Australasian Legal Information Institute

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Open justice and free access to case law
(A submission to the NSW Law Reform Commission)

This submission by the Australasian Legal Information Institute (AustLII) is to the NSW Law Reform Commission (NSWLRC) in relation to the Consultation Paper (CP22) in its 'Open Justice Review'.[1] The focus of the submission is on those aspects relevant to the operations of AustLII and other legal publishers, rather than issues particular to the news media.

Background: AustLII and open justice

AustLII has been the predominant online publisher of legal information in Australasia since 1995, and is one of the world's largest free access legal publishers.[2] As of today, AustLII publishes 857 databases of Australasian legal information, including 1,364,488 cases and decisions. AustLII receives nearly 700,000 page accesses ('hits') per day.

AustLII is a non-profit provider of free access to legal information. It consists of the AustLII Research Centre (a joint centre of the law Faculties of UNSW and UTS), and AustLII Foundation Ltd, a company limited by guarantee, with charitable status, of which UNSW and UTS are the members. Details are in AustLII's *Annual Report*.[3]

In relation to New South Wales, AustLII publishes 49 databases of the decisions of NSW Courts and Tribunals,[4] some of which are historical.[5] These databases contain 162,704 cases. NSW decisions on AustLII are kept as current as provision by the Courts make possible. For example, as of today (3 March 2021), the most recent cases in NSW Supreme Court, Court of Appeal, and Court of Criminal Appeal databases is in each instance 3 March 2021, and these databases are updated daily. Currency statistics for all databases are available.[6] AustLII's automated case law citator, LawCite, provides

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[1] NSWLRC 'Consultation Paper 22 - Open justice: Court and tribunal information: access, disclosure and publication' <https://www.lawreform.justice.nsw.gov.au/Pages/lrc/lrc_current_projects/Courtinformation/Project_update.aspx>

[2] AustLII website <http://www.austlii.edu.au/>

[3] AustLII *Annual Report 2019* <http://www.austlii.edu.au/austlii/reports/2019/AustLII_YiR_2019.pdf >, particulatly pgs. 5-

[4] AustLII *NSW Resources > New South Wales Case Law* <http://www.austlii.edu.au/au/nsw/>

[5] AustLII has NSW decisions back to 1788: see Superior Courts of New South Wales (NSWSupC) 1788-1899 and numerous other databases of digitised historical decision series.

[6] AustLII *Update Status for Case Law Databases > New South Wales Case Law* <http://www.austlii.edu.au/cgi-bin/cases_status.cgi?mask_path=au/cases/nsw>

the citation histories, both within Australia and internationally, of decisions by NSW courts, and currently holds citation information on 6,134,971 indexed cases, law reform documents and journal articles.[7] In 2019 there were 4,089,857 accesses to AustLII's NSW case law.[8] Accesses to AustLII account for about 20% of all Australian online legal traffic.[9]

These statistics indicate the extent to which AustLII plays a key role in the achievement of open justice in New South Wales. It provides comprehensive access to the decisions of all NSW courts and tribunals that wish to make their decisions available, from the smallest tribunals to the Supreme Court. All decisions, not just those included in 'law reports' are included. It provides historical depth, with most of its 49 NSW case law databases going back to the first decisions of the relevant court or series.[10] Most important, access to AustLII is free, so AustLII provides open justice to any person who has access to the Internet, irrespective of their means.

It is correct that 'the internet has supplanted traditional forms of publication' (CP22, 1.6), but we stress that this is not only in relation to delivery of and access to news. Free access and non-profit publishers such as AustLII, and government providers such as CaseLaw NSW (which provides a much more narrow range of content), have created a revolutionary expansion of the concept and the practice of open justice, which should be valued and protected.

AustLII policies relevant to publication of decisions

We will note a number of AustLII policies and practices, because they are relevant to the submissions made below.

- AustLII is frequently requested by courts to temporarily remove a decision from one of its databases, or to replace a decision with an amended copy of the decision, and complies with these requests. In some instances, court registries are provided with the capacity to remove or amend decisions in the databases of their decisions on AustLII. Such removals or amendments may occur shortly after the decision is first placed on AustLII, or a significant time afterwards. There are many reasons why courts need to remove or amend decisions.

- AustLII does not provide decisions that it receives from courts[11] to any other party so that they may republish them. We do not 'on-supply' decisions to other publishers. One reason is that AustLII cannot ensure that decisions provided to other publishers would be removed or amended (as discussed above).

- AustLII takes active steps to prevent any other parties (publishers or otherwise) from obtaining decisions from AustLII in bulk. This is for the reasons discussed above, and other policy reasons. AustLII uses the Robots Exclusion Standard (or Protocol)[12] to help prevent web robots (or crawlers) from copying case law on

[7] LawCite <http://www.austlii.edu.au/lawcite/>

[8] AustLII *Annual Report 2019*, p. 18.

[9] Information provided by the *HitWise* monitoring service.

[10] For a few databases there are gaps for some years before AustLII started in 1995, due to copyright impediments caused by pre-AustLII law reporting practices.

[11] As in the NSWLRC Discussion Paper, we use 'court' to include Tribunals.

[12] See *Wikipedia: Robots exclusion standard* < https://en.wikipedia.org/wiki/Robots_exclusion_standard>

AustLII.[13] Most robots observe this protocol, so for example it is not possible to search AustLII case law via Google or other general search engines. Where a web robot does not observe the protocol, or there are other attempts to bulk copy cases, AustLII has warning systems in place, and takes measures to completely exclude the source of the activity from AustLII, for example by blocking whole IP address ranges. These steps have proven to be effective, and have been in operation for over 25 years.

- If a person contacts AustLII and claims that their identity, or other information about them, has been included in a decision published on AustLII when it should not have been, AustLII's invariable practice is to refer the person to the relevant court (to a Registrar or other appropriate official). In some cases this results in a decision being removed or amended by the court. AustLII itself does not make decisions to remove or amend decisions.

- AustLII is built on, and relies upon, the automated processing of the legal materials that it receives, including the cases that it receives by email 'feeds' from each court. There are no editors at AustLII, no staff who inspect and make editorial judgments about each decision received from the courts. Decisions are published automatically when received, unless there is a technical malfunction in the processes for receipt and publication which needs correction. AustLII therefore relies on the courts supplying it with decisions in a form suitable for publication. Any requirements that are incompatible with such reliance are not economically sustainable for an organisation that has no 'core funding' and depends on donations for its maintenance and day-to-day operations.

Our particular focus in this submission is on the publication of court and tribunal decisions (and we use 'court' to refer to both), but we think the same arguments apply to transcript of hearings, if and when NSW courts decide to make hearing transcripts available online (as does the High Court[14]).

Submissions

Importance of open justice

'Access to court information is increasingly recognised as an essential element of open justice' (CP22, 1.16), and 'enables the public to know what happens in courts and the way justice is administered', and thus 'helps to maintain public confidence in the court system' (CP22, 1.19). In general 'the public' does not attend court hearings and cannot access commercial legal databases for cost reasons. It is only through free access systems such as AustLII, and to a lesser extent government systems, that access to the full an unmediated content of court decisions is possible. Law reports by the media are an important aspect of open justice, but free public access to timely, high quality, full reports of court decisions is an entirely different aspect of open justice.

As Australian courts have affirmed '[t]he open justice principle extends to the media being able to publish fair and accurate reports of proceedings' and '[n]othing should be done to discourage fair and accurate reporting on proceedings' (CP22, 1.23). We suggest that this applies *a fortiori* to the full text publication of the court's decisions.

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[13] See the exclusion file at <http://www.austlii.edu.au/robots.txt>

[14] AustLII > High Court of Australia Transcripts database <http://www.austlii.edu.au/cgi-bin/viewdb/au/cases/cth/HCATrans/>

Submission 1: A high value should be placed on facilitating (or not impeding) free access to timely, high quality, full reports of court decisions, as a key component of open justice. Rules applicable to news media will not necessarily be appropriate for publishers of full court decisions.

Automatic statutory prohibitions on publication

In NSW there is an extremely wide variety of circumstances which result, or many in future result, in a prohibition on publication of a decision, or a decision containing such information (CP22, 3.1-56). There is inconsistency in the terminology used to describe the types of actions which are prohibited, including uncertainty in some cases whether publication via the Internet is covered (CP22, 3.59-61).

Many of these prohibitions necessarily require the use of judgment by journalists and editors to decide what information disclosed in court comes within the terms of the prohibition. However, this is not possible in the circumstances of a publisher such as AustLII.

The alternative approach is that many statutory provisions contain general exceptions, of which two that are relevant to AustLII are that the prohibition will not apply if publication or disclosure of the relevant information is (as summarised in CP22, 3.74): 'in an official report of proceedings[15]' [or] 'with permission, consent or leave of the court, tribunal or commission.[16]' Publication on AustLII is not an official report of proceedings, and it is unlikely (but possible) that legislation would so designate it. However, NSW court decisions are published on AustLII 'with permission, consent or leave of the court': they are provided to AustLII, by the court, for the express purpose of being published on AustLII.

We agree with the Law Reform Commission (CP22, 3.76) that '[i]t may be desirable for statutory prohibitions to all include the same general exceptions. This could promote consistency and simplicity.' We consider that they should all contain an exception for publication with the consent of, or at the request of, the court, whether express or implied.

Submission 2: All statutory prohibitions should contain a general exception allowing publication of decisions by a publisher with the consent of, or at the request of, the court to that publisher, whether the consent or request is express or implied, and where the court has provided the decisions to the publisher or consented to the publisher downloading the decisions from court facilities.

Such an exception would in effect normalise the status quo: AustLII would continue to publish decisions on the assumption that, if the court has provided the decision for publication, AustLII should publish it without further enquiry. The corollary of this is that, if the court requests a change to the publication of the decision (whether removal

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15. "See, eg, *Adoption Act 2000* (NSW) s 180(3)(b); *Bail Act 2013* (NSW) s 89(4); *Civil and Administrative Tribunal Act 2013* (NSW) s 65(3); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 100H(2); *Mental Health Act 2007* (NSW) s 162(2)." (from CP22, 3.74)

16. "See, eg, *Adoption Act 2000* (NSW) s 180(3); *Children (Criminal Proceedings) Act 1987* (NSW) s 15D; *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 45(4)(b); *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 29(1)(f)(ii); *Mental Health Act 2007* (NSW) s 162(1); *Civil and Administrative Tribunal Act 2013* (NSW) s 65(2); *Law Enforcement Conduct Commission Act 2016* (NSW) s 91(3)." (from CP22, 3.74)

or amendment), AustLII would facilitate that request (as discussed above concerning AustLII's practices).

If another publisher, in breach of AustLII's policies, was to copy decisions from AustLII and republish them, the above exception would not apply to that publisher, because the court has not consented to, or requested, publication of the decisions by them, nor provided the decisions to that publisher.

The Law Reform Commission suggests that '[t]here might be a case for including this exception in statutes where it is not currently included' (CP22, 3.79), and gives examples of situations where publication with the consent of the court would not be an exception to a prohibition. We agree, and we propose that the best course would be a general exception, applicable to all prohibitions on publication, along the lines of the above submission. Such a general exception could be included in the *Court Suppression and Non-publication Orders Act 2010* (NSW) (*CSNPO Act*).

Such an exception means that publishers like AustLII would rely, as they now do, on courts providing decisions that comply with prohibitions. If a person named in a decision complains to AustLII about some aspect of the content of the decision, AustLII would bring that to the attention of the court concerned for it to decide what action to take (as described above in relation to AustLII's practices).

Submission 3: There should be a general exception to all prohibitions on publication, perhaps included in the Court Suppression and Non-publication Orders Act 2010 (NSW), for publication of a decision at the request of, or with the consent of, a court.

Submissions in this section relate to Question 3.7, and particularly sub-question (4).

Discretionary orders for non-disclosure or suppression

In NSW, section 9(4) of the *CSNPO Act* provides that a discretionary order by a court for non-disclosure or suppression of certain information may be subject to exceptions and conditions as the court thinks fit. Courts have made exceptions 'allowing the information to be published on legal websites, for use by legal practitioners'[17] (CP22, 4.26). Such a requirement reflects the policy that open justice considerations are different for legal publishers than they are for other media.

From the perspective of a legal publisher like AustLII, it would be desirable if a Court, when deciding to make such an order, was always required to consider whether publication on legal websites was to be allowed. If it is not to be allowed, the decision should not be provided to legal publishers at all (or at least not until any time-limited prohibition had expired).

AustLII is very substantially used by legal practitioners,[18] so if an exception was made using terms like 'for use by legal practitioners', it would be necessary to ensure that included AustLII (and government sites). It would probably be preferable to simply refer to websites publishing the full text of decisions in legal databases.

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[17]. 'See, eg, *R v Simmons (No 5)* [2015] NSWSC 333 [45]; *Commissioner of Australian Federal Police v Agius* [2017] NSWSC 1764 [51]; *R v Qaumi (No 8)* [2016] NSWSC 1730 [32]'. (from CP22, 4.26).

[18] AustLII *Annual Report 2019*, op cit, pgs. 19-20 'Major Users – Commercial', showing almost 4 million accesses by barristers and 2 million accesses by legal practitioners, in 2019 (from top 50 identifiable commercial users only – actual usage would be much higher).

Submission 4: Courts making discretionary non-disclosure or suppression orders should be required to consider whether there should be an exception allowing the information to be published on legal websites publishing the full text of decisions in legal databases.

Submissions in this section relate to Question 4.4, and particularly sub-question (a).

Summary of submissions

AustLII makes the following submissions:

We trust that these submissions will be useful to the Commission.

Philip Chung, Associate Professor of Law, UNSW, and Executive Director, AustLII
Andrew Mowbray, Professor of Law & Information Technology, UTS, and Co-director, AustLII
Graham Greenleaf AM, Professor of Law & Information Systems, UNSW, Senior Researcher and Co-founder, AustLII
(on behalf of the Australasian Legal Information Institute)

5 March 2021