Supreme Court
of New South Wales

# Open Justice – Consultation paper

*To: nsw-lrc@justice.nsw.gov.au*

## *Executive summary*

The Court fully supports the concept of open justice and recognises it as a fundamental principle and necessary for public trust in the rule of law. The Court also recognises the various competing principles that are referenced in the consultation paper.

The Court acknowledges the pace of technological change in society has impacted upon media reporting and the immediacy and world-wide dissemination that can occur, and its availability to virtually every citizen.

The positive aspects of technological development are also apparent: audio-visual systems enabled courts to continue to operate throughout 2020 and facilitated open justice via livestreams and virtual courtrooms.

The key issue regarding the yet to commence *Court information Act 2010* (NSW) is helpfully captured at [1.14] of the consultation paper:

> '…the issues that have prevented its commencement would need to be addressed. This includes the question of whether personal identification information in court documents should be redacted and if so, who bears the responsibility for this.'

The Court is already struggling to cope with demands from the media concerning interest in cases before the Supreme Court. The Court is considering its response to this increase in demand and whether the increased use of technology can overcome this difficulty. This may be the subject of proposals from the Court to the Department of Communities and Justice and the Attorney General. As part of this review it is worthwhile to consider technical solutions but noting they would, of course, require significant investment and ongoing funding to implement and support.

## *Open court principle – exclusion orders*

Paragraph 2.62 sets out the Australian Law Reform Commission's suggestion that courts be required to give a written statement of reasons for an exclusion order.

NSW Caselaw was developed in 1999 to publish decisions for NSW courts and tribunals. Caselaw is publicly accessible and provides open access to published judgments, usually within 24 hours of the judgment being delivered.

Some decisions are not published – these are usually of a minor nature in proceedings that are continuing or rulings on evidence in a criminal trial. Information of a private nature is another consideration, for example adoption matters.

A requirement to give a written statement of reasons in all cases may lead to delays in some matters and unnecessarily impacts courts resources. Courts are attune to the needs of parties and litigants and a 'requirement' seems unnecessarily prescriptive.

### *Non-disclosure and suppression – statutory prohibition*

The Court recognises there are occasions when an individual whose identity has been protected by a statutory prohibition may consent to the publication of their identity.

Where the Court has the discretion to permit publication or disclosure the Court would weigh several factors before exercising discretion. A leading consideration would be the views of the individual concerned.

The consultation paper poses the question whether a court should have regard to specific criteria before exercising discretion. The Court would posit that is currently the case and an attempt to codify current practice runs the risk of excluding important discretionary factors that may apply in limited circumstances. A broad range of considerations – in a non-exhaustive list – would preserve the court's discretion whilst providing a framework in which such matters could be considered.

### *Non-disclosure and suppression – discretionary orders*

Page 81 [4.96]-[4.99] considers court suppression and non-publication orders and whether the court should be required to give reasons for an order.

Note the comments above regarding written reasons for exclusion orders.

### *Monitoring and enforcing prohibitions on publication and disclosure*

Paragraphs 5.92 to 5.96 discuss the difficulties in proving an alleged offender (in breach of a non-publication or suppression order) was aware of the order. The consultation paper raises the idea of a publicly accessible database. It appears superficially attractive but would suffer from a major deficiency – too much information on the publicly available system would defeat the purpose of the order. Too little and it serves no purpose. This, and other issues, are highlighted at [13.12].

An alternative suggestion is a notification system whereby interested parties register with the court. The court would notify registered parties if an order is made in the matter. This would place an unnecessary administrative burden on the court to maintain a register that would be used infrequently.

The Supreme Court made 741 suppression and non-publication orders in the period 2017-2020. The majority (597, 80.6%) non-publication orders.

### *Access to information*

The issues regarding the *Court Information Act* have been canvassed repeatedly for over a decade. In that time additional procedures have been implemented (such as court practice notes) to ensure that some of the Act's objectives and principles of open justice are addressed. In terms of court resourcing, the yet to be proclaimed legislation still looms large suggesting an enormous administrative burden if the court was required to review and redact all court information that was to be supplied to the media or public.

The Court is not resourced for this function. It would require a significant investment by government to properly resource all courts and tribunals to undertake these tasks. It should not fall to the parties as this would increase the cost of litigation, reducing access to justice for the individual.

Redacting personal information from a court file will be timing consuming. It cannot presently be automated and the risk of missing or overlooking an item in a court file would be hard to mitigate against in a cost-effective manner. In addition, personal information now exists in a variety of forms that are not immediately self-evident; for example, barcodes and automated text on documents, and metadata attached to electronic documents. Even where redaction occurs in some cases that does not provide complete protection. [See the Federal Court case where documents were poorly redacted.]

The previously considered criminal sanctions for court staff for failure to properly redact documents remains of concern.

Essentially the Court Information Act offered two competing principles – open justice for general society whilst offering privacy for the individual – without a mechanism, guide or resources to resolve the conflict.

### *Media access to information*

The consultation paper states:

> 'The Supreme Court prohibited attendance at its courts from late March 2020, instead using a virtual courtroom via video or telephone conference to conduct hearings.'

This is incorrect. The Supreme Court has remained open to the public and media throughout the coronavirus pandemic. The restriction applied to the parties appearing before the Court. Technology was utilised to minimise the risk to public health in line with the prevailing public health orders and state and commonwealth government health advice.

It is worth noting at this point that the definitions of 'media' and 'news media organisation' have substantially shifted from what was, or could be, envisaged more than a decade ago. The 'democratisation' of journalism (as it is sometime described) and the rise of 'citizen-journalists', bloggers, and specialist interest groups means these definitions are now stretched and tested.

The conflict noted above – open justice and privacy – has been addressed by the Court through rules and Practice Notes. Practice Note Supreme Court General #2 concerns access to court files. The Practice Note was most recently considered and amended in October 2019. It applies across the Court.

The Court conducts regular round-table discussions with media representatives in order to understand the concerns and assist with accurate and timely reporting of court matters and this informs changes to the Practice Note. In the Court's view the current approach balances the benefit and burden.