



Our ref:

20 June 2019

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

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

Dear Mr Cameron

The New South Wales Bar Association ("the Association") would like to thank you for the opportunity to provide a preliminary submission to the Open Justice Review being conducted by the NSW Law Reform Commission (NSWLRC). The Association intends upon making a further submission upon the commencement of a full consultation.

The Association invites the NSWLRC to consider the following:

1. The Association strongly supports the principle of open justice as a mechanism for transparency, accountability, consistency and fairness. This principle is of course subject to certain limitations and protections to ensure the proper administration of justice;
2. It is the view of the Association that the current laws, in general, strike an appropriate balance between the principle of open justice and other interests, with appropriate safeguards, such as the protection of safety, and avoidance of undue embarrassment;
3. The courts should be allowed a fair amount of discretion to consider any orders that may limit open justice, as it requires careful determination on a case-by-case basis, due to what is often the sensitive nature of the proceedings attracting such applications;
4. The Association emphasises the importance of the protection of children, whether witnesses or a party such as an accused, in light of the principles enshrined in the United Nations Convention on the Rights of the Child and the ICCPR. As such, any amendment to the current legislative regime should reflect that protection consistently. This is particularly important for young offenders, even those on the cusp of adulthood, who are in need of rehabilitation that may be impeded by publication of their identity.
5. The Association holds concerns over news media organisations having separate rights to restricted information. If matters are restricted, they should be so restricted across the board so as to ensure consistency in the application of the principle of open justice. The Bar Association acknowledges the challenges that result from the proliferation of social media and the digital

environment. There is need for recognition of this proliferation, and for appropriate safeguards to be implemented in order to ensure that the impact of orders is not diluted or overshadowed by the power and speed of social media. The widespread use of social media as a “news source” should be taken into account when considering the access that news media organisations have to restricted information (s10 *Court Information Act NSW 2010*) in circumstances where the definition of “news media organisation” may encapsulate a far wider range of organisations and people than initially envisaged by the legislation;

6. There are concerns associated with the influencing of jurors’ perception both before, and in some cases, during trial. There may be some consideration of amendment to s 132 of the *Criminal Procedure Act 1986* to allow for a consideration of the level of publicity in the matter to be taken into account when considering an application for a trial by judge-alone. This is in circumstances where there have been a number of cases where jurors or juries are discharged as a result of internet searches conducted by jurors, despite directions (for example, *R v JH (No 3)* [2014] NSWSC 1966). The Association invites consideration of the issues raised by his Honour Justice Hamill in *R v Qaumi & Ors (No 16) (Internet “take down” orders)* [2016] NSWSC 319;
7. The Association raises concerns as to the oppressive costs associated with the ordering of transcripts in proceedings, particularly for a criminal accused ordering a transcript in their own trial, and urges consideration of greater financial accessibility to such information.

The Association welcomes the full review of the legislation pertaining to open justice by the Commission, and looks forward to providing a submission to the review.

If you have any questions please contact the Association’s Executive Director, Mr Greg Tolhurst on [REDACTED] or by email at [REDACTED]

Yours sincerely

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Tim Game SC
President