



RULE OF LAW

EDUCATION CENTRE

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Law Reform Commissioner

Nsw_lrc@justice.nsw.gov.au

Dear Commissioner,

Open Justice: Court and Tribunal Information: Access, disclosure and publication
Response to draft recommendation

Thank you for the opportunity to make a submission regarding the Draft Proposals for the laws relating to open justice in courts and tribunals.

[Background of the Rule of Law Education Centre](#)

The Rule of Law Education Centre (ROLE) was formed in 2009 and is an independent, politically non-partisan, gift deductible entity formed to uphold the rule of law in Australia. The Centre aims to educate and inform about how the Magna Carta and subsequent rule of law principles have impacted and contributed to the history, culture and legal processes of Australia and to strengthen the rule of law and human rights through education.

ROLE operates education programs and initiatives to provide school and university students with an understanding of the importance of the Magna Carta and rule of law principles and how they relate to contemporary issues. ROLE's most successful program is the Law Day Out Excursion. On a Law Day Out Court Excursion, students who visit the Courts as part of the curriculum requirements, are guided through the courts by an experienced facilitator and then provided a unique opportunity to meet a Judicial Officer. Before Covid-19, ROLE facilitated over 4,500 students and 180 schools, together with over 50 volunteer judicial officers on the program each year.

In addition, ROLE specialises in creating easy to understand resources and materials for students and the community to grasp legal concepts. www.ruleoflaw.org.au receives around 440,000 page views per year, in addition to views on social media platforms of Twitter, Facebook, Pinterest and Instagram.

Open Justice Law Reforms

As part of the NSW Law Reform Commission, the Commissioner will consider;

‘b) whether the current arrangements strike the right balance between the proper administration of justice And the public interest in open justice’¹

As part of the Review, the Consultation Paper² raised the below questions:

Question 13.3 Education initiatives

- (1) What education initiatives could be implemented to improve people’s understanding of open justice and associated restrictions?
- (2) Who should be responsible for delivering those initiatives?

And further highlighted ‘if the rules of open justice and how associated prohibitions and restrictions operate were better understood, it is likely that breaches would be less common and confidence in the justice system would increase’ and ‘public education should be improved to ensure suppression and non-publication orders and other automatic prohibitions are adhered to.’

Relevantly for our submission, we have considered the below Draft Proposals³:

Proposal 9.6: A Court information Commissioner

A Court Information Commissioner should be established to, or an existing body should, carry out the following functions:

¹ https://www.lawreform.justice.nsw.gov.au/Pages/lrc/lrc_current_projects/Courtinformation/Terms-of-reference.aspx

² <https://www.lawreform.justice.nsw.gov.au/Documents/Publications/Consultation-Papers/CP22.pdf>

³ <https://www.lawreform.justice.nsw.gov.au/Documents/Publications/Other-Publications/Draft-proposals/Open%20Justice%20Draft%20Proposals.pdf>

- (a) monitor and investigate breaches of prohibitions on publication or disclosure and nonpublication, suppression, exclusion or closed court orders, including those occurring online
- (b) liaise with publishers and content hosts to remove material that is in breach of prohibitions and orders
- (c) commence proceedings for alleged breaches of prohibitions and orders, in appropriate cases
- (d) produce educational material about the risks and consequences of breaching prohibitions and orders, and
- (e) maintain and update a register of orders and control access to it.

And

Proposal 11.1: Virtual access to proceedings

- (1) A clear process should be established for journalists and the public to access court and tribunal proceedings virtually.
- (2) Courts and tribunals should be able to control registration for virtual access to proceedings.
- (3) Section 9 of the Court Security Act 2005 (NSW) should be amended to expressly prohibit the recording of court or tribunal proceedings by a person who accesses them virtually.
- (4) People who access court or tribunal proceedings virtually should, as a condition of access, be required to acknowledge the prohibition on recording the proceedings and declare that no unauthorised party is attending with them.

The Role of Education to Improve Public Confidence in the Justice System

There is a lot of loose talk in Australia about democracy, the rule of law and basic rights. Yet unless we educate future citizens concerning the broad outline of our

laws, they may grow up feeling that law is alien to their experience. I want them to grow up insisting that the law must be just and modern and accepting the citizen's responsibility to ensure that this is so.

– The Hon Michael Kirby AC CMG

The public interest in open justice is critical to inspire public confidence in the justice system, to educate the public about the law and how it operates and to show the rule of law in practice- that the law is applied equally and fairly to all. ⁴

Michel Maya of the International Bar Association highlighted that children should be instilled with rule of law values at an early age:

‘cultural values can promote or undermine law-abidingness and that such acquisition occurs largely during childhood and early adolescence should give development experts pause for thought. If it is true that such value acquisition occurs largely in one's youth and common sense suggests it does, why is such a tiny fraction of rule of law promotion resources directed at young people.’⁵

Therefore, it is important that education initiatives that are implemented to improve people's understanding of open justice include robust and sustained campaigns directed towards school and university students.

These education campaigns should not be delivered by lawyers but require childhood education specialists and ‘multidisciplinary teams ...to devise strategies aimed at building a rule of law culture’ to mould the views of school and university students about the rule of law and the justice system.

[Open Justice and Education Programs for Students in New South Wales](#)

The Curriculum for Legal Studies and Commerce Students in NSW encourages students to attend the Courts to experience the law in action. Before Covid-19, students could attend Court Cases and observe trials.

⁴ Hall, S 2021, ‘Open Justice – Seen to be done’, *Piddington Society- Fremantle Conference, 19 February, Keynote Address*

⁵ Maya, M 2015, ‘Culture, youth and neuroscience: implication for rule of law programmes’, *The Rule of Law in the 21st Century; a worldwide perspective*

It must be noted that neither the NSW Courts nor the NSW Law Society have a designated Education Officer/program to aid students on their excursions to the Courts or help them understand the rule of law in practice.

Most other states in Australia have Education programs for Court observation such as;

- Western Australia: Francis Burt Law Education Program supported by the Law Society of Western Australia <https://www.lawsocietywa.asn.au/francis-burt-law-education-programme-2/>
- Victoria: Supreme Court of Victoria VCE Education Program <https://www.supremecourt.vic.gov.au/going-to-court/for-the-public/vce-education-program>
- Queensland: Supreme Court Library Sir Harry Gibbs Legal Heritage Centre <https://legalheritage.sclqld.org.au/school-program/schools-program/courtroom-visit>

Currently, ROLE fills this gap and oversees the booking system for all students wishing to visit the Sydney Courts, provides information and resources for students before they attend the Courts and also runs the Law Day Out excursion for students visiting the Courts. ROLE is a not-for-profit, funded by private donations and receives no financial support from the Government or Judiciary. It charges a small fee for a Law Day Out to partly cover the cost of facilitating the program by trained Educators, with special arrangements for schools that are low SES.

Response regarding Education initiatives

In response to the Consultation question of (1) What education initiatives could be implemented to improve people's understanding of open justice and associated restrictions? and (2) Who should be responsible for delivering those initiatives?, Proposal 9.6 suggests that A Court information Commissioner should '(d) produce educational material about the risks and consequences of breaching prohibitions and orders.' The Court Information Commission will perform a range of functions related to the enforcement and prosecution of offences.

Further information is required regarding this Proposal as to whether the ‘education material’ will:

1. Provide education resources for school students regarding open justice and the operation of the rule of law to inspire confidence in the justice system
2. Assist in the promotion, organisation and facilitation of valuable Court Excursions for school students in line with the other state programs
3. Be created by Education Specialists

Response regarding Openness during a Pandemic

A. Remote Galleries to ensure open justice

Specific measures have been taken by the Courts to reduce the spread of Covid-19. In particular, the Courts have stipulated that only those who are ‘a party to a Court or tribunal matter’ can attend the courts during the pandemic. As a result, school and university students have not been able to visit the NSW Courts since March 2020. It is unlikely that school excursions to the Courts will resume in 2021.

The Hon Justice Stephen Hall in his address to the Piddington Society on 19 February 2021 stated:

‘The rationale for this was that the State was in lock-down for public health reasons. There was a perceived infection risk in members of the public attending and remaining in court buildings. The courts were seen as just another public venue that had to close – in the same class as cinemas, restaurants and bars. The courts are, however, an essential service in society and some cases continued – though often with the parties attending by video or audio link with no provision for observation by the general public. Should we so readily accept that the business of the courts can be done privately?’ ...

‘I don’t mention this for any reason other than to say it is incumbent on us all to ensure that the courts remain open. Even in a crisis where attendance at court by the public is difficult, dangerous or ill-advised, there are often ways to ensure that public access is maintained. We are often all too ready to give up or suspend our rights in a crisis. The institutions of a democratic society can wither away if we forget the rationale for them.

In a post-Covid world there will be pressure for more interactions to occur electronically rather than in person – this could easily lead to court proceedings that no-one other than the parties will see or hear or study or even know about. Court rooms could become redundant and open justice a mere relic of a bygone age. If that happens the independence and integrity of the judiciary as a separate arm of government will be threatened.

To paraphrase Chief Justice Burger, justice will not function in the dark. Nor will it survive behind closed doors.’⁶

Consequently, consideration must be given to open justice for students during a pandemic. As also suggested by Hon Justice Hall:

‘Accommodation – the courtroom should have a public gallery that allows for the public to clearly hear and see what occurs. That may require electronic screens near the gallery so that they can see any witnesses or evidence that is projected on them. If those who want to attend exceed the seating capacity then consideration should be given to using remote galleries, live-streaming or posting recordings on the internet. This is also relevant to accessibility – given that many people are unable to attend and are more likely to rely on other ways of obtaining information.’

Consideration should therefore be given to provide remote galleries within the NSW Courts where there are concerns regarding social distancing for students (and the general public) visiting the Courts to enables them to view proceedings.

B. Virtual Access to High Schools and Universities

Proposal 11 aims to promote virtual access to proceeding in NSW to enhance open justice. This includes proposal 11.1 where

(1) A clear process should be established for journalists and the public to access court and tribunal proceedings virtually.

⁶ Hall, S 2021, ‘Open Justice – Seen to be done’, *Piddington Society- Fremantle Conference, 19 February, Keynote Address*

This should be broadened to also include teachers in schools and universities who also require virtual access to court and tribunal proceedings as part of their education programs about justice and the rule of law.

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Under the rule of law,⁷ all people should be ruled by just laws to ensure that no-one is above the law and the law is applied equally and fairly. The rule of law must be supported by informed and active citizens- with education a key part of the development of this public confidence.

Sally Layson
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⁷ <https://www.ruleoflaw.org.au/what-is-the-rule-of-law/>