The Chief Justice
New South Wales

10 August 2021

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

BY EMAIL ONLY: nsw-lrc@justice.nsw.gov.au

Dear Mr Cameron

Open Justice: Court and Tribunal Information - Access, Disclosure and Publication

Thank you for giving the Court the opportunity to respond to the draft proposals contained in your Report of June 2021.

My response to the Report is based on my inquiries of members of the Court and in particular the Heads of Divisions. I have also discussed the matter with the Chief Executive of the Court and members of the registry staff.

Whilst I understand the reasoning behind the Report and agree with the importance of the principle of open justice, consideration must also be given to the burden any proposed reforms place on the Courts and for that matter litigants involved in proceedings before it. In that context Practice Note SC GEN 2 seems largely acceptable to non-parties and the media. The Court seeks to ensure that its practice and operations support the principles of open justice. Thus, in 2019 the Court's Media Manager completed 5,666 requests for information, 70% of which came from Sydney Metropolitan journalists from major newspapers, television and radio stations. The number of requests is demonstrative of the quantum of information already disseminated to the media and non-parties and the burden that some of the proposals will place on the Court.

That is not to say that I oppose the thrust of the reforms. Indeed, as will be seen from what I have written below, many of them are actively supported by the Court. However, there are some which in the Court's view may be unworkable in promoting justice and place an intolerable burden on the Court's staff.

The Honourable T F Bathurst AC
Telephone: [redacted]
Facsimile [redacted]

GPO Box 3, Sydney NSW 2001, Australia
Email: [redacted]
Website: www.supremecourt.justice.nsw.gov.au

As a matter of convenience, I deal hereunder with the proposals made by the Commission seriatim:

1. The Court supports the uniform definitions suggested in Proposals 3.1 to 3.6. The definition of journalists is problematic. The definition which is an inclusory definition includes a series of factors which are designed to indicate that a person is engaged in the profession or occupation of journalism. The difficulties with the definition are twofold. First, at a practical level who is to determine by reference to those and other factors whether a person is "engaged in the profession or occupation of journalism in connection with the publication of information in a news medium". Second, the definition could go well beyond what might be called traditional journalists to include people who regularly use social media to express their views on news items. Such activity may be included having regard to the definition of news media organisation as a service that engages in the business of broadcasting. Further, the recognised journalistic or media professional standards or codes of practice referred to in Proposal 3.7(c)(v) are not identified.

2. The position is not alleviated but in fact worsened by Proposal 3.8. Given the significance of the identification of journalists to the balance of the proposals a number of matters would have to be addressed before it could be determined whether the access scheme is feasible. These include without being exhaustive:

   (a) Who will apply the factors set out in the definition, that is, who or what will determine who is and who is not an accredited journalist?

   (b) Will there be a fit and proper person test to be an accredited journalist? For example, would a person who has been convicted of contempt or failed to comply with court conditions imposed on access, be deemed to be a fit and proper person?

   (c) Will the accreditation scheme be embodied in the statute with rights of appeal?

   (d) Can or should the Court be able to initiate the removal of a journalist from the accreditation list?

   These questions identify fundamental questions about free speech that perceived difficulties with the current procedures concerning access to information do not. Any proposal for the Executive Government to confer what is in effect a privileged status on certain journalists would have to be sufficiently robust to withstand criticism of accreditation being traded for favourable political coverage. That problem is even more acute where a media organisation which employs journalists is a party to the proceedings or otherwise has a vested interest in their outcome.

3. The Court has no difficulty with the definitions in Proposal 4.1 or the principles in Proposal 4.2. However, this should be read with the specific reservations raised subsequently in this letter.

4. Proposal 4.3 is ambiguous. Does it inhibit the inherent jurisdiction the Court has to restrict publication of material when it is in the public interest or in the interests of the party to do so. A common example is of course sensitive material in commercial matters or corporations matters.

5. The purpose of Proposal 4.5(b) is not understood. There seems to be no reason that the Court should include such a note in its judgment.

6. The Court has no difficulty with Proposal 4.6.

7. So far as Proposal 4.7 is concerned, it does not seem to be necessary to give standing to anyone other than the applicant for an order, the party to the proceedings or any other person who in the Court's opinion has a sufficient interest in the question of whether an order should be made. There is no need to give standing to the government of the Commonwealth or a State or Territory in respect of matters in which they have no real interest. We make a similar comment in relation to Proposal 4.8. Further, if the Court is required to give reasons it should be made clear where an order is made in the course of contested proceedings it is not necessary to give those reasons during the course of those proceedings if it is impractical to do so.

8. So far as appeals are concerned, it seems to us that parties having the right to apply for leave to appeal should be limited to the applicant, a party to the proceedings or another person who has sufficient interest in the proceedings. Further, there does not seem to be any reason to take away the discretion on the Court to order costs in unsuccessful appeals.

   Further, as the appeals will generally be urgent and perhaps need to be conducted during the course of a trial in which the order is made, it may be desirable to confine the nature of any appeal to one where there has been an error of law.

9. So far as Proposal 4.12 is concerned there is no reason the proceedings for offences should be tried in the Supreme Court in its summary jurisdiction rather than in the District Court.

10. The Court does not wish to comment on Proposals 4.13 to 4.16 inclusive, save to note the difficulty in enforcing an order outside the Commonwealth.

11. The Court does not wish to comment on Proposal 4.17. So far as Proposal 4.18 is concerned, the Court is of the view that the persons to be heard on a review should not extend beyond the applicant, the party to the proceedings or any other person who in the Court's opinion has a sufficient interest in the matter. Subject to making the same comment in relation to Proposals 4.21 and 14.24 the Court has no difficulty with the Proposals 4.19 to 4.25 inclusive.

12. The Court has no objection to Proposals 5.1 to 5.6 inclusive. However, we doubt that Proposal 5.5(b) is necessary.

13. The exception in Proposal 5.7 should be clarified. An official report of proceedings could include a judgment. The Court has no objection to Proposals 5.8 to 5.14 inclusive.

14. The Court considers that the persons entitled to appear in proceedings referred to in Proposals 6.1, 6.5 and 6.6 should be limited to the applicant, a party to the proceedings or any other person who the Court considers has a sufficient interest. We make a similar comment in relation to Proposal 6.4 and also point to the difficulty of giving reasons on interlocutory applications during the course of a trial, particularly a criminal trial. Subject to those matters the Court does to wish to make any submissions on Proposals 6.1 to 6.10.

15. The Court has no difficulty with Proposals 7.1 and 7.2.

16. So far as Proposal 7.3 is concerned s 119 of the Adoption Act 2000 requiring that proceedings under the Act or Regulation to be heard in closed court should be continued as there is no reason for journalists to have the right to attend those matters which are inherently personal. The Court has power if it considers it appropriate to permit persons who are not parties to the proceedings to be present. Allied to that there should be an exemption to Proposal 4.22 in respect of matters heard by the Court in its parens patriare jurisdiction.

17. The Court has nothing to say on Proposals 7.4 and 7.5.

18. So far as Proposals 7.6 to 7.16 are concerned the Court again has the view that persons having the right to appear should be limited to the applicant, the parties to the proceedings and persons who the Court is of the view have a sufficient interest. The same comment is made in relation to the requirement to give reasons as has been made in respect of Proposal 6.4.

19. So far as Proposals 8.1 to 8.9 are concerned the Court makes the same comment in relation to persons entitled to appear and the requirement to give reasons as has been previously made.

20. The Court does not wish to comment on Proposals 9.1 to 9.4.

21. So far as Proposal 9.5 is concerned the Court has an existing database for this purpose and supports it being expanded and formalised to capture all such orders. However, the expanded database outlined in the proposal would require significant staff and other resources to develop and maintain. Thus, to implement the proposal significant funding would be needed.

22. So far as Proposal 9.6 is concerned if the Court Information Commissioner is to be the Prothonotary she would not have the capacity consistent with her existing duties to maintain the register. Leaving aside that question it is probably more desirable that each individual court has its own Information Commissioner.

23. The Court maintains serious reservations about Proposals 10.1 to 10.12. They can be grouped under a number of heads. First, Proposal 10.4 provides records available to journalists. As drafted, it seems to be limited to criminal proceedings. However, it is to be assumed that it is intended to extend to civil proceedings. Access apparently extends to making available an electronic copy of the record.

The proposal would significantly affect criminal trials and sentencing proceedings. Presently, section 314 of the *Criminal Procedure Act 1986* (NSW) provides for media access to court documents, including the indictment, witness statements tendered in evidence and transcripts of evidence. However, this entitlement does not include exhibits especially electronic exhibits. However, the *entitlement* conferred by proposal 10.4 (and proposal 10.5) extends to any "record" admitted into evidence and the definition of "record" includes any document or electronic file.

At present, during the course of a criminal trial it is common to receive press requests for access to exhibits especially electronic records of interview and in some cases photographs of a crime scene. The trial judge usually considers the application in the context of the potential for the release of the material to receive publicity that may affect the fairness of the trial (ie the jury being exposed to commentary on the evidence) and distress to the victim. It is quite common to deny access until the jury's verdict is returned and reconsider access at that point. By conferring an entitlement to access to the exhibits, these proposals appear to cut across and this and substantially undermine a trial judge's ability to maintain a fair trial.

The conferral of an entitlement to access to records admitted into evidence also has the potential to be severely distressing to victims of crime and their families. In particular it would undermine the legitimate interest they have in avoiding distressing material being made freely available in the media and on the internet and deny them the opportunity to be heard before material is released.

The last two points are illustrated by the judgment of Adamson J in *R v Abdallah (No. 3)* [2015] NSWSC 12 in which the media applied for access to CCTV footage of the accused stabbing the deceased to death. The CCTV footage had been played in open Court. In considering the effect on potential jurors, Adamson J noted that, unlike material that is displayed in court and then described in media reporting, if the footage was released then "the images would be posted on the internet and could be captured and replayed" and that "circumstance, when coupled with the graphic nature of the evidence, would tend to place undue significance on it" (at [21]). In refusing to release the material Her Honour was concerned about the potential effect of that on the jury but added (at [24]) that the release of the material would be distressing to the deceased's family in that the "publicity that can be expected to be given to moving images of her last hours of life could not but aggravate their grief and distress." (at [24]).

A similar circumstance arose before Justice-Beech Jones in *R v Villaluna* [2017] NSWSC 1390 where at a sentencing hearing the Crown played CCTV footage of the offender brutally stabbing the deceased and his ex-wife in a food court at a shopping centre. The media applied in writing to have the footage released. The family of the deceased fiercely opposed the release of the material on the basis that it would appear on the

internet especially every time a search was made of his name. In the face of that opposition, the judge required the media to make their application in open court but they declined. This proposal would confer on journalists an entitlement to access this material.

CCTV footage is not the only type of "record" which journalists are entitled to and which if released might find its way onto the internet and cause distress to victims and their families. For example it could include such matters as autopsy photos; crime scene photos including bodies in situ; and video footage of witnesses at the scene. If the ALRC's proposals in Chapter 10 are implemented then accredited journalists would have an entitlement to the material just noted and victims would have no right to even be heard in opposition to its release.

Similar considerations apply in relation to material concerning witnesses and in some cases offenders; that is there is the potential for the public release and broadcast of electronic material that would be disproportionately harmful compared to a description of it in media reporting. A recent example concerns a high profile case in Victoria where an AFL identity was arrested for stalking while cross dressing. He was clearly suffering mental distress. His electronic record of interview was leaked to the media who broadcast it. The police officers involved in the release of the material were disciplined. However, based on this proposal, if the record of interview was played in open court then each journalist would have an "entitlement" to access it by obtaining a copy.

HRO, Bails and Civil Sexual Assault matters

The points just raised in relation to criminal trials (and set out below in relation to redacting) can also apply to High Risk Offender matters, bail applications and civil proceedings involving an allegation of sexual assault.

Court of Criminal Appeal

In the ordinary course a reporting of appeals to the CCA can be expected to involve a consideration of the written and oral submissions of the parties. The recently introduced CCA practice note requires the parties. when filing their written submissions. to indicate if there is any objection to media or third party access. That said, CCA matters can often raise difficult questions about release of information including such matters as confidential assistance provided by the offender to the authorities, national security considerations in terrorism cases etc. Proposal 10.4 does not provide much guidance as to how those matters will be reconciled with an entitlement to access written submissions which is only subject to conditions.

Further, the observations noted above in relation to criminal matters apply with equal force to the CCA. In conviction appeals, the CCA receives a copy of all the transcript and exhibits from the court below. Hence the entitlement to access the Court file will apply to the CCA's file and the points made above in relation to access to files in criminal proceedings will apply save that there is no jury. Further, as a significant number of conviction appeals concern sexual assault charges including child sexual assault charges, court resources that are involved in facilitating an entitlement to

access will also have to consider the various proposals concerning statutory prohibitions and redaction of information.

Similar considerations arise in relation to civil files. As I indicated access is governed by Practice Note SC GEN 2 which enables material to be provided by leave of the Court. It is not clear why it is considered that approach is not working satisfactorily. It already places a significant burden on judges and the one Media Manager the Court has (in fact two but they job share). The Report provides little indication of when access must be granted. Documents are usually admitted into evidence during a hearing or a trial. The proposals do not appear to have considered that conferring an entitlement to access these documents may interfere with a hearing or a trial because the exhibits are actually needed in Court or by a judge to write their judgment.

24. As for how access is to be granted, proposal 10.9 confers an entitlement on journalists to "obtain" a copy of a document or record to which they are entitled including electronic records. Presumably the court is required to facilitate that copying exercise. Proposal 10.10 deals with conditions of access and allows the Court to impose conditions such as limiting access to a copy of the Court record "from which personal identification information has been deleted or removed" (10.10(d))).

Given privacy considerations and the number of different types of statutory restrictions that can operate in criminal cases, the other types of cases noted above and the CCA, it can be expected that the editing process for many exhibits in those cases could be significant. Thus in criminal cases a review of an electronic ERISP may need to be undertaken and then electronic editing undertaken. At present there is no entitlement and so this is commonly done by the trial judge indicating to the crown that, after the trial, an edited ERISP can be released and they arrange it. These proposals would throw that obligation on the Court and potentially require that be undertaken during the course of the trial.

25. A similar proposal was raised at the time consideration was given to passing the Court Information Act 2010. At that time a standard equity file was reviewed by a registrar. The review process to identify all personal information took four and a half hours. A criminal review file was reviewed by the then Chief Executive Officer. That review to redact the name of four juveniles mentioned in the proceedings took four hours to complete.

Further even where obvious information is redacted (such as a name, address or date of birth) court material may contain information sufficient to identify a person – for example through tax/financial records or description of a location a person visited or specific actions. As such the redaction process is relatively complex and the persons employed to complete these tasks will need to be of some seniority and renumerated appropriately.

It is a simple fact that the Court does not presently have the capacity to undertake the redaction task much less do it with any urgency. The legislation would place the Court in an impossible position of either having to divert staff from matters which may be of more significance or suffer the criticism of not being able to provide the access required. This would hardly reflect well on the administration of justice in this State.

If these proposals are to be pursued it is not sufficient to simply provide a fee to meet the cost. What would be needed is a significant increase of the Court's resources to enable it to be done. At a very minimum the Court would require a further Media Manager employed fulltime, a lawyer to supervise the process and one clerical assistant. If this was not supplied the Court could not undertake the task.

I have little doubt that the District Court and the Magistrates Court will be in a similar position.

I trust these comments are of assistance.

Yours sincerely

T F BATHURST AC
Chief Justice