



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: PDL/PuLC:JWas2057544

4 March 2021

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

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

Dear Mr Cameron,

Open Justice Review: Consultation Paper

Thank you for the opportunity to respond to the NSW Law Reform Commission's *Open Justice Consultation Paper* ("the Consultation Paper").

The Law Society strongly supports the principle of open justice and access to court information, while emphasising the need to balance this principle to ensure that access does not unduly prejudice the rights of parties to proceedings. As noted in our preliminary submission to this review dated 31 May 2019 (enclosed), the Law Society has articulated four principles that should govern any access to court information. We take the opportunity to restate those principles here:

1. There is a general public interest in ensuring the public has a right of access to court information.
2. The legislation must balance the interest of open and unfettered access to justice and other public interests, for example, the interests in protecting the privacy of individuals, national security, or parties in litigation from unnecessary prejudicial impact. Accordingly, some court information should not be publicly accessible.
3. Parties to proceedings may have an interest in restricting access to court information related to their proceedings. These parties should be heard before any related court information is disclosed.
4. Individuals' privacy and personal information should be protected from unwarranted disclosure. They should be heard prior to disclosure.

In addition to these principles, the Law Society's preliminary submission to the NSW Law Reform Commission addressed a number of the questions in the Consultation Paper.

We look forward to participating in the NSW Law Reform Commission roundtable on closed courts and the suppression and non-publication of court information [REDACTED]. We look forward to reviewing other stakeholder submissions, and to providing comment on any specific proposals for reform, should the opportunity arise at a later date.

The Law Society has the following comments in relation to specific questions in the Consultation Paper. These comments are informed by the Law Society's Public Law and Privacy and Data Law Committees.

THE LAW SOCIETY OF NEW SOUTH WALES

170 Phillip Street, Sydney NSW 2000, DX 362 Sydney
ACN 000 000 699 ABN 98 696 304 966

lawsociety.com.au

T +61 2 9926 0333 F +61 2 9231 5809
E lawsociety@lawsociety.com.au



Law Council
OF AUSTRALIA
CONSTITUENT BODY

12.3. Suppression and non-publication orders in the digital environment

The Law Society would support further work to facilitate international cooperation regarding mutual recognition of suppression and non-publication orders, in order to improve the effectiveness of orders and enable the removal of offending content from the internet. We note that at a meeting of senior officials of Commonwealth law ministries on 16 and 17 February 2021, an expert working group was established to assess the need for a formal structure to promote the efficacy and enforcement of suppression orders across borders.¹ The expert working group's deliberations are likely to be highly relevant to the Law Reform Commission's work.

13.1. A register of orders

The Law Society notes the potential benefits of a publicly accessible database of suppression and non-publication orders, as detailed at 13.10 of the Consultation Paper. We suggest, however, that if a register of orders is adopted, steps should be taken to ensure that any defects or administrative errors with the register cannot be used as an excuse to publish information on proceedings.

13.2. An Open Justice Advocate

The Law Society supports the appointment of an independent, properly resourced advocate who could be called upon to assist the Court to strike a balance between open justice principles and the various legitimate exceptions to these principles. To ensure a level of transparency and accountability, the Open Justice Advocate could be required to report to the NSW Attorney General or an appropriate Parliamentary Committee at regular intervals. Our position on the proposal for an Open Justice Advocate is outlined in further detail at pages 3–4 of our 31 May 2019 submission.

13.3. Education initiatives

The Law Society would support the implementation of initiatives in NSW designed to improve public understanding about open justice principles and some of the broad categories of exceptions which can apply to counter the general principles. A manual, guidance notes, and/or a website would be useful to help outline these issues. Any education initiatives could also provide information on the use of social media in the context of court proceedings. Open justice education resources could include a disclaimer to indicate that the information about the principles and exceptions is general in nature and any decisions relating to disclosure or suppression will ultimately depend upon what the court decides, considering all the circumstances of each case.

If you have any queries about the items above, or our earlier submission, please contact [REDACTED], on [REDACTED] or [REDACTED].

Yours sincerely,

[REDACTED]

Juliana Warner
President

Encl.

¹ The Commonwealth, 'Outcome statement: Meeting of Senior Officials of Commonwealth Law Ministries' (16 and 17 February 2021)
<<https://thecommonwealth.org/sites/default/files/inline/Final%20Outcome%20Statement%20SOLM%202021.pdf>>