

# OPEN JUSTICE

## Survey results

# 16

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New South Wales  
Law Reform Commission

RESEARCH  
REPORT

May 2022

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# 1. Introduction

## In Brief

The NSW Law Reform Commission has reviewed the laws relating to open justice in courts and tribunals. We conducted an online survey to encourage wide public participation in the review.

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- 1.1 The NSW Law Reform Commission is an independent statutory body that provides independent, expert law reform advice to the Government on matters referred by the Attorney General.
- 1.2 On 27 February 2019, the Attorney General asked us to review and report on the laws relating to open justice in courts and tribunals.
- 1.3 As part of the review, we conducted an online survey. We wanted to encourage people who otherwise might not participate in the law reform process to have their say about issues relating to open justice.
- 1.4 To achieve this, we developed an online response form (the “survey”) using SurveyMonkey. This gave people a quick and easy way to participate in our review, without having to prepare a formal submission.
- 1.5 The questions focused on key issues concerning open justice. These included:
  - when courts should be closed to the public
  - when information should be kept from the public
  - what information about a case the media should be able to access, and
  - how social media use in the courtroom should be regulated.
- 1.6 The survey opened on 22 March 2021 and closed on 29 June 2021. We received 189 responses. The survey is reproduced in the appendix to this report.

# Methodology

## Survey design

- 1.7 The survey contained 28 questions, including demographic questions. The only compulsory question was question 1: “Would you like your answers to be confidential?”. The option to request confidentiality was designed to encourage people to share their views on open justice.
- 1.8 Some respondents chose not to answer some questions. Some respondents did not answer some questions because they had been automatically directed to a later section of the survey. For example, those who answered “no” to question 21 (“If there was an online portal with key information about NSW court cases, would you be likely to access this?”) automatically skipped question 22 (“What types of cases you would be interested in knowing about?”).
- 1.9 The survey included a mix of question types:
  - Rating scale questions, which displayed a scale of answer options from 1 to 10. The respondent selected the number that most accurately represented their response.
  - Multiple choice questions, which allowed respondents to select one or more options from a list of answers.
  - Open-ended questions, which allowed respondents to provide an answer in their own words.
- 1.10 For some closed questions, respondents could provide additional comments. Some of these comments have been summarised in this research report.

## Data collection

- 1.11 We advertised the survey widely, including through our website, mailing list, on Twitter and on Facebook. We also sent an email with a link to the survey to stakeholders who we thought would be interested in our review.
- 1.12 We “boosted” a Facebook post about the survey to reach more people (including people who previously did not follow us on Facebook). The boost targeted people over 18 years old and who live in NSW.
- 1.13 The majority of respondents (184) accessed our survey via our website, mailing list or the targeted email campaign. Four respondents accessed the survey through Facebook and one respondent accessed it through Twitter.

## Demographics of survey respondents

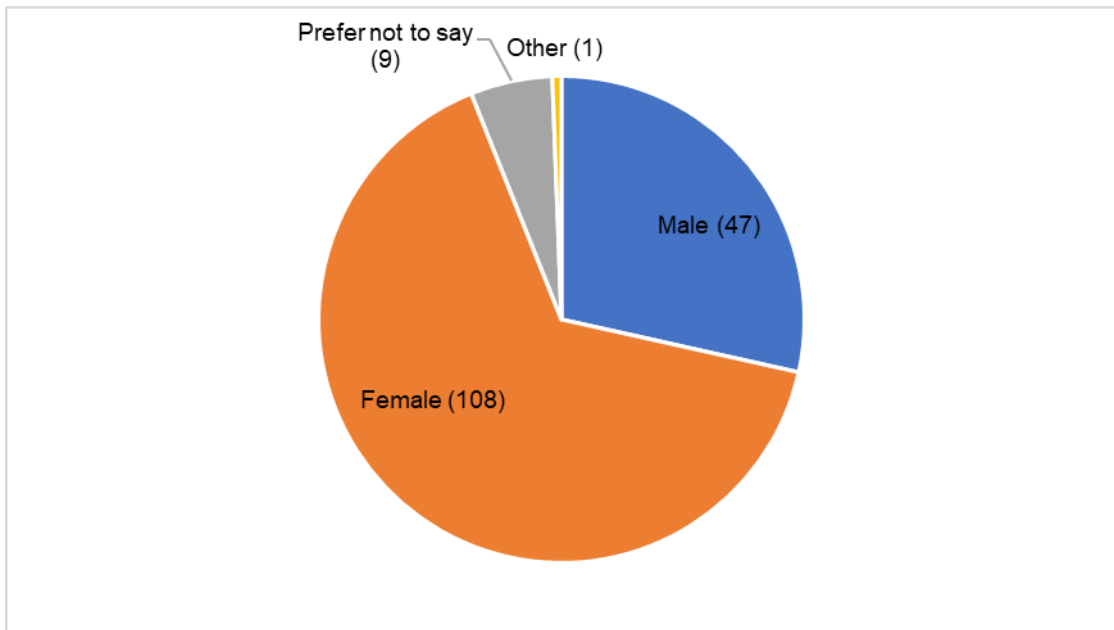
- 1.14 We asked demographic survey questions to gain insights into our survey respondents.



### Gender identity

- 1.15 Of the 189 respondents to the survey, 165 reported their gender identity. Of these, most (65.45%) said they identified as female.
- 1.16 Nine respondents preferred not to specify their gender identity. One respondent chose the “other” option.

Figure 1.1: Gender identity of respondents (N=165)

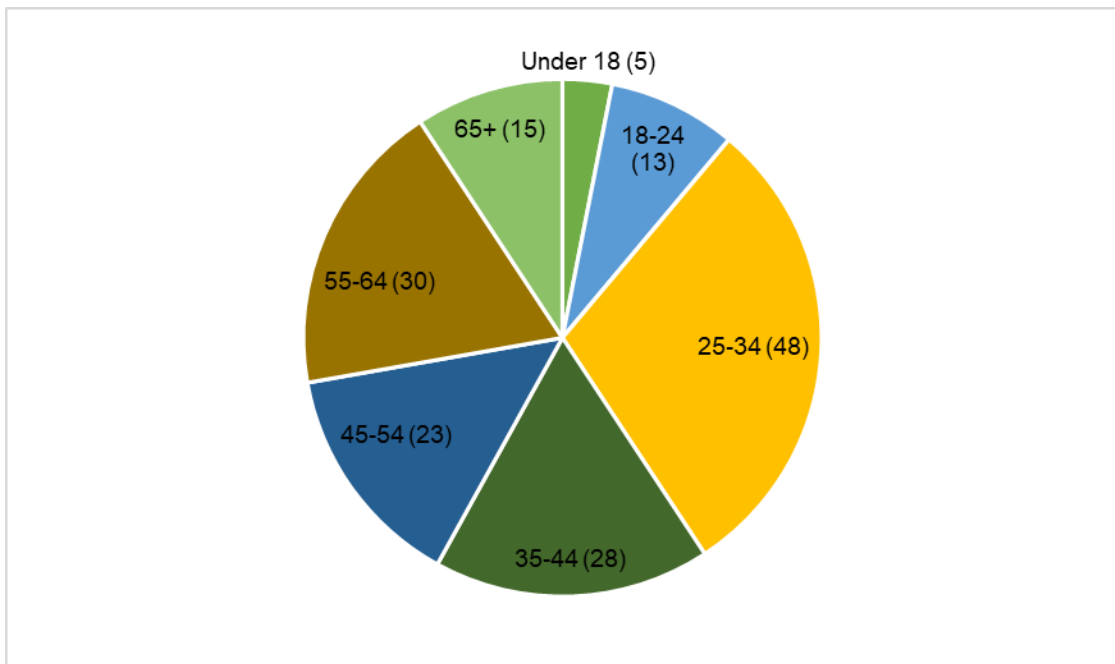


Source: SurveyMonkey Inc

### Age

- 1.17 Of the 162 respondents who reported their age, most (29.63%) were between 25 and 34.

Figure 1.2: Age of respondents (N=162)



Source: SurveyMonkey Inc

### Country of residence

- 1.18 Of the 160 respondents who reported their country of residence, the majority (99.38%) lived in Australia.

Table 1.1: Respondents' country of residence

Country of residence	Count	%
Australia	159	99.38%
Other	1	0.63%
<b>Total</b>	<b>160</b>	

Source: SurveyMonkey Inc

### State or territory of residence

- 1.19 Of the 162 respondents to this question, the majority (90.74%) lived in NSW.

Table 1.2: Respondents' state or territory of residence

State or territory of residence	Count	%
Australian Capital Territory	1	0.62%
New South Wales	147	90.74%
Northern Territory	0	0.00%
Queensland	4	2.47%
South Australia	3	1.85%
Tasmania	0	0.00%
Victoria	4	2.47%
Western Australia	3	1.85%
<b>Total</b>	<b>162</b>	

Source: SurveyMonkey Inc

### Identification as Aboriginal or Torres Strait Islander

- 1.20 Of the 162 respondents who answered this question, the majority (94.44%) did not identify as Aboriginal or Torres Strait Islander.

Table 1.3: Respondents' identification as Aboriginal or Torres Strait Islander

Identification as Aboriginal or Torres Strait Islander	Count	%
No	153	94.44%
Yes (Aboriginal)	7	4.32%
Yes (Torres Strait Islander)	0	0.00%
Yes (Aboriginal and Torres Strait Islander)	0	0.00%
Prefer not to say	2	1.23%
<b>Total</b>	<b>162</b>	

Source: SurveyMonkey Inc

## 2. Survey results

### In Brief

We outline the results of our survey. The small absolute number of responses limits the application of the survey results to the general population, but the information is still, in our view, of interest.

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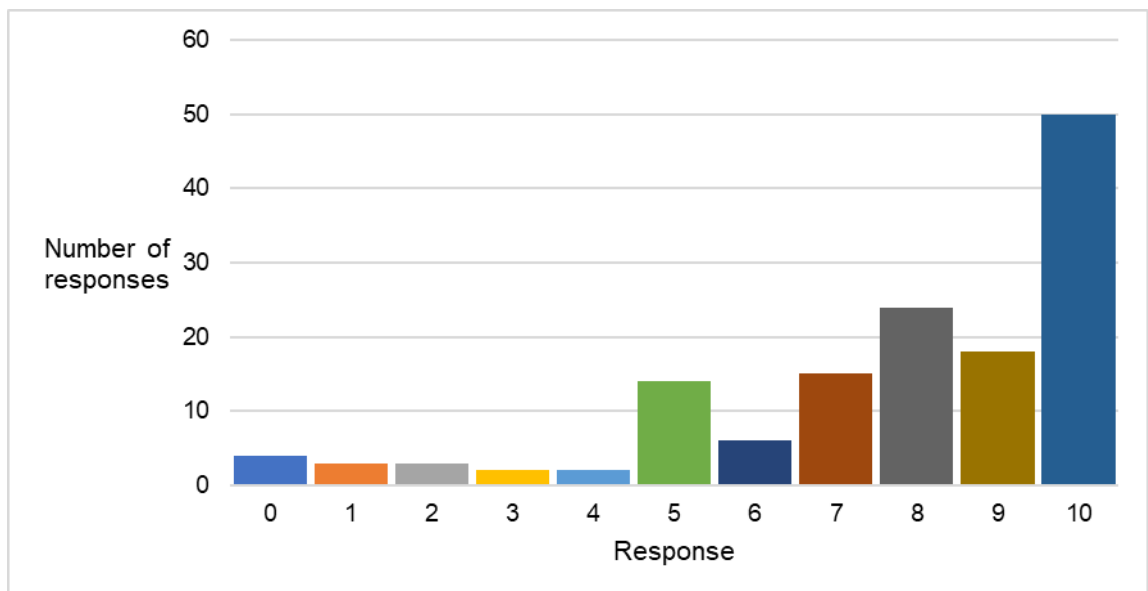
## The principle of open justice

- 2.1 In this section of the survey, we asked respondents to rank on a scale of 0 to 10 (with 0 being least important and 10 being most important) how important certain statements relating to open justice were to them.

### Courts in NSW should be open and court information accessible to everyone

- 2.2 Question 9 had 141 respondents who ranked the importance of courts in NSW being open and court information accessible to everyone. The median response was 8 and the mean was 7.72.

Figure 2.1: Importance of the statement: “Courts in NSW should be open and court information should be accessible to everyone” (from 1–10)

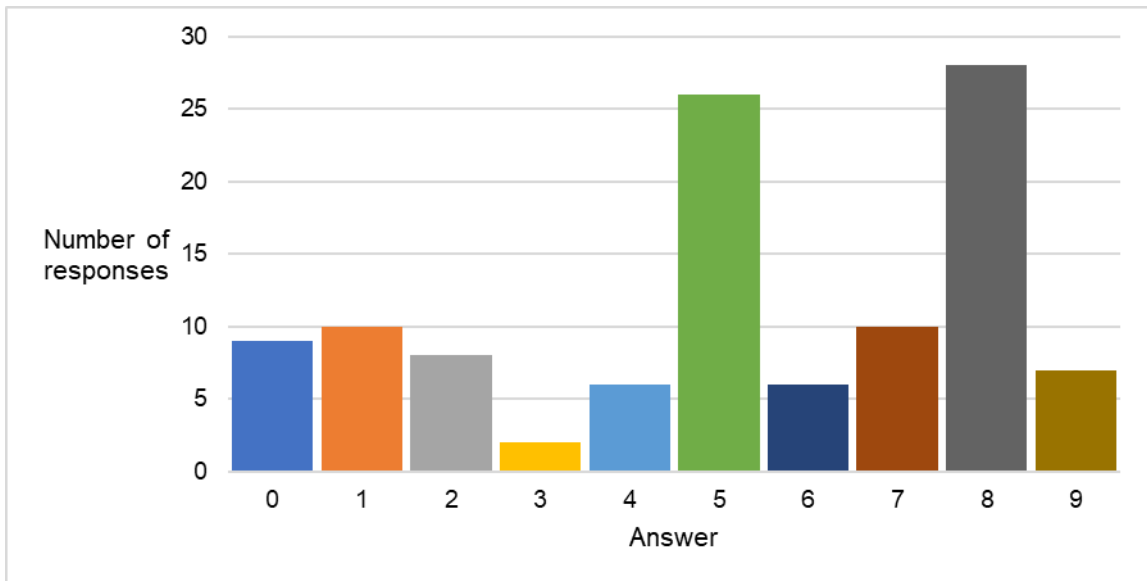


Source: SurveyMonkey Inc

### The need to protect a person's privacy justifies limiting open justice

- 2.3 Question 10 had 141 respondents who ranked the importance of the need to protect a person's privacy as a justifiable reason for limiting open justice. The median response was 7 and the mean was 6.16.

Figure 2.2: Importance of the statement “The need to protect a person's privacy is a justifiable reason for limiting open justice” (from 1–10)

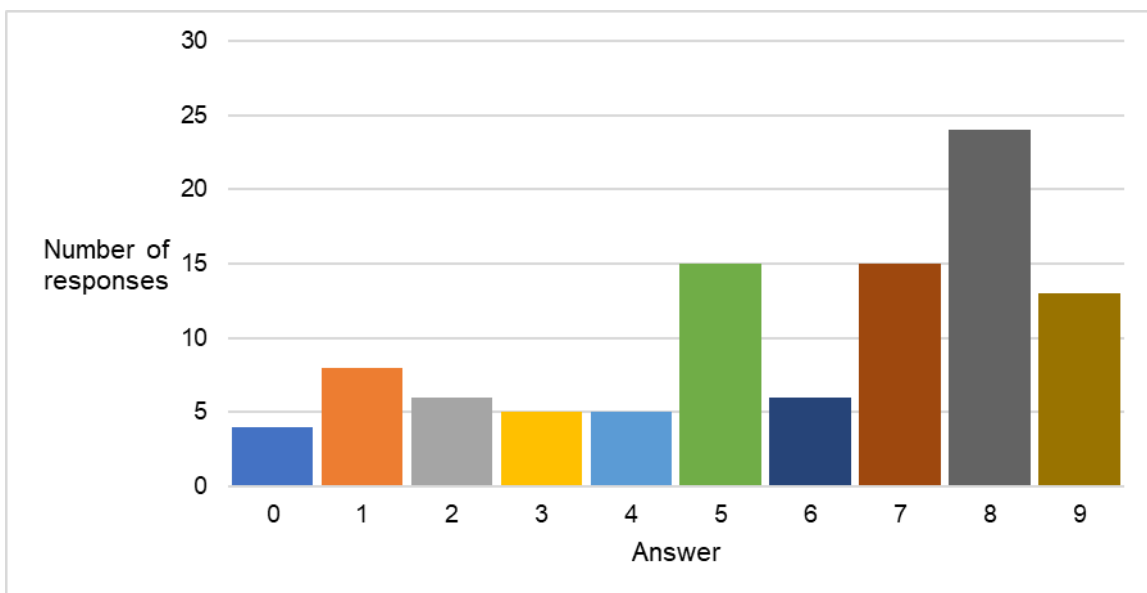


Source: SurveyMonkey Inc

**The need to encourage witnesses and victims of crime to come forward is a justifiable reason for limiting open justice**

- 2.4 Question 11 had 141 respondents who ranked the importance of the need to encourage witnesses and victims of crime to come forward as a justifiable reason for limiting open justice. The median response was 8 and the mean was 6.95.

Figure 2.3: Importance of the statement “The need to encourage witnesses and victims of crime to come forward is a justifiable reason for limiting open justice” (from 1–10)

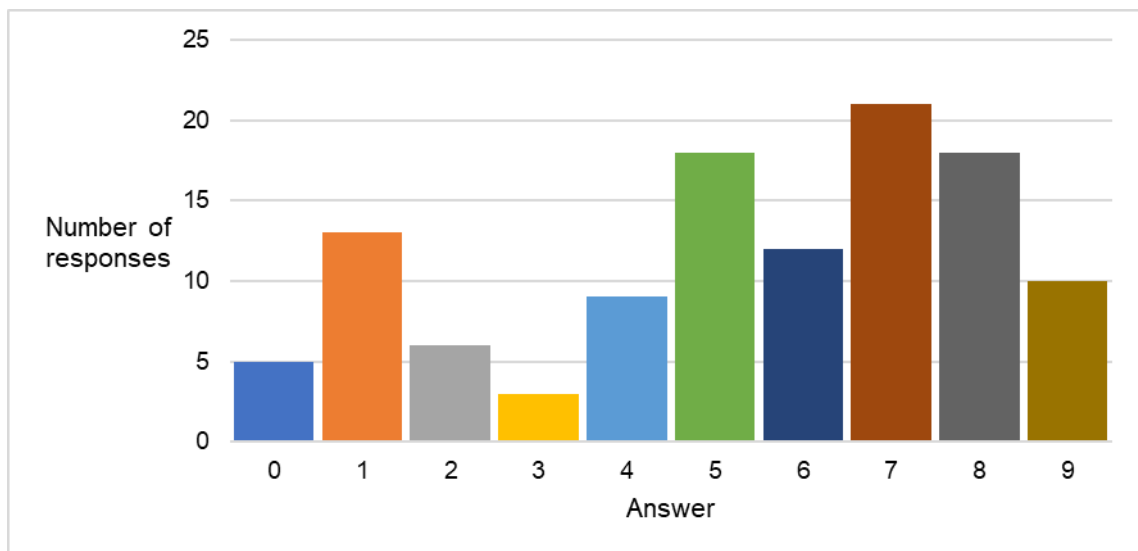


Source: SurveyMonkey Inc

## The need to protect a defendant’s right to a fair trial is a justifiable reason for limiting open justice

2.5 Question 12 had 142 respondents who ranked the importance of the need to protect a defendant's right to a fair trial (including the presumption of innocence) as a justifiable reason for limiting open justice. The median answer was 7.00 and the mean was 6.22.

Figure 2.4: Importance of the statement “The need to protect a defendant's right to a fair trial (including the presumption of innocence) is a justifiable reason for limiting open justice” (from 1–10)



Source: SurveyMonkey Inc

## The open court principle and its exceptions

2.6 Question 13 asked when courts should be closed to the public. Of the 133 respondents, most (87.97%) said “when a child victim or witness is giving evidence”. The second most popular answer was “to ensure a person’s safety” (85.71%).



Table 2.1: When courts should be closed to the public

Answer	Count	%
To ensure a person's safety	114	85.71%
To prevent hardship or embarrassment to any victim or witness	52	39.10%
When a child defendant is giving evidence	109	81.95%
When a child victim or witness is giving evidence	117	87.97%
When a victim of a domestic violence offence is giving evidence	78	58.65%
When a victim of a sexual offence is giving evidence	90	67.67%
Other	11	8.27%
<b>Total</b>	<b>133</b>	

Source: SurveyMonkey Inc

2.7 Some respondents provided reasons for their answers in the comments section. For example:

- one respondent said victims should be protected and supported ahead of defendants,<sup>1</sup> and
- another respondent said that where a person has been found not criminally responsible due to mental illness, it is unfair to them and their family for the details of the case to be made public.<sup>2</sup>

2.8 Some survey respondents suggested other circumstances where the court should be closed to the public, including:

- whenever a vulnerable person is giving evidence,<sup>3</sup> and

1. NSW Law Reform Commission, Open Justice Survey, Response #189 (question 13).

2. NSW Law Reform Commission, Open Justice Survey, Response #187 (question 13).

3. NSW Law Reform Commission, Open Justice Survey, Response #93 (question 13).

- when the defendant is known to the public (such as a sports person or actor).<sup>4</sup>
- 2.9 Some respondents emphasised the need for people to be able to choose to give evidence in open court.<sup>5</sup> Other respondents said the media should still be able to report on closed proceedings, or be present in them, provided they comply with any restrictions on publication.<sup>6</sup>

## Disclosure and publication of information

- 2.10 Question 14 asked when information should be kept from the public. Of the 125 respondents, most (92.80%) said “to protect the identity of a child victim”. The second most popular answer was “to ensure a person’s safety” (85.60%).

Table 2.2: When information should be kept from the public

Answer	Count	%
To ensure a person’s safety	107	85.60%
To prevent undue hardship to a victim or witness in any court case	65	52.00%
To prevent undue distress or embarrassment to a defendant in a sexual offence case	37	29.60%
To protect the identity of a child offender	85	68.00%
To protect the identity of a child victim	116	92.80%
To protect the identity of a victim of a sexual offence	90	72.00%
To protect the identity of a victim of a domestic violence offence	75	60.00%
To protect the identity of a mental health patient	71	56.80%

4. NSW Law Reform Commission, Open Justice Survey, Response #21 (question 13).
5. NSW Law Reform Commission, Open Justice Survey, Response #28 (question 13), Response #160 (question 13), Response #178 (question 13).
6. NSW Law Reform Commission, Open Justice Survey, Response #37 (question 13), Response #40 (question 13).

Answer	Count	%
To protect the identity of a person whose occupation as a sex worker could be revealed in a court case	55	44.00%
To protect the identity of a person whose HIV status could be revealed in a court case	56	44.80%
Other	8	6.40%
<b>Total</b>	<b>125</b>	

Source: SurveyMonkey Inc

2.11 In the comments section, some respondents suggested other circumstances in which information should be kept from the public, including:

- to protect a defendant before a verdict, while evidence is still being tested, or if the defendant is found innocent<sup>7</sup>
- to protect the name of a person, unless they are a person with public responsibility,<sup>8</sup> and
- where information is potentially harmful to a person.<sup>9</sup>

2.12 Some respondents emphasised the need for the person protected by the restriction to be able to identify themselves or consent to publication or disclosure of their identity.<sup>10</sup> One respondent said protected information should still be released to the media, so they can understand the full context of the case and report fairly.<sup>11</sup>

## When a person consents to publication of their identity

### How the law should enable a person to consent to their identity being published

2.13 Question 15 asked respondents how the law could be changed to enable a person to consent to their identity being published. Of the 118 respondents, most (68.64%) said

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7. NSW Law Reform Commission, Open Justice Survey, Response #36 (question 14).
  8. NSW Law Reform Commission, Open Justice Survey, Response #34 (question 14).
  9. NSW Law Reform Commission, Open Justice Survey, Response #67(question 14).
  10. NSW Law Reform Commission, Open Justice Survey, Response #37 (question 14), Response #76 (question 14), Response #178 (question 14).
  11. NSW Law Reform Commission, Open Justice Survey, Response #49 (question 14).

that if their identity is already protected, a person should be able to consent to their identity being published. Of these 118 respondents, 63.56% said that a court should be required to consider the person’s views before making an order protecting their identity.

Table 2.3: How the law should enable a person to consent to their identity being published

Answer	Count	%
A court must consider the person's views before making an order protecting their identity	75	63.56%
A court must not make an order protecting a person's identity if the person doesn't consent	57	48.31%
If their identity is already protected, a person can consent to their identity being published	81	68.64%
If their identity is already protected, a person can apply to the court to have their identity published	69	58.47%
A person's identity must not be disclosed, despite their wishes, if this would reveal another person's identity, against that other person's wishes	56	47.46%
Other	6	5.08%
<b>Total</b>	<b>118</b>	

Source: SurveyMonkey Inc

2.14 In the comments section, respondents’ views included:

- disclosure of a victim’s identity should be their choice<sup>12</sup>
- people should be able to consent to identifying themselves, without restriction, as this can enable them to regain a sense of agency and many victims feel as though the perpetrator is protected by the courts<sup>13</sup>
- disclosure of a victim’s identity should only be restricted if it would reveal the identity of another victim or someone in need of protection, and not a defendant<sup>14</sup>

12. NSW Law Reform Commission, Open Justice Survey, Response #189 (question 15).

13. NSW Law Reform Commission, Open Justice Survey, Response #49 (question 15).

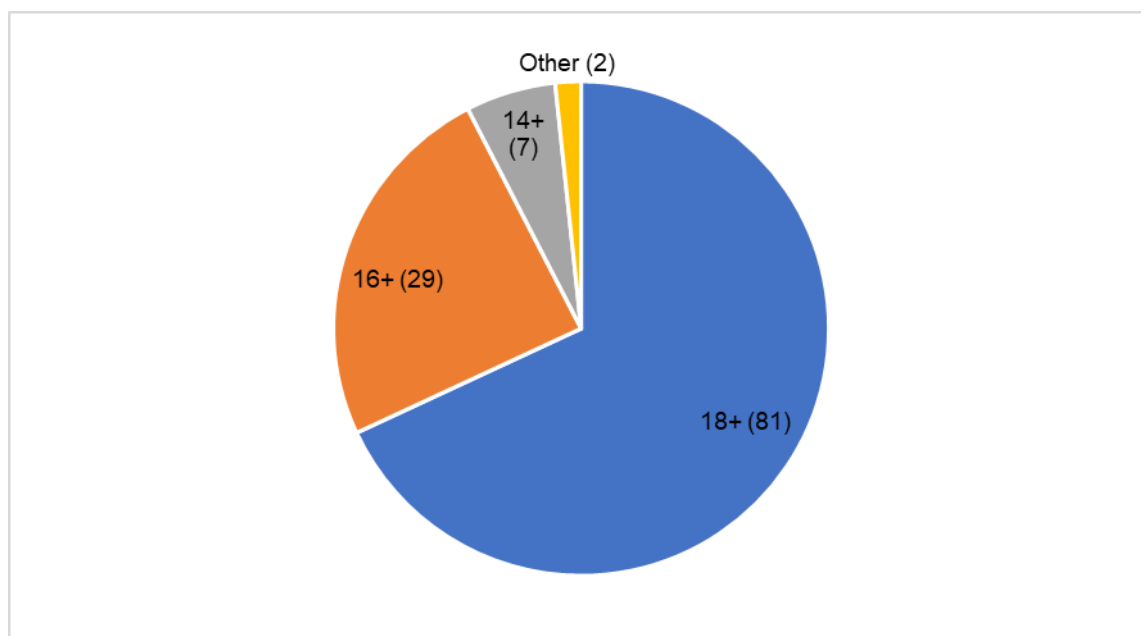
14. NSW Law Reform Commission, Open Justice Survey, Response #178 (question 15).

- a person’s identity should not be disclosed if it would reveal another person’s identity and there is good reason for not revealing that other person’s identity (for example, because they are a child victim or offender),<sup>15</sup> and
- any consent must be given by a person who has full capacity to consent, and who is over 16.<sup>16</sup>

### Age when a person should be able to consent to the release of their identity

2.15 Of the 119 respondents to question 16 (“if a person may consent to the release of their identity, how old do you think should be before they can consent?”), most (68.07%) answered 18 or over.

Figure 2.5: Age when a person should be able to consent to the release of their identity



Source: SurveyMonkey Inc

2.16 In the comments section, respondents’ views included:

- a person’s capacity should also be considered<sup>17</sup>
- a person should be 16 or over before they can consent, so they are able to comprehend the long-term consequences of their actions,<sup>18</sup> and

15. NSW Law Reform Commission, Open Justice Survey, Response #135 (question 15).

16. NSW Law Reform Commission, Open Justice Survey, Response #135 (question 15).

17. NSW Law Reform Commission, Open Justice Survey, Response #80 (question 16).

18. NSW Law Reform Commission, Open Justice Survey, Response #135 (question 16).

- a minor should be allowed to consent to disclosure of their identity alongside a parent or guardian, unless the parent or guardian is the defendant.<sup>19</sup>

## Access to court information

- 2.17 Question 17, “what information about a case would you be interested in accessing?”, had 113 respondents. Of these, the majority (93.81%) chose “the facts of the case”, followed by 80.53% who chose “what was said in court”.

Table 2.4: Information about a case that respondents are interested in accessing

Answer	Count	%
The facts of the case	106	93.81%
What was said in court	91	80.53%
Documents used in the case as evidence	84	74.34%
Video and photos used in the case as evidence	69	61.06%
What each party or their lawyers had to say	87	76.99%
Other	7	6.19%
<b>Total</b>	<b>113</b>	

Source: SurveyMonkey Inc

- 2.18 In the comments section, some respondents said they would be interested in accessing other types of information, including:
- the basis of an order for confidentiality<sup>20</sup>
  - suppression and non-publication orders<sup>21</sup>
  - forensic material,<sup>22</sup> and

19. NSW Law Reform Commission, Open Justice Survey, Response #189 (question 16).

20. NSW Law Reform Commission, Open Justice Survey, Response #187 (question 17).

21. NSW Law Reform Commission, Open Justice Survey, Response #17 (question 17).

- the police fact sheet in criminal cases and pleadings in civil cases.<sup>23</sup>

2.19 Other respondents' views included:

- for open justice, there should be access to the whole case<sup>24</sup>
- digital access to court files is critical<sup>25</sup>
- the more documents [that] are made available, the more accurate and contextual reports of proceedings are likely to be,<sup>26</sup> and
- non-parties should not have any access to the listed material as they may not understand its significance, or they may misuse it.<sup>27</sup>

### Media access to court information

2.20 Question 18 asked respondents what information about a case the media should be able to access. Of the 112 respondents who answered this question, most (98.21%) said “the charges against the defendant”. The second most popular answer (75%) was “the details of what the police allege the defendant did”.

- 
22. NSW Law Reform Commission, Open Justice Survey, Response #22 (question 17).
  23. NSW Law Reform Commission, Open Justice Survey, Response #37 (question 17).
  24. NSW Law Reform Commission, Open Justice Survey, Response #67 (question 17).
  25. NSW Law Reform Commission, Open Justice Survey, Response #49 (question 17).
  26. NSW Law Reform Commission, Open Justice Survey, Response #38 (question 17).
  27. NSW Law Reform Commission, Open Justice Survey, Response #115 (question 17).

Table 2.5: Information about a case that should be accessible to the media

Answer	Count	%
The charges against the defendant	110	98.21%
The details of what the police allege the defendant did	84	75.00%
Information about a person's bail, such as bail conditions	71	63.39%
If the defendant is found guilty, the materials they gave to the court while they were being sentenced	67	59.82%
The claims made by those involved in civil (non-criminal) cases, such as defences	66	58.93%
Other	7	6.25%
<b>Total</b>	<b>112</b>	

Source: SurveyMonkey Inc

2.21 In the comments section, some respondents said the media should be able to access other types of information, such as:

- details of an innocent verdict and the evidence provided to support that verdict<sup>28</sup>
- the police facts during bail applications, to provide an accurate account of the allegations against the accused,<sup>29</sup> and
- the criminal history of a defendant in a trial or who is being sentenced.<sup>30</sup>

2.22 Other respondents' views included:

- the media should have access to all information in any form, as they are the eyes and ears of the public, and often cannot report accurately on a case without all the information<sup>31</sup>

28. NSW Law Reform Commission, Open Justice Survey, Response #36 (question 18).

29. NSW Law Reform Commission, Open Justice Survey, Response #40 (question 18).

30. NSW Law Reform Commission, Open Justice Survey, Response #27 (question 18).

31. NSW Law Reform Commission, Open Justice Survey, Response #17 (question 18).



- the information provided to the media should be consistent with the information that is presented in open court<sup>32</sup>
- the media should only have access to information after the accused person has been found guilty of the crime and any appeal has been unsuccessful,<sup>33</sup> and
- names should be redacted before the media has access (except for the name of a person with public responsibility),<sup>34</sup> and
- the media should not be given access to any material the public is not.<sup>35</sup>

### Public access to court information in criminal cases

2.23 Of the 109 respondents to question 19 (“if you were charged with a criminal offence, what information about your case should the public be able to access?”), most (88.99%) said “the details of the charges against you”, followed by “your name” (73.39%).

Table 2.6: Information about criminal cases that should be available to the public

Answer	Count	%
Your name	80	73.39%
The details of the charges against you	97	88.99%
The police allegations against you	66	60.55%
What your lawyer told the court about your case	71	65.14%
If you were found guilty, the materials given to the court while you were being sentenced (such as medical reports)	50	45.87%
Other	8	7.34%
<b>Total</b>	<b>109</b>	

Source: SurveyMonkey Inc

32. NSW Law Reform Commission, Open Justice Survey, Response #135 (question 18).

33. NSW Law Reform Commission, Open Justice Survey, Response #31 (question 18).

34. NSW Law Reform Commission, Open Justice Survey, Response #34 (question 18).

35. NSW Law Reform Commission, Open Justice Survey, Response #115 (question 18).

2.24 In the comments section, respondents' views included:

- no information should be available until all appeals have been exhausted<sup>36</sup>
- a defendant's name and residence should only be made available to the public or media once they have been found guilty and not before, unless they consent<sup>37</sup>
- the judgment and transcript should be available<sup>38</sup>
- medical information should be kept private<sup>39</sup>
- medical reports should not be accessible, except where such reports are referred to in submissions in open court,<sup>40</sup> and
- unproven allegations should not be available, except with the defendant's consent.<sup>41</sup>

### **Public access to court information in civil cases**

2.25 Question 20 ("if you had a civil (non-criminal) case about a car accident, what information about your case should the public be able to access?"), had 102 respondents. Of these, most (74.51%) said "the details of your arguments or what your lawyer(s) told the court about your case". The second most popular answer was "your name" (72.55%).

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36. NSW Law Reform Commission, Open Justice Survey, Response #31 (question 19).

37. NSW Law Reform Commission, Open Justice Survey, Response #36 (question 19).

38. NSW Law Reform Commission, Open Justice Survey, Response #99 (question 19).

39. NSW Law Reform Commission, Open Justice Survey, Response #125 (question 19).

40. NSW Law Reform Commission, Open Justice Survey, Response #135 (question 19).

41. NSW Law Reform Commission, Open Justice Survey, Response #187 (question 19).

Table 2.7: Information about civil cases that should be available to the public

Answer	Count	%
Your name	74	72.55%
The details of your arguments or what your lawyer(s) told the court about your case	76	74.51%
The details of pre-existing illnesses or any injuries you have (such as a medical report)	32	31.37%
Your driving record	57	55.88%
How much money you received in compensation after winning the case	43	42.16%
Other	9	8.82%
<b>Total</b>	<b>102</b>	

Source: SurveyMonkey Inc

2.26 In the comments section, respondents' views included:

- no information in civil cases should be available,<sup>42</sup> except in the case of a vexatious litigant or fraud<sup>43</sup>
- the judgment, transcript and evidence should be available<sup>44</sup>
- medical reports should not be accessible to the public,<sup>45</sup> and
- submissions made in court about matters such as driving records and the details of pre-existing illness or injuries should be accessible to the public.<sup>46</sup>

42. NSW Law Reform Commission, Open Justice Survey, Response #27 (question 20), Response #31 (question 20), Response #60 (question 20).

43. NSW Law Reform Commission, Open Justice Survey, Response #36 (question 20).

44. NSW Law Reform Commission, Open Justice Survey, Response #99 (question 20).

45. NSW Law Reform Commission, Open Justice Survey, Response #135 (question 20).

46. NSW Law Reform Commission, Open Justice Survey, Response #135 (question 20).

## Online access to court information

### Access to an online portal with key information about cases

- 2.27 There were 114 respondents to question 21 (“if there was an online portal with key information about NSW court cases, would you be likely to access this?”). Of these, the majority (92.98%) said “yes”.

Table 2.8: Online portal to access information about cases

Answer	Count	%
Yes	106	92.98%
No	8	7.02%
<b>Total</b>	<b>114</b>	

Source: SurveyMonkey Inc

- 2.28 Those who answered “no” to this question were automatically directed to question 23.
- 2.29 In the comments section, respondents’ views included:
- An online portal would be more cost and time effective than attending a courthouse.<sup>47</sup>
  - The media’s capacity to attend courts has been impacted by the COVID-19 pandemic and the decline in journalist and newspaper numbers. An online portal would help more than any other tool.<sup>48</sup>
  - Access to court information via an online portal would be useful for work purposes.<sup>49</sup>

### Cases that should be accessible via an online portal

- 2.30 There were 84 respondents to question 22, “what types of cases you would be interested in knowing about?”. Responses included:
- all cases<sup>50</sup>

47. NSW Law Reform Commission, Open Justice Survey, Response #36 (question 21).

48. NSW Law Reform Commission, Open Justice Survey, Response #49 (question 21).

49. NSW Law Reform Commission, Open Justice Survey, Response #55 (question 21), Response #77 (question 21).

- high-profile cases or public interest cases<sup>51</sup>
- criminal cases<sup>52</sup>
- assault cases<sup>53</sup>
- domestic violence and sexual offence cases<sup>54</sup>
- homicide cases<sup>55</sup>
- corruption cases<sup>56</sup>
- workers compensation cases<sup>57</sup>
- cases relating to environmental and social justice issues<sup>58</sup>
- cases relating to guardianship, fraud and elder abuse<sup>59</sup>
- cases relating to mental health<sup>60</sup>
- anti-discrimination cases<sup>61</sup>
- cases concerning police misconduct or judicial bias,<sup>62</sup> and

- 
50. NSW Law Reform Commission, Open Justice Survey, Response #14 (question 22), Response #17 (question 22), Response #37 (question 22), Response #42 (question 22), Response #90 (question 22), Response #115 (question 22), Response #119 (question 22), Response #125 (question #22), Response #148 (question 22).
  51. NSW Law Reform Commission, Open Justice Survey, Response #38 (question 22), Response #135 (question 22), Response #153 (question 22).
  52. NSW Law Reform Commission, Open Justice Survey, Response #20 (question 22), Response #29 (question 22), Response #34 (question 22), Response #40 (question 22), Response #154 (question 22), Response #160 (question 22).
  53. NSW Law Reform Commission, Open Justice Survey, Response #23 (question 22).
  54. NSW Law Reform Commission, Open Justice Survey, Response #15 (question 22), Response #49 (question 22), Response #80 (question 22), Response #134 (question 22), Response #171 (question 22), Response #173 (question 22).
  55. NSW Law Reform Commission, Open Justice Survey, Response #49 (question 22), Response #87 (question 22).
  56. NSW Law Reform Commission, Open Justice Survey, Response #49 (question 22), Response #96 (question 22).
  57. NSW Law Reform Commission, Open Justice Survey, Response #31 (question 22).
  58. NSW Law Reform Commission, Open Justice Survey, Response #33(question 22).
  59. NSW Law Reform Commission, Open Justice Survey, Response #35 (question 22).
  60. NSW Law Reform Commission, Open Justice Survey, Response #34 (question 22).
  61. NSW Law Reform Commission, Open Justice Survey, Response #76 (question 22).
  62. NSW Law Reform Commission, Open Justice Survey, Response #83 (question 22).

- cases relating to children.<sup>63</sup>

## Digital technology and open justice

### Online information that breaches a restriction

- 2.31 Of the 114 respondents to question 23 (“should websites that host information that breaches a restriction have to remove that information?”), most (94.74%) answered “yes”.
- 2.32 Those who answered “no” were automatically directed to question 25.

Table 2.9: Whether websites that host information that breaches a restriction should have to remove that information

Answer	Count	%
Yes	108	94.74%
No	6	5.26%
<b>Total</b>	<b>114</b>	

Source: SurveyMonkey Inc

- 2.33 In the comments section, respondents’ views included:
- websites should be responsible for removing content but this would be difficult to police<sup>64</sup>
  - traditional media and news platforms have to abide by publication restrictions and take down material, so social media sites should be treated in the same way<sup>65</sup>
  - the individual who posts the information should be responsible for removing it and subject to prosecution for breaching court orders,<sup>66</sup> and

63. NSW Law Reform Commission, Open Justice Survey, Response #93 (question 22).

64. NSW Law Reform Commission, Open Justice Survey, Response #36 (question 23).

65. NSW Law Reform Commission, Open Justice Survey, Response #38 (question 23), Response #49 (question 23).

66. NSW Law Reform Commission, Open Justice Survey, Response #93 (question 23).

- a website should only be required to remove information that breaches a restriction once the existence of the information has been brought to the attention of that website.<sup>67</sup>

### **Who should be responsible for removing restricted information from the internet**

2.34 There were four respondents to question 24: “if websites were not required to remove restricted information from the internet, who do you think should be responsible for doing this?”. Their views were:

- a party to proceedings should be entitled to instruct a website to remove the information<sup>68</sup>
- the person or entity who posted or published the information should be responsible for removing it,<sup>69</sup> and
- websites should not be held accountable for people making comments on their pages.<sup>70</sup>

### **When websites should be held responsible for not removing content breaching a restriction**

2.35 There were 110 respondents to question 25: “if websites were required to remove content that breaches a restriction, when should they be held responsible for not removing it?”. Of these, most (53.64%) said “only after they have been told the content is on their website”.

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67. NSW Law Reform Commission, Open Justice Survey, Response #135 (question 23).

68. NSW Law Reform Commission, Open Justice Survey, Response #35 (question 24).

69. NSW Law Reform Commission, Open Justice Survey, Response #23 (question 24), Response #36 (question 24), Response #93 (question 24).

70. NSW Law Reform Commission, Open Justice Survey, Response #93 (question 24).

Table 2.10: When websites should be responsible for not removing content breaching a restriction

Answer	Count	%
At any time	45	40.91%
Only after they have been told the content is on their website	59	53.64%
Other	6	5.45%
<b>Total</b>	110	

Source: SurveyMonkey Inc

2.36 Respondents' views included:

- websites should be responsible for removing restricted content once they have been notified of the content or become aware of it,<sup>71</sup> and
- websites could be required to proactively monitor for restricted content.<sup>72</sup>

## A Court Information Commissioner

2.37 There were 110 respondents to question 26, "if NSW introduced a Court Information Commissioner, what should they be able to do?". Of these, most said a Court Information Commissioner should be able to:

- monitor and investigate breaches of restrictions on publishing or disclosing information (93.64% chose this option)
- communicate with publishers and internet hosts to arrange the removal of restricted content (94.55% chose this option)
- educate the public about restrictions (93.64% chose this option), and
- keep a register of suppression or non-publication orders (92.73% chose this option).

71. NSW Law Reform Commission, Open Justice Survey, Response #33 (question 25), Response #36 (question 25), Response #77 (question 25), Response #135 (question 25).

72. NSW Law Reform Commission, Open Justice Survey, Response #135 (question 25).



Table 2.11: Functions of a Court Information Commissioner

Answer	Count	%
Monitor and investigate breaches of restrictions on publishing or disclosing information	103	93.64%
Communicate with publishers and internet hosts to arrange the removal of restricted content	104	94.55%
Charge and/or prosecute people who breach restrictions	77	70.00%
Educate the public about restrictions	103	93.64%
Keep a register of suppression or non-publication orders	102	92.73%
Other	6	5.45%
<b>Total</b>	<b>110</b>	

Source: SurveyMonkey Inc

2.38 Respondent's views included:

- Charging and prosecuting breaches should be a matter for the Office of the Director of Public Prosecutions.<sup>73</sup>
- It is not necessary for someone to proactively seek out breaches of non-publication orders, as they are rare in the media. If a breach occurs, a party's lawyer can bring it to the court's attention.<sup>74</sup>
- A register or resource for the media to identify non-publication and suppression orders would be beneficial.<sup>75</sup>

2.39 Some respondents suggested other functions for a Court Information Commissioner, including:

- educating the judiciary and registry staff about restrictions and the principle of open justice,<sup>76</sup> and

73. NSW Law Reform Commission, Open Justice Survey, Response #99 (question 26).

74. NSW Law Reform Commission, Open Justice Survey, Response #38 (question 26).

75. NSW Law Reform Commission, Open Justice Survey, Response #49 (question 26), Response #93 (question 26).

- providing information to researchers.<sup>77</sup>

## Using social media in the courtroom

- 2.40 There were 105 respondents to question 27, “how should use of social media in the court should be regulated?”. Of these, most (66.67%) said social media use should not be allowed in the courtroom, unless the court gives permission.

Table 2.12: How social media use in the courtroom should be regulated

Answer	Count	%
Social media use should not be allowed in the courtroom, unless the court gives permission	70	66.67%
Journalists should have to wait at least 15 minutes before posting about a case on social media, in case the court chooses to suppress the information	57	54.29%
Other	10	9.52%
<b>Total</b>	105	

Source: SurveyMonkey Inc

- 2.41 Respondents’ views about regulation of social media use included:
- Social media use should not be separately regulated as it is a crucial method of informing the public in the modern era.<sup>78</sup>
  - The court should educate journalists about what information can be disclosed and what cannot, particularly where there is a suppression order in place at the request of a victim.<sup>79</sup>
  - No social media posts should be made until the case has concluded or the court has granted permission.<sup>80</sup>
  - Any sensitive material should be identified in advance, and the court could give a direction not to post about it.<sup>81</sup>

76. NSW Law Reform Commission, Open Justice Survey, Response #17 (question 26).

77. NSW Law Reform Commission, Open Justice Survey, Response #42 (question 26).

78. NSW Law Reform Commission, Open Justice Survey, Response #17 (question 27).

79. NSW Law Reform Commission, Open Justice Survey, Response #35 (question 27).

80. NSW Law Reform Commission, Open Justice Survey, Response #36 (question 27).

- If there has been a verdict in a high-profile case, reporters should not have to break the news. It should be left to the judge’s discretion to manage reporting if there are sensitive matters or non-publication orders.<sup>82</sup>
- The media should not be allowed to use social media in the courtroom.<sup>83</sup>
- There should be no publication on social media until final orders in the proceedings have been handed down.<sup>84</sup>
- Journalists should only be able to post on social media during adjournments of proceedings, and not while the court is in session. Journalists should also have to observe a 15-minute rule.<sup>85</sup>
- It would be unfair to allow journalists to tweet but not others who are present in proceedings (such as students).<sup>86</sup>
- The media should be subject to the same rules as anyone else.<sup>87</sup>

## Other thoughts about open justice

2.42 There were 45 respondents to question 28, “do you have any other thoughts about open justice in NSW?”. In relation to the protection of information, respondents’ answers included:

- Both victims and witnesses need complete protection of their identity, so they will testify.<sup>88</sup>
- Not everyone charged with an offence is found guilty, so a person who has not yet been convicted requires protection.<sup>89</sup>
- The information that is protected by an order should be specified. Often orders provide that a paragraph of a particular document is suppressed, but access to the document may not be permitted.<sup>90</sup>

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81. NSW Law Reform Commission, Open Justice Survey, Response #37 (question 27).

82. NSW Law Reform Commission, Open Justice Survey, Response #38 (question 27).

83. NSW Law Reform Commission, Open Justice Survey, Response #40 (question 27).

84. NSW Law Reform Commission, Open Justice Survey, Response #93 (question 27).

85. NSW Law Reform Commission, Open Justice Survey, Response #135 (question 27).

86. NSW Law Reform Commission, Open Justice Survey, Response #148 (question 27).

87. NSW Law Reform Commission, Open Justice Survey, Response #187 (question 27).

88. NSW Law Reform Commission, Open Justice Survey, Response #27 (question 28).

89. NSW Law Reform Commission, Open Justice Survey, Response #36 (question 28).

90. NSW Law Reform Commission, Open Justice Survey, Response #49 (question 28).

- It is particularly important that the identities of vulnerable people such as children are protected, and that people's safety is ensured.<sup>91</sup>
- Sexual offence complainants should have standing to seek non-publication and suppression orders. To encourage complainants to come forward, the threshold for seeking an order should not be set too high.<sup>92</sup>
- Most victims are not aware of their right to seek non-publication orders.<sup>93</sup>
- There needs to be better enforcement methods or access to agencies that can assist people to enforce breaches of restrictions.<sup>94</sup>

2.43 In relation to access to court information, respondents' views included:

- the *Court Information Act 2010* (NSW) should be commenced,<sup>95</sup> and
- the courts' media units need more staff, as they deal with large numbers of requests for access to audio visual links, court documents and non-publication orders.<sup>96</sup>

2.44 Some respondents expressed views on issues relating to digital technology and open justice, including:

- the wide availability of the internet and social media makes it easy to disseminate information that should be restricted (either inadvertently or advertently),<sup>97</sup> and
- most hearings should be publicly available for viewing through an easily accessible livestream.<sup>98</sup>

2.45 Other views from respondents about open justice included:

- It is difficult to balance privacy, the presumption of innocence and the public's need to see justice done. The views of victims should be considered.<sup>99</sup>
- It is difficult to balance the principle of open justice with the need to protect privacy and to ensure that information is not misused.<sup>100</sup>

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91. NSW Law Reform Commission, Open Justice Survey, Response #135 (question 28).

92. NSW Law Reform Commission, Open Justice Survey, Response #160 (question 28).

93. NSW Law Reform Commission, Open Justice Survey, Response #160 (question 28).

94. NSW Law Reform Commission, Open Justice Survey, Response #189 (question 28).

95. NSW Law Reform Commission, Open Justice Survey, Response #40 (question 28).

96. NSW Law Reform Commission, Open Justice Survey, Response #49 (question 28).

97. NSW Law Reform Commission, Open Justice Survey, Response #135 (question 28).

98. NSW Law Reform Commission, Open Justice Survey, Response #120 (question 28).

99. NSW Law Reform Commission, Open Justice Survey, Response #120 (question 28).

100. NSW Law Reform Commission, Open Justice Survey, Response #135 (question 28).

- Access to the courts is important for the administration of justice and courts should only be closed to the public in the most considered circumstances.<sup>101</sup>
- Justice must be seen to be done, and people who are powerless, or have reduced responsibility due to mental illness, should be entitled to protections.<sup>102</sup>

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101. NSW Law Reform Commission, Open Justice Survey, Response #173 (question 28).

102. NSW Law Reform Commission, Open Justice Survey, Response #187 (question 28).



# Appendix: NSW Law Reform Commission - Open Justice Review Survey

## About this survey

The NSW Law Reform Commission is reviewing the laws relating to open justice in NSW courts and tribunals.

Open justice is the principle that justice should not only be done, but should be seen to be done. We are interested in what you think about some important issues concerning open justice.

This survey will take 10-15 minutes to complete. You do not need to answer every question.

If you would like to skip a question, simply leave the answer space blank and move on to the next question.

You can choose to remain anonymous if you wish.

## Content warning

Some of the questions in this survey relate to sexual assault and/or domestic violence, which may confront or disturb readers. If you need help, some options for advice and support are:

### **NSW Victims Services**

Call the Victims Access Line on 1800 633 063 or the Aboriginal Contact Line on 1800 019 123

The Victims Access Line is the single entry point for victims of crime in NSW to access information, referrals, support and counselling.

### **1800 RESPECT**

Call 1800 737 732 or visit [1800respect.org.au/](http://1800respect.org.au/)

1800 RESPECT is a national sexual assault and domestic and family violence counselling service.

### **NSW Rape Crisis Centre**

Call 1800 424 017 or visit [nswrapecrisis.com.au](http://nswrapecrisis.com.au)

The NSW Rape Crisis Centre is a 24/7 telephone and online counselling service for anyone affected by sexual assault in NSW.

## Sexual Assault Counselling Australia

Call 1800 211 028 or visit [sexualassaultcounselling.org.au](http://sexualassaultcounselling.org.au)

Sexual Assault Counselling Australia provides counselling, information and referral.

## Confidentiality

We will consider the responses to this survey carefully. We may refer to your comments in our publications (including our final report).

You may ask us to treat your comments as confidential. If so, we will take your comments into account but we will not identify you in our publications.

More information on our privacy policy can be found [here](#).

### \* 1. Would you like your answers to be confidential?

- Yes
- No

## Contact details

### 2. What are your contact details? (This is optional)

Name \_\_\_\_

Email Address \_\_\_\_

### 3. Would you like to sign up to our email list to receive updates about our work?

- Yes
- No

## Demographics

Please note this information is for statistical purposes only, and will be kept confidential.

### 4. Do you identify as:

- Male
- Female
- Prefer not to say
- Other (please specify)

### 5. Which of the following age categories do you fall into?

- Under 18
- 18-24



- 25-34
- 35-44
- 45-54
- 55-64
- 65+

**6. What country do you live in?**

7. If you live in Australia, what state or territory do you live in?

- Australian Capital Territory
- New South Wales
- Northern Territory
- Queensland
- South Australia
- Tasmania
- Victoria
- Western Australia

**8. Do you identify as Aboriginal or Torres Strait Islander?**

- No
- Yes (Aboriginal)
- Yes (Torres Strait Islander)
- Yes (Aboriginal and Torres Strait Islander)
- Prefer not to say

## The principle of open justice

The open justice principle requires that courts are open to members of the public who want to attend, and those who do so can publish fair and accurate reports of court cases. Access to court information is increasingly recognised as an essential element of open justice.

Open justice is important, as it ensures the courts are publicly scrutinised and kept accountable. This helps to maintain public confidence in the courts.

There are some limits to open justice. These include the need to protect a defendant's right to a fair trial and to protect the identities of certain victims and witnesses.

**Key terms in this section:**

**Defendant** = A person who has a criminal charge or claim brought against them.

**Victim** = A person harmed, injured or killed as a result of a crime, accident or other action.

**Witness** = A person who saw, heard or experienced something and can give a first-hand account of it in a court case.

Please rank on a scale of 0 to 10, with 0 being least important and 10 being most important, how important the statements below are to you.

**9. Courts in NSW should be open and court information should be accessible to everyone**

0 1 2 3 4 5 6 7 8 9 10

**10. The need to protect a person's privacy is a justifiable reason for limiting open justice**

0 1 2 3 4 5 6 7 8 9 10

**11. The need to encourage witnesses and victims of crime to come forward is a justifiable reason for limiting open justice 0**

0 1 2 3 4 5 6 7 8 9 10

**12. The need to protect a defendant's right to a fair trial (including the presumption of innocence) is a justifiable reason for limiting open justice 0**

0 1 2 3 4 5 6 7 8 9 10

## The open court principle and its exceptions

The open court principle is the principle that the public (including the media) can attend and observe court cases. In NSW, the law recognises certain exceptions to the principle.

In some cases, the court must be closed to the public (for example, when a victim of a sexual offence or domestic violence offence is giving evidence). This means you can't walk into the courtroom to watch the case. It is meant to prevent further trauma to victims and protect their privacy.

### Key terms in this section:

**Domestic violence offences** = A range of offences (for example, assault or stalking) committed by a person against another person who whom they are, or were, in a domestic relationship.

**Sexual offences** = A range of offences of a sexual nature, including sexual assault, assault with intent to have sexual intercourse, sexual touching and incest.

**13. When do you think courts should be closed to the public? You may select more than one answer.**

- To ensure a person's safety
- To prevent hardship or embarrassment to any victim or witness
- When a child defendant is giving evidence
- When a child victim or witness is giving evidence
- When a victim of a domestic violence offence is giving evidence
- When a victim of a sexual offence is giving evidence
- Other (please specify in the box below)

You may provide reasons for your answer. \_\_\_\_

## Disclosure and publication of information

In NSW, various laws limit the disclosure or publication of court information, including information about a person's identity.

In some cases, a court does not need to make an order to stop disclosure or publication of certain information. This is because there is an automatic prohibition on publishing or disclosing it. For example, there is an automatic prohibition on publishing the identities of victims of certain sexual offences.

Other laws require the court decide whether to make an order to stop publication or disclosure of information. Grounds for making these types of orders (suppression and non-publication orders) include where, for example, it is necessary to protect a person's safety.

### Key terms in this section:

**Non-publication order** = A court order that stops the publication of certain information. This means no one (including the media) can publish the information.

**Suppression order** = A court order that stops the disclosure of certain information (by publication or otherwise). This means no one (including the media) can see the information.

**14. When do you think information should be kept from the public? You may select more than one answer.**

- To ensure a person's safety
- To prevent undue hardship to a victim or witness in any court case
- To prevent undue distress or embarrassment to a defendant in a sexual offence case
- To protect the identity of a child offender
- To protect the identity of a child victim

- To protect the identity of a victim of a sexual offence
- To protect the identity of a victim of a domestic violence offence
- To protect the identity of a mental health patient
- To protect the identity of a person whose occupation as a sex worker could be revealed in a court case
- To protect the identity of a person whose HIV status could be revealed in a court case
- Other (please specify in the box below)

You may provide reasons for your answer. \_\_\_\_

## When a person consents to publication of their identity

Sometimes a person's identity may be kept from the public, but that person wants to identify themselves publicly. They may, for example, want to speak about their experiences in a meaningful way or educate other people. Some NSW laws do not allow a person to have a say in whether a court should make an order to protect their identity, or to consent to their identity being published.

### **15. How could the law be changed to enable a person to consent to their identity being published? You may select more than one answer.**

- A court must consider the person's views before making an order protecting their identity
- A court must not make an order protecting a person's identity if the person doesn't consent
- If their identity is already protected, a person can consent to their identity being published
- If their identity is already protected, a person can apply to the court to have their identity published
- A person's identity must not be disclosed, despite their wishes, if this would reveal another person's identity, against that other person's wishes
- Other (please specify in the box below)

You may provide reasons for your answer. \_\_\_\_

**16. If a person may consent to the release of their identity, how old do you think should be before they can consent?**

- 18+
- 16+
- 14+
- Other (please specify in the box below)

You may provide reasons for your answer. \_\_\_\_

## Access to court information

Access to information held by courts and tribunals is an important aspect of open justice. Such information may include:

- physical and digital court files
- the contents of a court's electronic database
- judgments
- witness statements, and
- video footage.

Historically, evidence and arguments in court were usually oral. Courts now rely on written materials more. This means that, without access to court materials, it can be hard for people watching court cases to fully understand what is going on.

**17. What information about a case would you be interested in accessing? You may select more than one answer.**

- The facts of the case
- What was said in court
- Documents used in the case as evidence
- Video and photos used in the case as evidence
- What each party or their lawyers had to say
- Other (please specify in the box below)

You may provide reasons for your answer. \_\_\_\_

## Media access to court information

In NSW, the media have special rights to access court information. This is because the media report on court cases for the public to read.

**18. What information about a case should the media be able to access? You may select more than one answer.**

- The charges against the defendant
- The details of what the police allege the defendant did
- Information about a person's bail, such as bail conditions
- If the defendant is found guilty, the materials they gave to the court while they were being sentenced
- The claims made by those involved in civil (non-criminal) cases, such as defences
- Other (please specify in the box below)

You may provide reasons for your answer. \_\_\_\_

## Access to court information

**19. If you were charged with a criminal offence, what information about your case should the public be able to access? You may select more than one answer.**

- Your name
- The details of the charges against you
- The police allegations against you
- What your lawyer told the court about your case
- If you were found guilty, the materials given to the court while you were being sentenced (such as medical reports)
- Other (please specify in the box below)

You may provide reasons for your answer. \_\_\_\_

**20. If you had a civil (non-criminal) case about a car accident, what information about your case should the public be able to access? You may select more than one answer.**

- Your name
- The details of your arguments or what your lawyer(s) told the court about your case
- The details of pre-existing illnesses or any injuries you have (such as a medical report)
- Your driving record
- How much money you received in compensation after winning the case
- Other (please specify in the box below)

You may provide reasons for your answer. \_\_\_\_

## Online access to court information

**21. If there was an online portal with key information about NSW court cases, would you be likely to access this?**

- Yes
- No

You may provide reasons for your answer. \_\_\_\_

**22. What types of cases you would be interested in knowing about?**

\_\_\_\_\_

## Digital technology and open justice

Technology brings both opportunities and challenges to open justice. On one hand, technology has enabled people to attend courts virtually, and given them easy access to judgments and other court information.

On the other hand, the global nature of the internet means that restricted information may be published and spread throughout the world via social media. It can be difficult to keep track of online information that breaches a restriction on publication or disclosure (that is, a suppression or non-publication order, or an automatic prohibition).

There is debate about whether websites (such as Facebook or Google) that host restricted information should be responsible for removing that information.

**23. Should websites that host information that breaches a restriction have to remove that information?**

- Yes
- No

You may provide reasons for your answer. \_\_\_\_

## Online information that breaches restrictions on publication or disclosure

**24. If websites were not required to remove restricted information from the internet, who do you think should be responsible for doing this?**

\_\_\_\_\_

**25. If websites were required to remove content that breaches a restriction, when should they be held responsible for not removing it?**

- At any time
- Only after they have been told the content is on their website
- Other (please specify in the box below)

You may provide reasons for your answer. \_\_\_\_\_

## A Court Information Commissioner

There are several difficulties with monitoring and enforcing breaches of restrictions (that is, breaches of suppression or non-publication orders, or automatic prohibitions on publishing or disclosing certain information). These issues include:

- multiple bodies being responsible for monitoring and enforcing restrictions, and
- a lack of public awareness about restrictions.

A new agency (for example, a "Court Information Commissioner") could be established to address these issues.

**26. If NSW introduced a Court Information Commissioner, what should they be able to do? You may select more than one answer.**

- Monitor and investigate breaches of restrictions on publishing or disclosing information
- Communicate with publishers and internet hosts to arrange the removal of restricted content
- Charge and/or prosecute people who breach restrictions
- Educate the public about restrictions
- Keep a register of suppression or non-publication orders
- Other (please specify in the box below)

You may provide reasons for your answer. \_\_\_\_\_

## Using social media in the courtroom

In NSW, only journalists are allowed to post on social media live from the courtroom. There are risks with "live tweeting" in court, including that information protected by a suppression order could be released.

**27. How should use of social media in the court should be regulated?**

- Social media use should not be allowed in the courtroom, unless the court gives permission



- Journalists should have to wait at least 15 minutes before posting about a case on social media, in case the court chooses to suppress the information
- Other (please specify in the box below)

You may provide reasons for your answer. \_\_\_\_

## Final thoughts

**28. Do you have any other thoughts about open justice in NSW?**

\_\_\_\_\_

## Thank you

Thank you for participating in our survey.

See our website and follow us on Twitter @NSWLawReform for further information and updates on the Open Justice review.

