7] Legal Aid NSW submission to the New South Wales Law Reform Commission, *Open Justice: Court and tribunal information: access, disclosure and publication*, (March 2021), 12.

Proposal 4.17: Duration of non-publication or suppression orders

While Legal Aid NSW agrees that non-publication or suppression orders of indefinite duration can pose certain difficulties, we note there are circumstances where they may be appropriate. For example, indefinite orders may be appropriate in situations where they are made for the protection of a victim or complainant, or in a prescribed sexual offence or a domestic violence offence. Revealing the victim's identity publicly years after the proceedings have ended may be no less traumatising for the victim than revealing it during the proceedings or immediately thereafter. Placing the burden on the victim or complainant to make an application to the court prior to the expiration of the order for another non-publication or suppression order, or an extension of the existing order, would be onerous and potentially retraumatising. At the same time, we recognise that indefinite orders have created obstacles for victims in the past who want to share their own stories. However, we consider that those obstacles would be removed under the proposed consent exceptions to statutory prohibitions dealt with in Chapter 5 of the Draft Proposals.

Proposal 4.18: Review and revocation of non-publication and suppression orders

Legal Aid NSW welcomes the ability of relevant applicants, including victims and complainants in criminal proceedings, to seek review and revocation of the orders. However, we repeat our earlier concerns in relation to draft Proposal 4.18(2)(c) about governments or their agencies being able to intervene in proceedings without first needing to demonstrate how the proceedings materially impact their interests.

Proposal 4.19: Grounds for making an exclusion order

We note that protected persons or victims in domestic violence or prescribed sexual offence proceedings are at times reluctant to give evidence when the defendant's family members are present in court. It is not clear whether an order could be made under Proposal 4.19 (1) (a) or (b) to address this situation, in which case we suggest drafting a separate ground for the making of an exclusion order in similar terms to that of Draft Proposal 4.19 (1)(c), to ensure that victims in these matters are appropriately supported to give evidence.

Proposals 4.22 – 4.25 regarding "closed court" orders

As stated above, we submit that the principles of the new Act need to better reflect the primacy of the principle of open justice, which should guide the court's decision-making. Closed court orders present a significant departure from the principle of open justice, particularly under the current proposals, whereby their combined effect is to both exclude the public from the proceedings and suppress information about their substance. While we agree there are situations in which these types of orders are appropriate, their use should be accompanied by adequate safeguards.

In addition to the overarching principles of the new Act providing for the primacy of the principle of open justice, we submit that the provisions dealing with closed court orders

should also give clear primacy to the principle of open justice, similar to that contained in section 28 of the *Open Courts Act 2013* (Vic). In our view, neither the Principles provision (Proposal 4.2) nor Proposal 8.9 (safeguarding the public interest in open justice) sufficiently elevate the significance of open justice over other considerations.

Further, for avoidance of doubt, Proposal 4.22(1)(b) should make a clear reference to the definition of "national security" found in section 8 of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) for the purposes of that provision.

We also submit that Proposal 4.22(3), which provides that a court may make a closed court order on a specified set of grounds, only where that ground cannot be addressed by other reasonable available means, including a non-publication, suppression or exclusion order, is drafted too narrowly. We suggest that this Proposal should list other available means which may address the concerns, including through jury directions, a proceedings suppression order, or through an order excluding only certain persons or a more limited class of persons from the court, as examples.[8]

[8] See for example, *Open Court Act 2013* (Vic) s 30.

5. Statutory prohibitions on publication or disclosure

Proposal 5.1: Prohibition on publishing information likely to lead to the identification of a child in connection with criminal proceedings

Legal Aid NSW welcomes this proposal. As stated in our earlier submission, media interest may be at its highest when a child is being investigated by police, before court proceedings have even commenced, placing the child's safety at risk. In our view, these risks justify the extension of the existing prohibitions.[9]

Proposal 5.2: Prohibition on publishing information likely to lead to the identification of a child involved in apprehended violence order proceedings

We support this proposal. In our earlier submission, we noted that there was an unfair disparity in the protections afforded to children and young persons below and over the age of 16. We consider that the same policy reasons in favour of additional protections for children and young persons involved in other legal proceedings justify the same protections applying in apprehended domestic and personal violence order proceedings. We also consider that the protections should be indefinite, rather than only having effect until the proceedings are concluded.[10]

Proposal 5.3: Prohibition on publishing information likely to lead to the identification of complainants of sexual offences

Legal Aid NSW supports this proposal. As discussed in our earlier submission, in high profile cases the parties' details are often published in the media before the matter reaches court for its first mention, undermining the protections otherwise afforded to complainants in these situations.[11] A prohibition on publishing information likely to lead to the identification of complainants in sexual offence matters where a complaint has been made to police, and regardless of whether legal proceedings for that offence have commenced, will provide necessary protections for complainants in the situations described above.

Proposal 5.4: Prohibition on publishing information likely to lead to the identification of people involved in mental health, guardianship or community welfare proceedings

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[9] Legal Aid NSW submission to the New South Wales Law Reform Commission, *Open Justice: Court and tribunal information: access, disclosure and publication*, (March 2021) 15

[10] Ibid. 21

[11] Ibid. 23

Legal Aid NSW submits that Draft Proposal 5.4 does not go far enough to ensure that sensitive health and medical information is protected regardless of the forum in which it is discussed.

To understand some of our recommendations, it is necessary to first consider the variety of matters which come before the Mental Health Review Tribunal (**MHRT**). On the one hand, there are the civil proceedings which relate to mental health inquiries, the making of Involuntary Patient Orders and associated decisions, approval of a range of treatments on both voluntary and involuntary mental health patients, as well as Orders under the *NSW Trustee and Guardian Act 2009* (NSW) committing a person's financial affairs to the management of the NSW Trustee. There are also forensic proceedings, namely review of those found unfit to be tried, individuals found not criminally responsible by reason of a mental health or cognitive impairment, cases of forensic patients that have received a limiting term, reviews of those who have been transferred from prison to hospital because of a mental illness and decisions regarding Forensic Community Treatment Orders.

Although proceedings conducted before the MHRT are open to the public, section 162 of the Mental Health Act protects the privacy of people involved in those proceedings. It prohibits, except with the consent of the MHRT, the publication or broadcast of the name, picture or any other information which identifies a person whose matter is before the MHRT, who appears as a witness or who is mentioned or involved in any proceedings. This includes carers and health practitioners. It applies before, during and after the hearing. A similar prohibition applies under section 65 of the *Civil and Administrative Tribunal Act 2013* (NSW) (**CAT Act**) to protect persons involved in guardianship proceedings.

However, the prohibitions only apply to the proceedings before the MHRT or the New South Wales Civil and Administrative Tribunal (**NCAT**). When external appeal and review proceedings are commenced in relation to mental health or guardianship proceedings in the NSW Supreme Court or Court of Appeal, the prohibitions do not apply, and instead it is up to the Court to decide following an application by the appellant whether or not publication of their identity should be prohibited under the CSNPO Act. In our experience, the Court of Appeal and Supreme Court, when conducting appeals, has been more willing to anonymise our clients' identities, however those restrictions have not always extended to all of the information considered and protected in the proceedings in the Tribunals below.

In our earlier submission, we raised concerns about the breadth of the prohibition and suggested that the focus be on the contents or the evidence of MHRT proceedings, rather than individual participants, thereby bringing the focus back to protecting sensitive

medical and health information.[12] To the extent that Proposal 5.4 seeks to clarify and limit the scope of the prohibition in section 162 of the Mental Health Act to publishing information that *connects* a person to the proceedings, thereby allowing patients and their loved ones to discuss their mental health more broadly, this is a welcome change. However, in our view, the proposal does not address our key concern around protecting sensitive medical and health information divulged before the MHRT, not only while it is before the MHRT, but any other court or tribunal.

As discussed in our previous submission, forensic patients who come before the MHRT may have limiting terms imposed by either the District of Supreme courts. Prior to the imposition of a limiting term, the patient will generally first appear before the MHRT. Those MHRT proceedings are protected from publication by virtue of section 162 of the Mental Health Act. Proceedings concerning the imposition of limiting terms on the other hand, are generally open to public and not subject to any publication restrictions, even when health and medical information is submitted to the MHRT, or the MHRT's own views and findings about the patient, are discussed during the special inquiries. Following the imposition of the limiting term, the person is referred back to the MHRT for review and further management, where again the protections in section 162 of the Mental Health Act apply. Towards the end of the patients' limiting term, an application might be made by the Crown for an extension of the person's forensic status. These Supreme Court proceedings involve two separate hearings and consequential published decisions are again generally conducted in open court and not subject to any non-publication or suppression orders.

While it is possible for the patient to obtain a non-publication or suppression order under the CSNPO Act for the special hearing or extension proceedings, they bear the onus of satisfying the court, generally against the objections of the Crown, that there is no prevailing public interest in publishing or broadcasting their proceedings, which will inevitably go over their health and medical information. As a result, while it is theoretically possible to obtain a non-publication or suppression order in these circumstances, in our experience it is very difficult to do so. Without a non-publication or suppression order, the information which was protected before the MHRT is laid bare in public during extension proceedings. If the person's limiting term is extended, they are again referred back to the MHRT where the whole process begins again under the protection of section 162. A significant proportion of those subject to extension orders are subjected to further applications resulting in a repeat of the process, including further public dissemination of information that is otherwise subject to the standard non-publication requirements under section s162 of the Mental Health Act.

[12] Legal Aid NSW submission to the New South Wales Law Reform Commission, *Open Justice: Court and tribunal information: access, disclosure and publication*, (March 2021) 6.

As discussed in our earlier submission, these issues do not only arise when higher courts are dealing with special hearings. Many individuals subject to proceedings under the *Crimes (High Risk Offenders) Act 2006* (NSW) or *Terrorism (High Risk Offender) Act 2017* (NSW) will also appear before MHRT. Obtaining suppression orders in these cases is even more difficult.[13]

In our view, it is inconsistent to protect this type of information before the MHRT but not before other forums. The primary consideration should always be the nature of information sought to be protected and the reason why it should be protected, not the forum in which it is used. It is important that patients feel comfortable disclosing very sensitive information to their treating teams. Openness about their health reduces the risk of harm to both patients and the broader community. If forensic patients know that this information will be discussed in open court, they are likely to be more guarded with their treatment teams.[14]

Legal Aid NSW therefore submits that the current section 162 of the Mental Health Act, as well as Draft Proposal 5.4, do not go far enough to ensure that sensitive health and medical information is protected regardless of the forum in which it is discussed. In order to protect this kind of information more broadly, the section 162 prohibition should instead apply to publishing information which formed part of the proceedings undertaken under the Mental Health Act or the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW).

The prohibition in section 65 of the CAT Act should also apply to information which formed part of the *proceedings* in the Guardianship Division of NCAT. This is because the same issues arise when health and medical information used to inform Guardianship Proceedings is subsequently used in other court proceedings to which the section 65 prohibition does not apply.

In the alternative, we submit that given the overlap between court and tribunal proceedings, and the fluidity with which some matters move from one forum to the other, consideration should be given to applying the provisions of the proposed new Act to Tribunal proceedings as well. This approach could further eliminate inconsistencies which presently arise in cases of this kind.

Proposal 5.5: Duration of certain prohibitions protecting information likely to lead to the identification of children and young people

Legal Aid NSW supports Proposal 5.5(a), which would extend the prohibition on publishing the identity of a child or young person involved in certain types of proceedings

[13] Legal Aid NSW submission to the New South Wales Law Reform Commission, *Open Justice: Court and tribunal information: access, disclosure and publication*, (March 2021) 7

[14] Ibid. 5.

to before the proceedings commenced and after they are concluded, and not just during those proceedings.

Legal Aid NSW does not support Proposal 5.5(b)(i) whereby publishing the identity of a child or young person would not be prohibited once they are deceased, as long as this publication does not identify another living person whose identity is protected.

We disagreed with the reasoning set out in the Draft Proposals, that part of the justification for not publishing a child's identity is no longer relevant after they are deceased. The proposal would apply not only to child defendants but child complainants and child witnesses. Apart from safeguarding the child's rehabilitation prospects, the prohibitions also protect the child's and their family's privacy and reflect important cultural considerations, none of which are rendered irrelevant on account of the child's death, irrespective of their role in the proceedings. We also note that the proposed exception risks publishing the identity of a sibling whose identity is not otherwise protected, for example, where that sibling was not involved or named in proceedings which would afford them the protection.

We submit that there is little or no public interest in publishing the identity of a deceased child defendant. The position of a child defendant who is deceased is arguably even more vulnerable, given they are unable to defend themselves or respond to anything that is published about them.

We acknowledge that there may be some instances where publishing the identity of a child complainant might be justified, for example, where there was a significant public interest and the deceased's family supported publication. Accordingly, we submit that instead of there being a blanket exception to publishing the deceased child's identity in the circumstances described in Proposal 5.5(b), the proposal should adopt the approach and wording of Proposal 5.13, namely, the court can grant an exception where:

(a) the court is satisfied that it has taken into account

(i) the views of the deceased child, if those views are known and ascertainable;
(ii) what the deceased child would have wanted if they had been alive; and

(b) that it has taken into account the views of family members, unless the family member is also the alleged or convicted offender and

(c) the publication does not contain *information likely to lead to the identification* of any other living person whose identity must not be published and

(d) it is not contrary to the public interest.

Proposal 5.6: Duration of prohibition on publishing information likely to lead to the identification of complainants of sexual offences

Legal Aid NSW does not oppose the proposal to extend the prohibition on publishing information likely to lead to the identification of a sexual offence complainant when the

complainant is deceased. We acknowledge that there are many situations where the application of the prohibition would be appropriate.

While we are concerned that the prohibition could inhibit disclosure and publication of information which is in the public interest, we acknowledge that the consent exception contained in Proposal 5.13 may address this concern.

Proposal 5.8: Consent exceptions in statutory prohibitions

In support of this proposal we reiterate our earlier statements, that Legal Aid NSW strongly supports victims of domestic and family violence having autonomy over when, and if, their experiences and involvement in domestic and family violence proceedings are shared. The ability to share experiences of domestic and family violence on their own terms promotes the dignity and autonomy of victims and may assist recovery from trauma. From a public policy perspective, it is important that with the consent of the victim, these stories are reflected in the media to encourage other victims to come forward, reduce stigma, and promote understanding of domestic and family violence.[15]

Proposal 5.9: Limitations on the consent exceptions in statutory prohibitions

Legal Aid NSW agrees with the proposed safeguards, particularly where proceedings are ongoing. We also support victims or complainants being able to consent to disclosure once proceedings have concluded, to avoid the need to make an application to the court which could be both stressful and expensive.

Proposal 5.10: Consent exception amended in certain provisions protecting the identity of children and young people

Legal Aid NSW supports the staged consent exceptions to provisions protecting children and young person's identities based on the child's age. Legal Aid NSW notes the potential impact on our services (including funding to provide legal advice in these cases) in terms of providing legal advice around consent exceptions to young people aged between 16 and 18. We welcome further consultation on this issue, if the proposal is ultimately supported by the NSW Government.

Proposal 5.12: Consent exception in relation to the prohibition on publishing the identity of a living sexual offence complainant

For reasons outlined above and discussed in our earlier submission, Legal Aid NSW supports victims and complainants having the ability to disclose their own identity if they wish to do so.

[15] Legal Aid NSW submission to the New South Wales Law Reform Commission, *Open Justice: Court and tribunal information: access, disclosure and publication*, (March 2021) 10

Proposal 5.13: Consent exception in relation to the prohibition on publishing the identity of a deceased sexual offence complainant

Legal Aid NSW broadly supports this proposal. We consider that it provides a sufficient mechanism for a deceased complainant's story to be shared. The proposal provides a balanced test that involves consideration of the deceased's own views, where those views are known or ascertainable, as well as the views of the deceased's family, rather than of solely relying on the family's views, which may not in fact be indicative of the complainant's own wishes. We acknowledge that there may be conflicting views among the deceased's family members and that the deceased's own views may only be ascertainable by speaking to their friends rather than family members. However, we are satisfied that the provision is drafted in sufficiently broad terms, which gives the court wide discretion to make appropriate inquiries.

Proposal 5.14: Consent exception in relation to publishing the identity of a person involved in mental health, guardianship or community welfare proceedings

Legal Aid NSW strongly supports patients having the opportunity to consent to their identity being published. As noted in our earlier submission, some forensic and civil mental health patients want to share their story in order to advocate for reform of the mental health system and disability, and to remove the stigma surrounding mental illness and disability.[16] Under the current prohibitions, they are unable to discuss those aspects of their journey and experiences as a person living with a serious disability. In addition, some of our clients have not been able to fully share their experiences with the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability for fear of breaching the prohibition.

[16] Ibid, 7

6. Non-publication and suppression orders

Proposal 6.1: Procedures for making non-publication or suppression orders

We note that the provisions relating to non-publication and suppression orders do not apply to tribunals. As mentioned in relation to Proposal 5.4 there are circumstances where evidence or information protected by non-publication or suppression orders in one forum is afforded no protection in another forum, which undermines the purpose of the protections. We are concerned that by excluding tribunals from the operation of the non-publication and suppression order regimes under the new Act, further inconsistencies will arise. For example, tribunal proceedings conducted in relation to a person's working with children check may consider material which would be protected during criminal proceedings. Similar issues may arise in tenancy proceedings where domestic violence is a factor. Consideration should be given to how the protections can carry over to associated tribunal proceedings to avoid inconsistencies and inadvertent revelation of people's identities.

Proposal 6.9: Duration of non-publication or suppression orders

Legal Aid NSW does not support proposed amendments to section 64 of the CAT Act and section 151 of the Mental Health Act to provide that non-publication or suppression orders cannot operate indefinitely. As stated in our earlier submission, the principles underlying the need for the prohibition do not cease to exist at any future date.[17]

[17] Ibid, 8.

7. Exclusion orders

Proposal 7.1: Where a court must make an exclusion order

We welcome the clarification of the scope of exclusion orders contained in Proposal 7.1(b).

Proposal 7.2: Requirement to make an exclusion order in children's criminal proceedings

Legal Aid NSW supports exclusion orders being made in proceedings for a traffic offence to which a child is a party and we endorse the reasoning provided at paragraph 7.11 of the Draft Proposals, that allowing members of the public to be present in traffic offence proceedings may cause distress to child defendants, and the departure from the principle of open justice is therefore appropriate in these circumstances.

Proposals 7.3, 7.4 and 7.5: Requirement to make an exclusion order in certain proceedings concerning children, domestic violence related proceedings and prescribed sexual offence proceedings

Legal Aid NSW supports these proposals. Reducing the number of people in the court room while the complainant in domestic violence or prescribed sexual offence proceedings is giving evidence promotes a victim's privacy and can reduce distress. We have previously raised concerns about complainants' names and details being published by the media and note that as exclusion orders do not restrict or prohibit the disclosure (by publication or otherwise) of information in that part of the proceedings, victim's safety could be compromised by media reporting on the proceedings. In high risk domestic violence matters, the victim would need to apply for a non-publication or suppression order, a process which is complicated and difficult without legal representation.

We acknowledge that the proposal in relation to domestic violence related proceedings achieves consistency between apprehended domestic violence order (**ADVO**) proceedings and domestic violence offence proceedings, recognising that although an ADVO may not be connected to an offence, the experience for victims may be the same and they should be entitled to privacy and safety.

Proposals 7.6 – 7.12 regarding exclusion orders

Legal Aid NSW broadly supports these proposals and makes no further comment.

Proposal 7.13: Exclusion orders in criminal proceedings against a child

Legal Aid NSW welcomes the proposal whereby the court would be required to consider the interests of a child witness in deciding whether or not to make an exclusion order under section 10(2) of the *Children (Criminal Proceedings) Act 1987*.

Proposal 7.14: Exclusion orders in domestic violence related proceedings

Legal Aid NSW supports this proposal for reasons outlined above, at Proposal 7.4.

Proposal 7.15: Exclusion orders in sexual offence proceedings

Legal Aid NSW does not oppose this proposal. We submit that it is important that victims and complainants are informed that an exclusion order does not restrict or prohibit the disclosure of information in that part of the proceedings, and that this could only be achieved by successfully applying for a non-publication or suppression order.

8. Closed court orders

Proposals 8.1 – 8.9 regarding closed court orders

We refer to our earlier concerns and recommendations regarding closed court orders stated in response to Proposals 4.22 – 4.25 above.

9. Monitoring and enforcing departures from open justice

Proposals 9.1 – 9.3

Legal Aid NSW submits that if the new Act is not proposed to apply to the MHRT and NCAT, then consideration should be given to amending the offence and penalty provisions under section 162 of the Mental Health Act and section 65 of the CAT Act to bring them in line with the offence and penalty provisions under the new Act. That is, those sections should also stipulate that a person is guilty of an offence if they engage in conduct that breaches the prohibition or order knowing the existence of the prohibition or order. Maximum penalties for individuals guilty of the offence should be a fine of 100 penalty units or imprisonment for up to two years, or in the case of a corporation, a fine of 500 penalty units.

Proposal 9.4: Time limit for commencing proceedings for an offence

Legal Aid NSW supports Proposal 9.4, which provides that all statutory prohibitions on publication or disclosure and provisions in existing subject specific legislation that relate to non-publication, suppression, exclusion or closed court orders should be amended to provide that proceedings for an offence of breaching a prohibition or order must be commenced within two years of the date of the alleged offence.

Proposals 9.5 – 9.6 - A register of orders and ***A Court Information Commissioner***

Legal Aid NSW supports the introduction of a register of orders as well as the appointment of a Court information Commissioner. The proposals will help with the administration and stronger enforcement of prohibition orders.

10. Access to records on the court file

Proposal 10.2: Definitions of key terms

We note commentary at paragraph 10.21 of the Draft Proposals that:

> It is not intended that "party", for the purposes of the access framework, should have the same meaning as that proposed in chapter 3. That definition includes people who are not traditionally considered "parties", such as complainants and victims (Proposal 3.3(a)). Given the access framework would confer broad access entitlements on parties, we think the "party" in this context should be interpreted narrowly, to mean "party" in the traditional sense (for example, the plaintiff or defendant in a civil proceeding).[18]

However, the term "party" is not defined in the definition section of chapter 4 of the new Act. If the definition of "party" for the purposes of chapter 4 is intended to be different from the definition of the term in chapter 3, that should be made clear in chapter 4 definition section.

We also suggest that a driver licence number should be included in the list of "Personal identification information" in Proposal 10.2(2).

Proposal 10.3: Records available to parties

Victims and complainants may need to access certain documents on the court records not only to understand orders (such as ADVOs) which are made about them, but to access a variety of social supports. In our earlier submission we advocated for better access to court records for victims and complainants, one that is preferably free of charge.

Legal Aid NSW agrees that victims or complainants are not "parties" to proceedings in the traditional sense and we therefore do not dispute their exclusion from the operation of Draft Proposal 10.3. However, we maintain that their interest and need to access certain court documents is greater than that of the general public. Consideration should therefore be given to introducing a separate provision dealing with victims' and complainants' access to court records to ensure they are not subject to onerous and costly access procedures, which effectively prevent them from obtaining documents which they have a legitimate need to access.

Proposal 10.4: Records available to journalists

Legal Aid NSW acknowledges the important role that journalists and media play in reporting on legal proceedings and bringing issues of public interest to the attention of the general public. We recognise that media scrutiny of governments' or their agencies'

[18] New South Wales Law Reform Commission, *Open Justice: Court and tribunal information: access, disclosure and publication*, Draft Proposals, June 2021, p.88

actions can be a powerful driving force for reform. We also accept that in order to fulfil their role conscientiously and to accurately report on legal proceedings, journalists may need access to court records. However, this needs to be carefully balanced against other important considerations including the need to protect victims' and witnesses' safety and all parties' right to privacy. Lack of court oversight over access to a wide range of court documents risks swinging the pendulum too far in favour of the press at potentially great cost to anyone mentioned in the documents.

Court documents carry a great deal of authority and are generally perceived as having a high degree of accuracy. This can result in journalists placing significant weight on the content of the documents and reporting on legal proceedings in circumstances where those documents may ultimately turn out to be inaccurate or subject of contention between the parties. This can be particularly problematic when access is granted before proceedings have concluded, as outlined in Proposal 10.4(1)(a)(iv). This is because pleadings are often contested and amended, and such early reporting may ultimately mislead the public, for example, where aspects of a claim are dropped or struck out, or worse, prejudice the proceedings.

We strongly oppose Proposal 10.4(1)(a)(iii) - that journalists would be given access to bail conditions. We have concerns about journalists reporting on bail conditions which could potentially identify third parties (who would not be covered by restrictions in section 89 of the *Bail Act 2013* (NSW), or enforcement conditions which require the defendant to refrain from consuming drugs or alcohol or to undergo testing for drugs or alcohol, and the impact this might have on the defendant's reputation, the presumption of innocence and the right to a fair trial. These concerns would be exacerbated in matters where bail conditions were incorrectly imposed or recorded, potentially giving rise to subsequent civil proceedings for false imprisonment.

Under Proposal 10.4(1)(a)(viii) journalists could also access any record admitted into evidence. We note commentary at paragraph 10.24 of the Draft Proposals that:

> There may be concerns that enhancing media access to certain records on the court file could increase the risk of information being disclosed or published contrary to suppression or non-publication orders or statutory prohibitions on publication or disclosure. We consider that our proposals for uniform definitions in chapter 3 could improve compliance with these restrictions and reduce the risk of breaches.[19]

We welcome further clarification around how the uniform definitions would protect specific records outlined in Proposal 10.4(a) from being released to journalists and how this would work in practice, given that journalists could access these records without first seeking leave. It is not clear whether the courts would need to make an order under

[19] New South Wales Law Reform Commission, *Open Justice: Court and tribunal information: access, disclosure and publication*, Draft Proposals, (June 2021), 88

Proposal 10.4(e) each time a record is received into evidence, to which the court would not grant access *if* leave was sought. This could place an unnecessary burden on courts in matters that may never be of interest to the media.

We further submit that records which may identify third parties who are not involved in the proceedings should be subject to leave-only access. An example of this is CCTV footage or other surveillance videos or photographs. Although images of those individuals should be blurred, this is often not the case and in any event their identities may be discoverable from the context in which they appear.

We also have concerns about media access to court records which identify young or vulnerable people. We submit that access to these records should be by leave only and the concept of "vulnerable person" should be clarified by reference to the definition of a "protected person" under the *NSW Trustee and Guardian Act 2009.*[20]

Proposal 10.6: Records available to members of the public

Legal Aid NSW supports stricter access to court records by the general public. As discussed above, our only concern is around access by victims or complainants. We submit that separate provisions should be introduced clarifying victims' or complainants' access to court records.

We query whether solicitors, regardless of whether they are party to the proceedings or not, will still be entitled to access any record on the court file for the proceedings. Access to court files is critical for solicitors to make decisions about the merits of an appeal or review of a decision. However, solicitors that are not a party to proceedings also in some cases require access to court files for investigative purposes. For example, Legal Aid NSW solicitors are instructed by a client to investigate files to ascertain whether there may be potential legal actions available to our client.

We suggest that Proposal 10.6 include additional grounds for the court to consider, when determining an access request, to take into account the above circumstances for requiring access.

Proposal 10.7: Considerations in deciding whether to grant leave for access

We suggest that Proposal 10.7(d) be amended in so far as it refers to "future prospects of a child". We submit that this term is too broad and ambiguous and should be clarified, perhaps by reference to "future *rehabilitation* prospects of a child", if that is what is envisioned.

[20] *NSW Trustee and Guardian Act 2009* (NSW) section 38.

Proposal 10.8: Procedures for access

We note that as per Proposal 10.8(3) the court may notify parties to the proceedings and allow them to be heard in relation to the access request. We understand that, although there is no specific definition of party for the purpose of the access framework, Chapter 10 of the Draft Proposals states that, for the purposes of the access framework:

> It is not intended that "party", for the purposes of the access framework, should have the same meaning as that proposed in chapter 3. That definition includes people who are not traditionally considered "parties", such as complainants and victims.[21]

In this situation, either the Police Prosecution or the Office of the Director of Public Prosecutions will be notified of the access request.

We broadly support this proposal. However, we suggest that safeguards be incorporated into the legislation or regulations, to facilitate the DPP and/or Police taking into account the views of the victim or complainant, regarding the opportunity to be heard in relation to the access request.

We would welcome further consultation on the drafting of any safeguards.

Proposal 10.12: Exemptions and reductions for access fees

Legal Aid NSW supports this proposal.

Proposal 10.13: Offence of disclosure of personal identification information

Legal Aid NSW supports the proposed offence provisions. However, if it is not proposed that courts would expressly impose a condition prohibiting an applicant who is given access to a record on the court file from publishing any personal identification information it contains, we welcome further clarification as to how this prohibition will be brought to the applicant's attention.

[21] New South Wales Law Reform Commission, *Open Justice: Court and tribunal information: access, disclosure and publication*, Draft Proposals, (June 2021), 88.

11. Technological issues and open justice

Proposal 11.2: Regulating transmission of information from the courtroom by journalists

Legal Aid NSW welcomes the additional safeguards sought to be introduced by this proposal. We submit that the proposal should make it clear that the 30-minute time lag excludes time taken up by adjournments.

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