Faculty of Law

Preliminary Submission to New South Wales Law Reform Commission

Open justice review

Court and tribunal information: access, disclosure and publication

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Open justice in Australian jurisprudence

The meanings of open justice, and the processes that enable its expression, have been contested and have changed over time. Non-party requests to access court information remain primarily deployed by commercial media agencies. In this preliminary submission, we set out some of the challenges that arise from the current open justice environment in Australian jurisdictions. We propose some additional concepts for decision-making about open justice. We argue that, for non-parties who are researchers and scholars, additional considerations and processes should be introduced to increase access to the justice system, while also subjecting it to expert criticism.

The changing meanings of open justice in Australia are amply set out by Rodrick.[1] She also clearly describes how changes in litigation practices have impacted upon the type of materials that might be subject to open justice requests, and also how changes in contemporary courtroom management might diminish the range of materials that are available for non-parties. Rodrick also sets out some of the transformations wrought, and the affordances offered by the technologies available in the digital age.

The emergence of open justice as a guiding concept in the administration of justice, is set out in Katherine Biber's article 'Inside Jill Meagher's Handbag: Looking at open justice'. In that article, Biber explores how the meaning of 'open justice' has evolved over time. She also explains how contemporary 'transparency movements' have used the principles of open justice and transparency with a more subversive aim – to transform, and potentially destroy, the state itself. Biber writes:

> Open justice is the belief that accountability and legitimacy within the legal process can be achieved through making accessible information about court procedures, court records, laws and judicial decisions. 'Open justice' emerged as a principle together with 'open government', which in modern democratic governance is the ideal of transparency; the creation of a public right to scrutinise the data and decisions of those who govern us. Eighteenth century proponents of transparency, including Kant, Rousseau and Bentham, imagined very different notions of open government and open justice to those of the contemporary 'transparency movement' comprised of groups such as Transparency International, OpenSecrets.org or Wikileaks. As we have learned, through the conviction of Chelsea Manning, [the charges laid against Edward Snowden… and the] extradition of Julian Assange, transparency is also deployed more radically, in the exposure of official data by those who hope that it may transform or destroy the authority of state institutions.[2]

[1] Sharon Rodrick, "Opportunities and Challenges for Open Justice in Light of the Changing Nature of Judicial Proceedings", 26 *Journal of Judicial Administration*, 2017, 76-97. See also Rodrick, "Achieving the aims of open justice? The relationship between the courts, the media and the public", 19(1) *Deakin Law Review*, 2014, 123-162.
[2] Katherine Biber, "Inside Jill Meagher's Handbag: Looking at open justice", 39(2) *Alternative Law Journal*, 2014, 73-77.

On the acceptance of open justice in Australian jurisprudence, Biber writes:

> Former NSW Chief Justice, James Spigelman has said that open justice is 'one of the most pervasive axioms of the administration of justice in common law systems'. In 1913 in *Scott v Scott*, the House of Lords, described it as 'a sound and very sacred part of the constitution of the country and the administration of justice'. That case was cited in the NSW Court of Appeal by Bathurst CJ and McColl JA who wrote that the contemporary principle of open justice can be stated in Lord Atkinson's phrase:
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> > in public trial is [to be] found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means of winning for it public confidence and respect.
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> Open justice demands that justice be seen to be done. Courts must be open to the public, and any non-compliance with the principle is permitted only in the most limited and defined circumstances. Non-adherence to the principle of open justice must only be permitted if it is 'necessary', although necessity is not to be construed narrowly.
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> In Australia, open justice is understood as a collection of principles and rules drawn from common law and statutory sources, as well as an emerging constitutional jurisprudence.

Biber's work also underlines the inconsistency in approaches that Australian jurisdictions take to the concept of 'open justice'. As Emma Cunliffe writes, 'Australian case law has not yet coalesced around a coherent theory of the substance of open justice principles'.[3] According to Biber:

> Australian jurisdictions take very different views of open justice, and there are inconsistencies within jurisdictions too. There is no consistency about the underlying presumptions, about which materials are 'open', about the processes to be followed, and about whether reasons need to be given by a requesting party. Dawson and Roughley note that these inconsistencies affect media organisations, but also researchers, witnesses, and others to whom court records are of significance.[4]

Much of Biber's scholarship relates to the appearance of criminal court information and evidentiary materials outside of the courtroom, and after the criminal trial. Where criminal materials appear in cultural contexts, Biber observes:

> [W]e find the intersection of two contemporary phenomena: 'open justice' and 'open secrets'. 'Open justice' demands transparency about court procedures and access to court information; the term 'open secrets' acknowledges that public records sometimes demand tact or sensitivity about the secrets they contain. This delicate balance arises in other legal contexts and is reflected in the need to regard certain disclosures as 'privileged' or 'protected', and where

[3] Emma Cunliffe, "Open Justice: Concepts and Judicial Approaches", 40 *Federal Law Review*, 2012, 385, at 405.
[4] Biber, "Inside Jill Meagher's Handbag". References removed.

> the benefit or interest in disclosure is weighed against the benefit or interest in restriction. It is a balance that has been criticized in instances where legal proceedings have continued despite some of the evidence having been kept 'secret' from one of the parties. And it is a balance that was recently attempted, without success, in New South Wales (NSW), in Australia's first attempt to achieve 'open justice' through legislation. Despite unanimous parliamentary support, the Court Information Act 2010 (NSW) ('the Act') that attempted to make court records easily and consistently accessible appears unlikely ever to come into force, unless amended (Court Information Act 2010, NSW). The Act and its failure might be regarded as an experiment with regulating crime's archive.[5]

In her article 'In Crime's Archive', Biber puts the contemporary concept of 'open justice' into its broader cultural context:

> The socio-legal discourse of 'open justice' and the cultural-political discourse of 'transparency' have emerged concurrently with a broader cultural sensibility—one that has been called the 'archival turn', the 'archival impulse' and 'archive fever'. Whilst not precisely synonymous, these terms collectively acknowledge the process by which we create a fetish of the stored document and the repository in which it is stored. Institutions holding medical scientific collections, human remains and indigenous cultural heritage have already undergone long processes for the development of guidelines and frameworks for decision making about access, display and use of their collections. Elsewhere, public archives and collections oscillate between traditional policies of restriction and emerging missions of generosity; as collections move online, a new discursive idiom develops: 'generous interfaces', 'sharing abundantly', 'rich content', 'show everything'. Courts and legal archives have yet to resolve their processes for permitting post-trial access and use of their records. In the absence of any formal rules, guidelines or legislation permitting access to, and use of, criminal evidence, knowledge about decision making and actual use of this material is anecdotal and arbitrary.[6]

In the introduction to a recently published collection, *The Court as Archive*,[7] editors Genovese, Luker and Rubenstein highlight the competing legal, procedural and other imperatives at stake in relation to the principle of open justice:

> For example, while the principle of open court is well established in Australia, there is no common law right of access to court records. Significantly, court records are also exempt from the operation of the *Archives Act 1983* (Cth) ('*Archives Act*'), despite a recommendation to the contrary. The complex, inconsistent and restrictive regime governing public access to court records across Australian jurisdictions has attracted concern, and different kinds of

[5] Katherine Biber, "In Crime's Archive: The Cultural Afterlife of Criminal Evidence", 53(6) *British Journal of Criminology*, 2013, 1033-1049. References removed.
[6] Ibid. References removed.
[7] 'Introduction', Ann Genovese, Trish Luker and Kim Rubenstein (eds), *The Court as Archive* (ANU Press, 2019).

response, from public lawyers and scholars of court administration, the judiciary, government, and the media. In general, these responses argue that without the ability to meaningfully witness the judicial process, the operation of open justice — famously called the 'hallmark of the common law system' — is significantly curtailed, and the institutional legitimacy and public confidence held in these superior courts is compromised. The absence of public access to the records of 'public interest claims' under adjudication also has detrimental consequences for understanding the court's role in promoting the rule of law and judicial process, as well as societal norms and behavioural standards.

There are also procedural problems, perhaps less publicly debated, that complicate these questions. Court procedures designed to enhance the efficiency of judicial administration now commonly require evidence in chief by way of affidavit. Written submissions are filed without oral explanation and pleadings are not ordinarily read in full. Even meaningful public access to oral evidence is frequently now sought via the written record as few people now attend judicial proceedings, and the severe truncation of spoken evidence has made 'the adjudicative process less and less comprehensible to the person in the public gallery'. Similarly, substantive media and academic access has been curtailed, further limiting public access to information about courts' daily business. The complexity for courts of upholding their constitutional duties, and at the same time recognising the function the records play for the public (historical or otherwise), therefore speak to profound issues underpinning civics and citizenship in our own time. As civil law scholar Hazel Genn has explained, 'for civil justice to perform its public role — to cast its shadow — adjudication and public promulgation of decisions are critical'.[8]

Proposed questions:

- What is the relationship between the concepts 'open justice', 'transparency', and 'accountability'? What other concepts or principles are entangled in 'open justice'?

The archival responsibilities of courts

The principle question addressed in the research project leading to the publication of *The Court as Archive,* was 'what [does] it means for contemporary Australian superior courts of record not only to have constitutional and procedural duties to documents as a matter of law, but also to acknowledge obligations to care for those materials in a way that understands their public meaning and public value for the Australian people, in the past, in the present, and for the future'.[9]

[8] Ibid 9-11 (refs removed).
[9] Genovese, Luker, Rubenstein (eds), *The Court as Archive*, 1 (refs removed).

> Our questions circulated around superior courts of record as they have an institutional mandate to maintain a conclusive 'testimony of all that has taken place'. As a matter of common and constitutional law, courts of record can unmake and re-decide decisions that are otherwise determinative, and the 'record' of their own proceedings are limited by, and subject to, legal requirements. Superior courts of record are guided by the civil law principle of 'open court' that encourages the public to witness the court's functions to promote the rule of law, and so that justice can be seen to be done. Federal superior courts of record are also subject to other constitutional imperatives, such as the principle of separation of powers. However, they must also respond to competing legal imperatives that arise because of the diverse accrued national jurisdictions, notably the right of individual litigants to privacy; the need to respect Indigenous control of cultural knowledge; the maintenance of legal professional privilege; and the protection of copyright. These matters of jurisdiction carry deeper public law issues underlying the institutional role of federal superior courts of record that are civic, as well as constitutional. When resolving disputes between parties (whether between individual citizens or between a citizen and the state), a federal superior court of record inevitably has an impact beyond those parties, through the democratic values it espouses and pronounces, the methods of administrative and judicial decision-making undertaken, as well as its engagement as one arm of government in the overall constitutional make-up of the state. The documents produced by and for federal superior courts of record as a result of litigation, which must be recorded, clearly have significance beyond the resolution of disputes. They are also rich records of public interest and importance about the relationship between the individual and the state that are not readily accessible elsewhere, as the 'archival turn' across scholarship in legal history and theory has demonstrated. However, we were also aware, through our experience as researchers, that there is no comprehensive, national approach or principled framework to administer or recognise how the preservation of a court's document and records may also act as an archive of Australian jurisprudence, of Australian citizenship, and of Australian civic life.[10]

Proposed question:

Should courts be made subject to Commonwealth, state and territory archives legislation?

The principle of open justice and the rule of law

The following appears in an article under consideration for publication by Pam Stewart and Anita Stuhmcke:

[10] Genovese, Luker, Rubenstein (eds), *The Court as Archive*, 8-9 (refs removed).

The rule of law, that all members of a society are equally subject to publicly available legal codes and processes,[11] is an overarching principle of the Australian democratic system of government.[12] The rule of law is opposed to the exercise of arbitrary power. In Albert Venn Dicey's oft-cited formulation the rule of law 'excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government'.[13] This exclusion of arbitrary power is both aspirational and formal: aspirational as it is an ideal of justice and formal as the constitutional role of the courts is to hold the Executive to account and to act as a balance against legislative supremacy.[14]

The courts themselves are subject to both the aspiration and formality of the rule of law.[15] Open justice, a core principle of the common law,[16] renders judicial authority subject to, and limited by, the rule of law. In the English decision, *Scott v Scott* open justice is reverently described by Lord Shaw as '…a sound and very sacred part of the constitution of the country and the administration of justice'[17] and by Lord Atkinson as 'the best security for the pure, impartial and efficient administration of justice'.[18] The High Court confirmed these sentiments in *Dickason v Dickason*[19] and has since observed there to be 'a strong tradition of open justice that characterises the courts of this country'[20] and that '[T]he clear authority of this court, of other final courts and of other Australian courts lays consistent emphasis on the fact that the principle of open justice is deeply entrenched in our law.'[21]

The core principle of open justice is the open court rule. This maintains public confidence in the administration of justice by safeguarding against secrecy, allowing the public and the media access to courts. The fact that courts of law are held in public is 'one of the most pervasive axioms of the administration of justice in our legal system'[22] and is a long standing principle of common law systems.[23] The open court rule also ensures records of judicial decisions may be accessed by the public.

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[11] Geoffrey de Q Walker, *The rule of law: foundation of constitutional democracy* (Melbourne University Press, 1988).
[12] While its definition may be contested and varied it is part of the Commonwealth Constitution: *South Australia v Totani* (2010) 242 CLR 1 (French CJ) [42].
[13] AV Dicey, *Introduction to the Study of the Law of the Constitution* (Liberty Classics, 8th ed, 1982) 104–273. For further discussion see Mark D Walters, 'Dicey on Writing the Law of the Constitution' (2012) 32(1) *Oxford Journal of Legal Studies* 21. On the much earlier antecedents of the rule of law, see James Spigelman, 'Magna Carta: The Rule of Law and Liberty' (2015) 31(2) *Policy: A Journal of Public Policy and Ideas* 24 and Friedrich Hayek, 'The Origins of the Rule of Law' in *The Constitution of Liberty* (University of Chicago Press 1960), 162, attributing the concept to Aristotle; on political and philosophical foundations of the concept, see Judith Shklar, 'Political Theory and the Rule of Law' in Allan C Hutchinson and Patrick J Monahan (eds), *The Rule of Law: Ideal or Ideology* (Carswell, 1987) 1, ch 1.
[14] *Chu Kheng Lim v. Minister for Immigration* (1992), 176 CLR 1 (Brennan, Deane and Dawson JJ) [38].
[15] Writing some 50 years earlier than AV Dicey, Governor Forbes wrote of the NSW Supreme Court that '…the judicial office … stands uncontrolled and independent, and bowing to no power but the supremacy of law.' Cited in Murray Gleeson, 'Courts and the Rule of Law, *The Rule of Law Series* (Speech, 7 November 2001) <http://www.hcourt.gov.au/assets/publications/speeches/former-justices/gleesoncj/cj_ruleoflaw.htm#_edn13>.
[16] *Hogan v Hinch* (2011) 243 CLR 506; see generally Beverley McLachlin, '*Openness and the Rule of Law' (Annual International Rule of Law Lecture, 8 January 2014).* <https://www.barcouncil.org.uk/media/270848/jan_8_2014_-_12_pt._rule_of_law_-_annual_international_rule_of_law_lecture.pdf>; Right Honorable Beverley McLachlin, *The 21st Century Courts: Old Challenges and New*, April 28, 2006 (AIJA, 2006).
[17] *Scott v Scott* [1913] AC 417, 473 (Lord Shaw).
[18] Ibid, 463 (Lord Atkinson).
[19] (1913) 17 CLR 50.
[20] *X v Australian Prudential Regulation Authority* (2007) 226 CLR 630 (Kirby J) [89].
[21] *Application by the Chief Commissioner of Police (Vic), Re* (2005) 214 ALR 422 (Kirby J) [114].
[22] Justice Spigelman, 'Seen to be Done: The Principle of Open Justice' (Keynote address to the 31st Australian Legal Convention, 9 October 1999).
[23] Sir Edward Coke traced this to *Statute Of Marlborough* 1267, see Edward Coke, *The Second Part of Institutes of Law of England* (London 1642) 103-104.

However, the application of the open court rule, is limited by the concept of 'court' and 'open court'.[24] This removes administrative judicial functions.

It is with respect to judicial self-administration that legislative amendment becomes critical in managing judicial administration and the principles of the rule of law and open justice. One example of this is proposed in legislation in states such as in NSW, where the still not proclaimed *Court Information Act 2010* (NSW) would allow access to originating process, pleadings, written submissions, transcripts of open court proceedings, statements and affidavits admitted into evidence, record of judgment given and any direction or order made in proceedings. This is now discussed.

The Court Information Act 2010 (NSW)

In her article "Evidence from the Archive: Implementing the Court Information Act in NSW", Biber sets out the objectives of the Act:

> The Court Information Act 2010 (NSW), which (as of June 2011) has yet to be proclaimed is the result of reports and studies conducted by the New South Wales Law Reform Commission, the Supreme Court of New South Wales, and the New South Wales Attorney General's Department. It begins with the assumption that 'open justice' brings together the desirable qualities of accountability, transparency, free speech, and a public right to scrutinise court proceedings. Initially anticipated to respond to concerns from established media organisation, the reports and Act accommodate both the media and members of the public. Reports leading up to its enactment acknowledge that access needs to be balanced against legitimate reasons for restriction, which might include privacy, personal or sensitive information, improper use, and concerns about material of specific kinds, for instance video footage, police fact sheets, or malicious pleadings unsupported by admissible evidence. When the Bill was introduced into Parliament it received unanimous support.[25]

The 2010 Act has still not come into force (as of May 2019). In her 2011 article, Biber offered this account for the delay:

> The news media reported that commencement of the Act was delayed because 'its practical implementation [is] a needlessly difficult task'; 'court registries in NSW are already under immense pressure'; and the 'painstaking and time consuming job of redacting personal information on court documents' requires additional staff and funding, 'an expense that might easily have been spared had the legislation been properly drafted in the first place'.[26]

Biber's 2011 article sets out the schema of the Act:

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[24] *Russell v Russell; Farrellly v Farrelly* (1976) 9 ALR 103 (Gibbs J) 122 determined that the open court rule applied to state courts as per Chapter III of the Commonwealth Constitution referred to in *Williams v Williams* (1976) 134 CLR 495 (Stephen J) 532 (Barwick CJ) 505. Cited with approval in *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, (French CJ) [49] discussing state courts and the application of the open court principle.

[25] Katherine Biber, "Evidence from the Archive: Implementing the Court Information Act in NSW", 33(3) *Sydney Law Review*, 2011, 575-598. References removed

[26] Nicola Shaver, "How privacy hobbles push for open justice", *The Australian*, 3 June 2011, 33-34.

> Under the Act, 'open' information is available to anybody who requests it, and the Act defines what is 'open' in both criminal and civil proceedings. 'Restricted' information refers to everything else, and is available subject to the court's leave. There are also restrictions placed upon certain categories of information that would otherwise be 'open'; for example, where pleadings have been struck out, or where information is contained in a victim's impact statement, or letter of comfort, or proceedings on the voir dire. In determining whether to grant leave to access 'restricted' information, the court may consider a range of factors. Anything defined in the Act as 'personal identification information' is not available. This includes things like bank account numbers, passport and drivers licence numbers, and material of that sort. News media organisations, as defined, have much wider access to information than members of the public, except for parties to proceedings, who can access any court information relating to their proceedings, unless a court orders otherwise.
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> This new regime aims to create uniformity across all New South Wales jurisdictions, removing discretion from individual courts and registrars, and speeding up both access and decision-making where members of the public or journalists seek court information.[27]

Proposed questions:

- Should the Court Information Act 2010 (NSW) come into force? Does it require amendments before it commences?

Concepts of "sensitivity" and "dignity"

Biber's article, "Inside Jill Meagher's Handbag: Looking at open justice", examines in detail the process by which the Melbourne Magistrates' Court sought to respond to a media application for access to a significant amount of evidentiary material in the criminal proceedings against Adrian Bayley, charged with the September 2012 murder and sexual assault of Jill Meagher. The article highlights the difficulty of balancing open justice with other considerations. It also addresses some of the unintended consequences, including sensationalism and voyeurism, when open justice solely serves commercial media interests.

As a result of current practices in Australian open justice, commercial media agencies have accessed materials and released them publicly, as Biber explains:

> We can watch a man being killed by a drunk driver, we can read the private diary of a murder victim, we can watch chilling footage of a woman being

[27] Biber, "Evidence from the Archive", op cit,. References removed.

> dragged, [allegedly] to her death, by her fiancé, we can look inside a murder victim's handbag.[28]

To begin to distinguish between open justice and other objectives, Biber sets out the need for clarity about the language being used. She writes:

> "The language of 'transparency', 'secrecy' and 'openness' has become muddled in broader debates about disclosure and non-disclosure", creating confusion and alarm.[29]

She continues that it is important to ensure clarity in distinguishing between, for instance,

> [S]ecrecy, privacy, confidentiality, privilege, sensitivity, and other justifications for non-disclosure. Further, there are unclear distinctions between the forms of non-disclosure that are justified by the proper administration of justice, and those intended to protect individuals from humiliation, hurt, harm or a breach of trust.[30]

In the present Review, the Terms of Reference refer to concepts including privacy, confidentiality, public safety, national security, and commercial/business interests.

We propose giving greater attention to the concepts of "sensitivity" and "dignity", both of which are supported by emerging and relevant jurisprudence.

In "The cultural afterlife of criminal evidence",[31] Biber writes:

> New concepts are needed to strike a balance between disclosure and discretion, and the concepts of sensitivity and dignity have been proposed for their existing status within jurisprudence and their capacity to respond to complex entanglements of public and private information. Other scholars have proposed "contextual integrity" as a framework, recognizing that certain materials need to remain within their intended context to protect them from misuse or misinterpretation.

Expanding upon some of the nuanced scholarship into "contextual integrity" that attempts to manage sensitive information in the digital age, Biber describes the work of United States media and privacy scholar Helen Nissenbaum:

> In the work of Helen Nissenbaum, for instance, she distinguishes intrusions by certain (usually state) agents from intrusions into private or personal spaces, and also—relevantly—intrusions that arise 'when the information in question meets societal standards of intimacy, sensitivity or confidentiality'. By focusing upon the integrity of the information in its own context, Nissenbaum proposes that we can recognize 'norms of information flow' within that context and that

[28] Biber, "Inside Jill Meagher's Handbag", op cit, references removed.
[29] Ibid.
[30] Ibid
[31] Katherine Biber, "The Cultural Afterlife of Criminal Evidence", in N. Rafter and M. Brown (eds), *Oxford Research Encyclopedia of Criminology and Criminal Justice*, Oxford University Press, 2017, 427-439. Refs removed.

> privacy violations will occur where contextual informational norms are transgressed.[32]

We propose that the Review gives thought to the concept of "sensitivity" as a jurisprudential tool in managing non-party requests to access court and tribunal information. Biber sets out some of the current uses of the term 'sensitive' in Australian legislative and policy contexts:

> Ordinarily, the term 'sensitive' arises in the laws and processes relating to information management. Where information is held by government agencies, the principles of transparency, openness, and freedom of information sometimes give way to non-disclosure by reference to 'sensitivity'. The term does not apply with a consistent meaning. For example, the Australian Privacy Principles define 'sensitive information' as personal information which is also information about an individual's religious or ethnic origin, political opinions, religious or philosophical beliefs, sexual orientation, criminal record, health information, genetic or biometric information.
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> By contrast, under the federal Information Security Management Guidelines, there are several separate classifications for sensitive information: Sensitive, Sensitive: Personal, Sensitive: Legal, and Sensitive: Cabinet. Of these, only Sensitive: Personal aligns with the privacy provisions above. In NSW, 'sensitivity' applies to decision-making about access to health records; sensitivity arises where the records concern children, people with disabilities, people in unequal or dependent relationships, Aboriginal or Torres Strait Islander peoples, and people who are incarcerated, among others.[33]

Elsewhere, Biber expands on the legal potential for the term 'sensitivity':

> 'Sensitivity' is a concept recognized by the laws and practices dealing with information management. Where information is stored or governed by public agencies, rules and guidelines attempt to manage the flow of that data: between or within agencies, between agencies and individuals, across borders, or otherwise. In jurisdictions where freedom of information functions presumptively, there are limited categories which function as exceptions to this presumption of openness. Whilst terminology varies, in general, these exceptions include: privacy, personal information, health records, protected confidences, trade secrets, disclosures against the public interest or matters of national security. Where an exception applies, the information might not be disclosed, or it might be edited or redacted before disclosure. Usually, where information is disclosed, it must be disclosed unconditionally.
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> Whilst jurisdictions differ in their rules and their terminology, it is illustrative to see the operation of the concept 'sensitive' under several Australian legal instruments. For example, the soon-to-commence Australian Privacy Principles retain a distinction between 'sensitive information' and 'personal

[32] Biber, "In Crime's Archive", op cit, references removed.
[33] Biber, "Inside Jill Meagher's Handbag", op cit. References removed.

information'; 'sensitive information' is personal information that is also information or an opinion about an individual's: racial or ethnic origin; political opinions; membership of a political association; religious beliefs or affiliations; philosophical beliefs; membership of a professional or trade association; membership of a trade union; sexual preferences or practices (soon to be replaced with 'sexual orientation or practices'); criminal record; or health information; genetic information; biometric information or biometric templates (currently Privacy Act 1998 (Cth), Schedule 3). Under the Australian Government's Information Security Management Guidelines, information in need of increased security may be subject to dissemination limiting markers (DLM), specifying disclosure restraints or special handling. Five categories of DLM are used: For Official Use Only; Sensitive; Sensitive: Personal; Sensitive: Legal; and Sensitive: Cabinet. Where information is marked 'Sensitive: Personal', the definition of 'sensitive' aligns with that in the privacy provisions, above (Australian Government 2011).

In NSW, 'sensitivity' operates as a factor when weighing the public interest in the disclosure of health records in the context of health research. For example, information may be 'of a particularly personal or sensitive nature' if it involves: children or young people; persons with intellectual or psychiatric disability; persons highly dependent on medical care; persons in dependent or unequal relationships; persons who are members of collectivities; Aboriginal or Torres Strait Islander peoples; persons whose information relates to their mental or sexual health; or persons who are incarcerated (Health Records and Information Privacy Act 2002 (NSW), Guideline 4.4(d)). Other Australian jurisdictions have similar or analogous provisions, and these are found in instruments governing 'privacy' or 'information privacy'.

It is evident that, whilst the concept of 'sensitivity' is recognized by law, it is a limited one and, contrary to ordinary understandings of the word 'sensitive', it attempts to be sensitive only to considerations within a limited list. I propose that a jurisprudence of sensitivity places pressure upon the existing legal concept of 'sensitivity' in order to bring it within the broader ambit of a sensory jurisprudence; that is, a jurisprudence connected with the senses, perceptible by the senses, endowed with the faculty of sensation; a jurisprudence that feels quickly and acutely. Listing what is 'sensitive' is an intellectual undertaking; recognizing what is 'sensitive' demands feeling something. A jurisprudence of sensitivity recognizes sensibilities, emotions and harm. It acknowledges the special susceptibility of some individuals, especially those whose context or experience makes them vulnerable in some circumstances. It recognizes that certain materials require special care, delicate handling, tact (derived in part from Oxford English Dictionary, 2000–).[34]

[34] Biber, "In Crime's Archive", op cit.

We further propose that the Review gives additional consideration to the concept of "dignity" as a jurisprudential tool for decision-making about access by non-parties to court and tribunal information.

In post-apartheid South Africa, the principle of open justice is constitutionally enmeshed with the aspiration to human dignity. The difficulty of sustaining both principles concurrently was clearly visible in the trial of Oscar Pistorius for the murder of Reeva Steenkamp.[35] In her article "Dignity in the digital age: Broadcasting the Oscar Pistorius trial" Biber examined in detail the media practices of the digital age, which further highlighted the challenges of achieving open justice in an environment in which court information is a valuable commodity for media corporations. The Pistorius trial revealed starkly the misalignment between the objectives of democratic institutions and those of commercial entities. In the context of contemporary South Africa, it showed how transparency and accountability – both vital principles for open justice – need to be balanced with human dignity, equality and freedom.

Biber explains the difficulties South African courts currently face, attempting to balance open justice with other constitutional principles. Writing about the media application in the Pistorius case:

> The media application was adjudicated in *Multichoice (Proprietary) Ltd v National Prosecuting Authority, In Re: S v Pistorius* (2014), with other applicants including Combined Artistic Productions CC, Primedia Broadcasting (a division of Primedia (Pty) Ltd), Media 24 Limited, Times Media Group Limited and Independent News and Media Limited. Together, the applicants represented corporations across the media spectrum: radio, newspapers, magazines, news production, television production, pay-television, internet subscription platforms and digital content publishers.
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> The media application was articulated through constitutional arguments asserting the right to freedom of expression. The South African Constitution guarantees freedom of expression, which includes the freedom of the press and other media, and also the freedom to receive and disseminate ideas and information (Constitution of the Republic of South Africa, 1996: s. 16; *Multichoice*, 2014: [6]). The Constitutional Court has given wide scope to the right to freedom of expression, finding that it 'lies at the heart of a democracy' and is 'a guarantor of democracy' (*South African National Defence Union v Minister of Defence and Another* 1999 (4) SA 469 (CC): [7]). The freedom is implicit in recognising and protecting 'the moral agency of individuals' and in facilitating 'the search for truth'; it enables citizens to 'hear, form and express views freely on a wide range of matters' (*South African National Defence Union v Minister of Defence and Another*, 1999: [7]). Recent jurisprudence gives rise to legitimate concerns, however, that freedom of expression has come to dominate other principles, including dignity and privacy, with the effect that

[35] Katherine Biber ,"Dignity in the Digital Age: Broadcasting the Oscar Pistorius trial", *Crime, Media, Culture*, 2018 (published Online First 20 June 2018).

> commercial media interests will inevitably, constitutionally, outstrip matters of humanity, compassion, respect and integrity. As a recent South African court stated, 'the right of the public to be informed is one of the rights underpinned by the value of human dignity' (*The NDPP v Media 24 Limited & others and HC van Breda v Media 24 Limited & others*, 2017: [16]). The tethering of human dignity to commercial media agencies might explain why South African courts now regard the demands made by open justice as 'uncharted constitutional territory'(*The NDPP v Media 24 Limited & others and HC van Breda v Media 24 Limited & others,* 2017: [8]).[36]

Acknowledging the difficulty of balancing the competing interests at stake, Biber wrote:

> The judge presiding over the media application was Judge President Dunstan Mlambo. In *Multichoice*, Mlambo made clear from the opening paragraph of his judgment that his decision would be guided by foundational constitutional principles: the various rights of the accused person, the obligations of the prosecution, the rights of the media and the principles of open justice. He described these as 'critical constitutional rights that are seemingly on a collision course with one another' (*Multichoice*, 2014: [1]).[37]

Proposed questions:

- Should consideration be given to using the concepts of 'sensitivity' and 'dignity' in decision-making about open justice?

The digital age

In the context of accusations that Pistorius' was a 'trial by media', Biber's article sets out in close detail the efforts to which the court and counsel went to manage media applications, media concerns and media demands, and also the extent to which media matters impacted events within the courtroom.

Biber described some of the challenges in reconciling traditional understandings of open justice with the rapid advances of the digital age. In the context of the live broadcast of the trial of Oscar Pistorius, she write[38]:

> Technologies of media production remain mostly at odds with the techniques of the criminal trial, which is characterised by lengthy oral submissions, motionless personnel, disjointed narratives, delays and arcane, awkward legal terminology. Traditionally, open justice has relied upon the expectation that the citizen makes the effort to attend court, observe its rituals and follow its processes. For those who make that effort, the brief moments of visceral,

[36] Ibid.
[37] Ibid.
[38] Ibid.

> traumatic or true emotion are all the more poignant for the extended formality and prolixity that surrounds them. In traditional open justice regimes, dignity is maintained by only sharing intimate, humiliating or personal facts with those citizens who did make the effort to attend. By live broadcasting the trial, and offering these sensitive details to an infinite global audience of strangers, there is no expectation of sustained attention, and no demand that the viewer sees a courtroom incident in the time consuming context of all of the evidence. Viewers can switch the trial on and off, tune in for highlights, avoid complexity and rely upon sensational commentary. The decision to live broadcast the trial did nothing to address the court's concerns about poor media practices, and it remains difficult to see why improving sloppy journalism should be a responsibility of the criminal justice system.[39]

The digital age, marked by new media technologies, poses new and rapidly-shifting challenges to existing debates about open justice: cameras in courtrooms, media portrayals of criminal justice, voyeurism, sensationalism and misinformation.[40]

Specific risks and opportunities arise for the administration of justice when court information is made electronic, searchable, and available online. Some of these are detailed in scholarship by United States privacy expert Peter A. Winn.[41] In particular he points to the "practical obscurity" that is afforded by paper records, providing a "default privacy benefit" when sensitive information is negligently or improperly disclosed. In the digital age, Winn cautions, additional safeguards are needed to protect privacy and preserve the proper administration of justice.

Proposed questions:

- Do the technological affordances of the digital age require different or additional considerations in decision-making about open justice?

Access to NSW Administrative Decisions – Publication of Tribunal Reasons for Decision

This section addresses the publication of reasons for decisions within Tribunals and administrative decision-making bodies. A number of NSW tribunals publish only a small fraction of their reasons for decisions, even in cases where reasons for decisions are de-identified and anonymised. Decisions published often reflect a small portion of work done by a particular administrative tribunal and of the cases that come before it.

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[39] Ibid, References removed.
[40] Yvonne Jewkes, *Media and Crime*, 3rd ed, London, Sage, 2015; Yvonne Jewkes and Travis Linnemann, *Media and Crime in the U.S.*, Thousand Oaks, Sage, 2018; Richard Sherwin, *When Law Goes Pop: The Vanishing Line Between Law and Popular Culture*, Chicago, University of Chicago Press, 2000; Richard Sherwin, *Visualizing Law in the Age of the Digital Baroque*, London, Routledge, 2011.
[41] Peter A. Winn, "Online Court Records: Balancing Judicial Accountability and Privacy in an Age of Electronic Information", *Washington Law Review*, Vol. 79, No. 1, 2004; Peter A. Winn, "Judicial Information Management in an Electronic Age: Old Standards, New Challenges", *Federal Courts Law Review,* 2009.

There are clear policy reasons for limiting the number of published decisions, including but not limited to the sheer volume of decision-making conducted by most tribunals; policy reasons against non-anonymised publication; and in some circumstances, the resources required to prepare decisions for release through de-identification or anonymisation processes. However, the percentage of decisions released and the basis for release of particular Tribunal decisions are frequently inconsistent, may vary from year to year, and the criteria for the selection of certain decisions to be made public are either not disclosed, or explained in broad and opaque terms. The Inquiry may wish to consider and compare policies for the release of reasons for decisions across NSW Tribunals. Even a basic outlining of existing (and inconsistent) approaches would be a constructive exercise before embarking on the more difficult question of what 'open justice', or indeed justice and accountability more generally, might require.

By way of a short case study, the NSW Civil and Administrative Tribunal, publishes 'a selection of written decisions … [whereby] NCAT's President or Divisional Heads select decisions for publication which are likely to be of public interest or useful as an educational tool'.[42] *NCAT Policy 2* outlines the policy governing the publication of decisions and notes that, 'because of the diversity of the jurisdictions exercised by the Divisions and the Appeal Panel, each of them takes a somewhat different approach to the publication of decisions.'[43] That is, even within a single Tribunal different divisions take a variety of approaches to publication.

At times this discretion within the NCAT is exercised in favour of 'routine publication' (though what amounts to 'routine' is not defined), save for where orders prohibiting or restricting publication apply.[44] This approach – of routine publication – is taken in the Occupational Division and the Administrative and Equal Opportunity Division.

However, publication policy in other divisions favours non-publication. The Guardianship Division and the Consumer and Commercial divisions, by contrast, do not routinely publish written reasons for decisions.[45] However, 'significant decisions concerning particular aspects of the Division's jurisdiction and decisions … which represent the majority of applications before the Division are published.' [46]

Decisions as to which decisions are 'significant' or 'representative' are made by the Division Head, and no further explanation is provided as to how particular decisions are selected.[47] While the Guardianship Division presides over sensitive matters, and a range of factors must be balanced in determining whether de-identified publication is 'in the public interest', the policy approach itself is vague and

[42] NSW Civil and Administrative Tribunal, *Published Decisions* <https://www.ncat.nsw.gov.au/Pages/ncat_decisions/published_decisions.aspx>
[43] NSW Civil and Administrative Tribunal, *NCAT Policy 2, Publishing Reasons for Decisions* (March 2018) <https://www.ncat.nsw.gov.au/Documents/ncat_policy_publishing_reasons_for_decisions.pdf>.
[44] *Civil and Administrative Tribunal Act 2013* (NSW), s 64.
[45] Ibid, 3.
[46] Ibid, 4.
[47] Ibid, 4.

inscrutable. As well, the extent of publication, and reasons for publication of particular decisions, is not addressed in the policy document.

While consistency across divisions and Tribunals is not always appropriate, a baseline of transparency around publication would enhance accountability and the ability to research and review Tribunal decision-making. By way of further example, see the publication policy of the Mental Health Review Tribunal whereby anonymised 'official reports' of the reasons for decisions are released if 'a case has broader significance.' In 2018, only four reports were published on the Tribunal's website.[48]

The above approaches limits and undermines the availability of 'open justice' in regards to administrative decision-making bodies. Limited and inconsistent publication of decisions also has a negative impact on academics, policy-makers and experts conducting research into the work of either specialist or general Tribunals.

Where the exact criteria by which decisions are selected for publication are unavailable, and only a small fraction of decisions are released, the ability to conduct representative, useful or meaningful research into the nature, outcome or decision-making practices of Tribunal work and matters is hindered. In some cases, there is no access to the nature of work conducted by tribunals and decision outcomes, beyond top-level description provided in annual reports.

Standardised, wider, consistent and more transparent policies of decision release would go some way to improving the accountability and transparency within Tribunals, and would also enable valuable research to be conducted into matters of administrative justice, both in relation to or across administrative decision-making bodies.

Other parts of these submissions address the challenges of accessing court decisions and transcripts on 'an application'. Provisions for access on application exist under the NCAT Rules,[49] and within other tribunals. Similar challenges to those associated with accessing court documents such as cost, inconsistency in decision-making, and resource intensity, apply to accessing Tribunal decisions on application. There may be circumstances where 'on application' release remains the most appropriate approach, however is may be worthwhile considering how such applications are managed; particular Tribunals' application of internals rules and the interaction of these processes with the *Government Information (Public Access) Act 2009* (NSW).

Proposed questions:

- In which NSW Tribunals should there be a presumption in favour of publication of reasons for decisions? Could this presumption be facilitated by, where necessary, de-identifying decisions and excluding decisions subject to prohibition or non-disclosure orders?

[48] Mental Health Review Tribunal, *Official Reports of Proceedings* < https://www.mhrt.nsw.gov.au/the-tribunal/official-reports.html>. Only two of these four are available on Austlii.
[49] Civil and Administrative Tribunal Rules 2014 (NSW), r 42.

- Where there is not a presumption in favour of publication, should there be a requirement that a 'minimum' percentage of reasons for decisions be published each year? Could allocation of resources for publication mitigate the cost of providing decisions on application?
- Where there are policy reasons for limiting publication of reasons, what criteria should govern the release of certain decisions? At a very minimum, should selection criteria be stipulated beyond a general standard such as release being 'in the public interest'?
- Where release of decisions is undertaken by way of application, should scholars and legal researchers have a presumption in favour of release of, or access to, decisions and/or a waiver of costs?

Open justice for scholars and researchers

For legal scholars, the principles of open justice offer the possibility of accessing court and tribunal information for the purposes of legal research. However, at present, our experiences in using open justice processes to access this information for research purposes have been mixed. Most jurisdictions have provisions for non-parties to seek to access court information. Whilst different processes operating in different jurisdictions involve foreseeable inconvenience for legal researchers, this has been compounded by discretionary and inconsistent decision-making, time-consuming decision-making and, in some jurisdictions, commercialisation of court transcription services. Furthermore, in most jurisdictions, legal researchers are regarded as ordinary members of the public, without any specific interest in – or right to – court and tribunal information. Legal researchers, unlike media agencies and their representatives, typically do not have standing to appear in court to defend their request to access court information. The media is a privileged non-party when it comes to attempting to access court information.

Biber sets out some of the distinctions in the way open justice operates across Australian jurisdictions. She also sets out the manner in which media agencies are treated differently from others seeking access, including legal scholars.

> It is worth knowing that the principles of open justice also apply to scholars seeking access to court materials. I was only able to obtain access to [Adrian] Bayley's committal proceedings after making my own application to the court. In Victoria, in the Magistrates' Court, the media can make applications for access to materials under the Principal Registrar's Practice Direction No 7 of 2013, and the decision will be made by the presiding magistrate. Non-parties (other than the media) must make their application to the Chief Magistrate, who determines applications under the Magistrates' Court Audio Recording Protocols, and who may impose conditions to their decision. However non-parties (including scholarly researchers) will only be able to access either transcripts or audio recordings of the proceedings. Non-parties are not permitted to access any other materials from the court file. Audio recordings,

if permission for access is granted, cost $55 per day. By way of comparison, in New South Wales, access to court files is governed by common law, court rules and practice notes. Attempts to provide statutory clarity — and a significantly more 'open' regime — failed; the Court Information Act 2010 (NSW), although it had bipartisan support, has never been proclaimed.

Currently in NSW, open justice is a principle and not a right, and there is no right for non-parties to access court records. Nevertheless, in NSW many legal instruments emphasise that open justice must apply, and provide presumptions in favour of openness and disclosure. The NSW Court of Appeal has said that 'the administration of justice must take place in open court', and that this is especially so in criminal proceedings. In civil cases, applications for access by the media require open justice to be balanced against the interests of the parties; in *Australian Securities and Investments Commission v Rich* (2001), Austin J set out the considerations which weigh against the principle of open justice, and which include 'prematurity, in the sense that the evidence has not been tested', the danger of 'trial by media', the need to weigh legitimate public interests against 'the urges of prurience', 'surprise or ambush', commercial confidences, and the potential abuse of the fair reporting privilege at s.27 of the Defamation Act 2005 (NSW).

In the NSW Supreme and Districts Courts, practice notes create a presumption of access by non-parties for certain types of materials (pleadings and judgments in concluded proceedings, documents recording what was said in open court, material admitted into evidence, information that would have been seen or heard in open court), unless a judge or registrar determines it should not be available. All other materials are not accessible unless there are exceptional circumstances.

Dawson and Roughley write that, while the practice notes assume that access applications will be made to the registrar on the relevant template, '[i]n practice, applications are often made to the trial judge with varying degrees of success'. What varies may be the decision (yes/no), the types of material to which access is granted, or whether access permits the materials to be copied, or merely inspected. In my own research, I sought access to a NSW Supreme Court file in which media access to evidence in a murder case might have been considered. I made my application, and some time later received a telephone call with the result. I was permitted to view a transcript of a small part of the proceedings, I could inspect it in the Supreme Court Registry, and there was no cost. When I went to view the materials, I could see that the Registrar had sought the opinion of the judge, who had responded 'I have no objection to access'. My access had been granted under Uniform Civil Procedure Rule 36.12. As a non-party, it seemed evident that the Registrar had determined that I was 'any other person appearing to have a sufficient interest in the proceedings'.

In contrast, applications to courts in Queensland follow a different process. I sought access to transcripts in two cases; the decision about media access to

Allison Baden-Clay's diary, and the decision to release the photographs from the crime scene where baby twins died of starvation. In Queensland, access to exhibits is determined by the court, on application, and upon payment of a fee. However, access to transcripts is determined by Auscript, the corporation that provides transcription services to Queensland courts. Auscript provides transcripts for a fee. I was quoted fees for transcripts of two days' hearings. Each day's transcripts averaged at a cost of $1526.58, including GST. Despite my explanation that I was undertaking scholarly research into open justice and that the costs were disproportionate to those of other Australian jurisdictions, Registry staff informed me that there were no exceptions. On its website, Auscript advertises its corporate values and vision:

> Our Culture: Totally Client and Quality focused and as a result 'easy to do business with'.
>
> Our Daily Mantra: 'Quality delivered on time, every time.'

In a context where private corporations are increasingly contracted to provide formerly-public services, these private providers are not necessarily subject to the same disclosure requirements as state agencies, creating a barrier to 'open' justice. There seems an implicit irony in the realisation that 'open justice' is available to media organisations that, in exchange for a fee to the court, have the opportunity to make arguments before a judge justifying their application. However, at least in Queensland, scholars seeking to study and scrutinise 'open justice' have no opportunity to present arguments in support of their applications, and are nevertheless compelled to pay their fees to a corporation. Recently in NSW, legislative amendments have also restricted the ability of bloggers and other informal 'media' from reporting from courtrooms, further limiting the ability of non-parties who are also regarded as non-media to scrutinise court proceedings. The most accessible jurisdiction in this respect is the High Court of Australia, with transcripts, current case submissions, and now audio-visual recordings of Full Court hearings freely accessible on their website. In the Northern Territory, South Australia, the Australian Capital Territory and Tasmania relatively informal non-party access regimes operate; in Western Australia a detailed administrative process operates.[50]

Proposed questions:

- Should legal scholars and researchers have specific standing when requesting access to court and tribunal information for the purpose of scholarly research?
- Should this standing include scholars and researchers in disciplines other than law?

[50] "Inside Jill Meagher's Handbag", op cit.. References removed.

Access to transcripts of proceedings and other court materials

For legal scholars, as for historians, criminologists, social researchers and other scholars, access to transcripts of court proceedings, and other court materials, is a valuable, and often crucial, source of data. Across all areas of legal doctrine, and in all jurisdictions, court transcripts in particular are an invaluable and rich resource enabling the detailed analysis of the legal process, legal argument, examination of witnesses, judicial comments and directions. These transcripts are not ordinarily accessible on legal databases and websites such as AustLII, therefore the scholar must apply directly to the court or tribunal for access to transcript.

For University-based scholars, all research is conducted under the supervision of an Ethics secretariat or committee. This ensures that University-based scholars are required to conduct research in a manner that conforms with legal obligations, ethical duties and any sensitivities arising from the vulnerabilities or sensitivities of those who are the subjects of the research. The Ethics process forces scholars to consider and confront ethical issues that relate to accessing court materials, including the fact that court files, transcripts, witness statements and records of interview may contain personal, embarrassing, distressing, and/or harmful information, some of which may be damaging to a person's reputation or dignity. The Ethics process ensure that scholars consider, devise and use adequate precautions to minimise or prevent any risks. In this way, the university ethics process acts as an additional safeguard that applies to academic researchers, while also playing a gatekeeper role in relation to potentially unethical research.

Access to coronial documents

There is particularly uneven accessibility by the public and scholars alike to documents in coronial inquiries. The availability of findings on state and territory coronial databases is patchy and transcripts are routinely unavailable. Leaving the latter aside, and having consideration to sensitivity issues above, there is an importance in making coronial findings and recommendations publicly available. They can provide significant input into the development of public policy and legislation, particularly with regard to reform processes in such areas as the health system, aged care, custodial settings and disability service providers. Coronial inquests are also especially important for researchers analyzing the impacts of the law and avenues for law reform. The lack of systemic analyses of coronial findings and recommendations results in a reinventing of the wheel. Families of deceased are made to champion reforms in their isolated cases without the benefit of insight into the patterns of death causation. Moreover, coronial findings frame the background context into which a formal legal findings of responsibility are made, which is critical for nuanced research.

Proposed questions:

- Is there capacity for a procedure to routinely ensure coronial recommendations and findings across Australian jurisdictions are made publicly available?
- If so, in what form?
- What role should families play in this process?

Barriers for scholars accessing court materials

For many scholars, the barriers to accessing court transcripts and court materials – including insurmountable barriers of cost, and unclear, inconsistent and lengthy applications procedures – have prevented them from using transcripts and other court materials as a reliable and accessible source of data about what happens during litigation.

The issue of access to court records for scholarly investigation is a source of practical frustration for many researchers. Genovese, Luker and Rubenstein point out that it was this sense of shared frustration that was the impetus for their project leading to the publication of *The Court as Archive*.

> This collection began its life in a prosaic manner: from a sense of practical frustration, unique perhaps to scholars who work with documents generated and located in courts, with the difficulties that occur in attempting to access these rich materials. These difficulties, although neither uniform across jurisdictions or academic pursuits, nor new, are strikingly similar when scholars step back from their research to share with each other experiences of restriction and inaccessibility of court materials, and the implications of these experiences on their research.
>
> The difficulties of access to court material emerged as a common theme in the CIPL [Centre for International and Public Law] workshop. Each of the presenters had encountered roadblocks in scholarly research due to a lack of access to key material held by the court. For example, Trish Luker, who had completed a PhD on the Stolen Generations case Cubillo v The Commonwealth, and Kim Rubenstein, in seeking the transcript of the David Hicks Federal Court matter concerning questions of citizenship. Whether it be transcripts of evidence, submissions of parties or a range of other material that could help enlighten our respective research, we had all been interested to draw insights from the court experience around the ways that individual citizens had challenged the exercise of state power within the judicial context and what that may mean in a range of scholarly interventions.[51]

In her earlier research leading to a PhD, Luker describes her experience of attempting to gain access to the transcript of trial for a Federal Court case:

[51] Genovese, Luker, Rubenstein (eds), *The Court as Archive*, 2 (refs removed).

> My own experience of efforts to obtain access to the transcript of trial for *Cubillo*—the key archival source of evidence for any legal dispute—is testament to the law's failure, indeed resistance, to critical appraisal of evidentiary matters. My initial request for permission to access the transcript of some 7000 pages was granted by Justice O'Loughlin. However, neither the Darwin nor Melbourne registries of the Federal Court claimed to have a copy of the document. I was referred to transcription services Auscript, and Spark and Cannon, which, I was informed, owned copyright. It is important to point out that while transcription services had previously been part of the public sector, in many jurisdictions, this essential aspect of legal proceeding is now in private hands. When I enquired as to the cost of obtaining a copy of the transcript from these services based in Darwin and South Australia, I was quoted between $6.89–8.50 per page, which would have resulted in a cost of over $50,000![52]

There are other instances of legal scholars at the UTS Faculty of Law have been quoted exorbitant fees for access to transcripts, reasons for judgment or other court materials. These include 'photocopying' fees reaching into four and even five figures, in instances where materials could have been emailed to the scholar (and thus, no photocopying need have taken place). In other instances, scholars have been charged costly 'transcription fees' where court hearings have already been transcribed and a typed version is readily available; this dramatically increases the cost to the researcher in accessing the document. These costs serve as a barrier to legal research, particularly for early-career research scholars and PhD students who are less likely to have access to adequate funding for their research. Where scholars have access to research funding, this is primarily provided by state and federal research funding agencies. To expect that researchers will expend public research funds to access materials from public agencies, including courts, is not an efficient use of public resources.

Legal scholars at UTS have also experienced vastly varying approaches by court registrars, court associates and other court staff when answering requests for legal material. Some court staff have required the scholar to complete forms and write letters to the presiding judicial officer seeking access; for others, a concise email will suffice. Response times in relation to access requests have also ranged from several minutes to several months. In some cases, requests for access to court materials have been refused with insufficient reasoning provided to scholars as to why such refusal has been given.

An issue relating to the exorbitant costs charged, and inconsistent approaches given to access to court materials, is the licensing agreements that some courts have with private transcription companies (e.g. Auscript). For example, in one instance, Auscript quoted a junior legal academic $77.50 for the first 8 pages of a trial transcript (the 2010 matter of *R v Patel*), and $9.60 per additional page. This amounted to a total cost of approximately $31,900 for the transcript of a 58 day trial

[52] Trish Luker, 'The Rhetoric of Reconciliation: Evidence and Judicial Subjectivity in *Cubillo v Commonweath*' (PhD thesis, 2006) 33.

of Dr Jayant Patel – a prominent Queensland court case in relation to medical negligence and manslaughter. This amount was patently unaffordable for the PhD researcher, and as a result, they were not provided access to court materials that were essential to their consideration of the criminal law doctrine relating to medical negligence and manslaughter. This is clearly undesirable. It is therefore vital that if courts enter into licensing agreements with private transcription companies, that such agreements make exceptions for legal scholars so that they are able to access and scrutinise court proceedings.

In order to ensure that our law and the legal system is subjected to vigorous and robust critique from legal experts, we believe that legal scholars are in a special category of the community that gives them specific standing to access court materials. Subject to certain considerations (outlined below) legal researchers should be afforded cheap and expedient access to primary court materials. In addition, courts should work towards adopting a uniform approach to providing access which facilitates these aims. As the Full Federal Court expressed in *R v Davis*[53] (in that case with respect to the media)

> exposure to public scrutiny is the surest safeguard against any risk of the courts abusing their considerable powers. As few members of the public have the time, or even the inclination, to attend courts in person, in a practical sense this principle demands that the media be free to report what goes on in them.

In addition, Santow J acknowledged in the Supreme Court of NSW that for justice to be done 'justice must be visible and its processes transparent.'[54] Justice Santow also recognised the desirability of the media having access to court transcripts in circumstances where they have not been able to attend and observe the court proceedings in person. Justice Santow agreed with Harper J who said, in granting access to a transcript, that is preferable that they have recourse to the transcript as an accurate and official record of what has occurred, and 'undesirable that the media rely on the parties for information about the case. Indeed, the ethical rules by which the legal representatives of the parties are bound inhibits them from providing to the media all the information in which the media is likely to be interested.'[55] We argue that these concepts apply equally to legal scholars, who must be afforded access to official court records to 'promote accuracy', while also promoting 'transparency in the administration of justice'.[56] This is *not* to say that expedient access to court materials should *always* be granted by the courts to legal researchers. In some cases, considerations relating to factors such as avoiding injustice, breaches of confidentiality, questions of public interest immunity, and unfair prejudice, particularly where a trial has not yet completed, may mean that access should not be granted, or otherwise, that access should be partially granted,

[53] (1995) 57 FCR 512, 514.
[54] *eisa Limited v Damien Brady and 2 Ors* [2000] NSWSC 929 (28 September 2000) (Santow J) [16].
[55] *Linter Group Ltd (in liq) v Price Waterhouse* ([2000] VSC 90, Harper J, 20 March 2000, unreported) quoted by Santow J in *eisa Limited v Damien Brady and 2 Ors* [2000] NSWSC 929 (28 September 2000) [23].
[56] *Linter Group Ltd (in liq) v Price Waterhouse* ([2000] VSC 90, Harper J, 20 March 2000, unreported) quoted by Santow J in *eisa Limited v Damien Brady and 2 Ors* [2000] NSWSC 929 (28 September 2000) [23].

may be delayed, or the court may place limits on how the material may be used. However, it is suggested that courts develop a transparent, uniform process with clear guiding principles that inform their consideration of requests to access court materials, and that such guidelines recognise legal scholars as having special standing in relation to requests to access court materials.

Proposed questions:

- Should legal scholars and researchers have access to court and tribunal transcripts for the purpose of scholarly research? Where court or tribunal proceedings have already been transcribed or audio-recorded, should scholars have access to transcripts and/or recordings without cost?
- Should this access be available to scholars and researchers in disciplines other than law?