



THE LAW SOCIETY
OF NEW SOUTH WALES

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6 August 2021

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,

Open Justice Court and Tribunal Information: access, disclosure and publication

Thank you for the opportunity to respond to the NSW Law Reform Commission's *Open Justice Court and tribunal information: access, disclosure and publication* paper ('the Proposal Paper'). This submission is informed by our Children's Legal Issues, Public Law, and Litigation Law and Practice Committees.

The Law Society strongly supports the principle of open justice and access to court information, while emphasising the need to balance this principle to ensure that access does not unduly prejudice the rights of parties to proceedings. As noted in our preliminary submission to the review dated 31 May 2019 and our response to the December 2020 consultation paper dated 4 March 2021, the Law Society believes four principles should govern any access to court information. We take the opportunity to restate those principles here:

1. There is a general public interest in ensuring the public has a right of access to court information.
2. The legislation must balance the interest of open and unfettered access to justice and other public interests, for example, the interests in protecting the privacy of individuals, national security, or parties in litigation from unnecessary prejudicial impact. Accordingly, some court information should not be publicly accessible.
3. Parties to proceedings may have an interest in restricting access to court information related to their proceedings. These parties should be heard before any related court information is disclosed.
4. Individuals' privacy and personal information should be protected from unwarranted disclosure. They should be heard prior to disclosure.

Broadly speaking, the Law Society of NSW supports the principled approach taken by the Law Reform Commission, and the intent of the majority of the proposals. In relation to the guiding principles at page 7 of the Proposal Paper, in our view, these principles are largely in accord with those proposed above, but diverge from our preferred principles by not specifically requiring an opportunity for the parties to a proceeding to be heard prior to court information being disclosed.

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Possible damage to a potential litigant's reputation can have a silencing effect. Similarly, unwanted media coverage and the potential prejudicial impact may dissuade those with sensitive personal information from commencing proceedings.

We make the following comments in relation to specific proposals in the Proposal Paper.

Proposal 3.8: Accreditation of journalists

There are clear benefits for the courts to having a list of accredited journalists, including that it may support journalists to develop specialist knowledge in the appropriate processes for accessing and publishing court and tribunal information. However, without further detail on how the accreditation process might be administered by the Department, the Law Society has some concerns in respect of the potential for anti-competitive effects, and possible barriers to entry for smaller media organisations, or freelance journalists.

In our view, the process for accreditation should be clear, fair and apolitical, and consideration should be given to consulting with the heads of the relevant courts in respect of the proposed process. Consideration should also be given to providing clear criteria for losing accreditation in circumstances, for example in instances of contempt, and where the conduct of the journalist fails to meet relevant professional standards and expectations.

Proposal 5.5: Duration of certain prohibitions protecting information likely to lead to the identification of children and young people

The Law Society supports proposal 5.5(a).

The Law Society does not support proposal 5.5(b). Our members have expressed the view that there would be little or no public interest in publishing the identity of a deceased child involved in criminal proceedings. Furthermore, there may be privacy and cultural considerations for the family of the deceased.

Rather than following the approach outlined at proposal 5(b), we suggest there be a presumption in favour of not publishing the identify of a deceased child involved in criminal proceedings, with provision for an application to a court to publish the child's identity. The court could be empowered to take certain factors into account in making this decision, including the public interest and the wishes of the child's family.

If this alternative approach is not followed, we suggest instead that the wording at proposal 5.5(b)(ii) be amended to change "does not identify" to "is not likely to lead to the identification of", which would align with the current wording at s 15A of the *Children (Criminal Proceedings) Act 1987*.

Proposal 11.1: Virtual access to proceedings

In our view, online hearings are not incompatible with the principle of open justice, however, measures need to be adopted to promote ease of access to hearings. We suggest Proposal 11.1(1) would be improved by incorporating a requirement that links be published online for journalists and the public to access virtual proceedings. Currently, potential spectators are usually required to contact the Judge's Associate via email to request a link to access proceedings. The process is an administrative burden which inhibits access to justice, and does not protect the anonymity of the spectator, which would otherwise be afforded in a physical courtroom.

The Law Society further supports the implementation of live streaming of hearings through a court's website, similar to that of 'ParlTV', the in-house television and radio service from the Parliament of Australia.

We hope this input is of assistance. Please contact Stephanie Lee, Policy Lawyer, on [REDACTED] or email [REDACTED] in the first instance if you have any queries.

Yours sincerely,

[REDACTED]

Juliana Warner
President