



**New South Wales Government**  

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**Attorney General's Department**

**REPORT ON ACCESS TO COURT  
INFORMATION**

**June 2008**

**Legislation, Policy and Criminal Law Review Division**

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## Introduction

Access to court information and documents is accepted as an essential feature of an open justice system. It allows the public to be informed about what takes place in the courtroom and to understand the basis on which judicial officers make their decisions.

The ability of the media and the public in general to understand what takes place in the courtroom increasingly depends on access to court records. Procedural reforms designed to improve the efficiency of court hearings have meant that information that used to be provided to the court orally is now tendered to the court in the form of documentary evidence, statements and affidavits.

While access to court information is critical to maintain public confidence in an open justice system, the current access regime is complex and unclear. The regime consists of numerous statutory provisions and rules of court that rely heavily on the discretion of courts and registrars.

The New South Wales Law Reform Commission Report 100 (2003) – “Contempt by Publication” made a number of recommendations relating to the law of sub judice contempt. The report recognised that the law of contempt by publication is intrinsically related to rights to access court information. The report suggested that rights to access court information should be clarified and made several recommendations in relation to access.

In 2004, the Supreme Court conducted community consultation on the issue of access to court records. This consultation raised issues about the existing framework and a draft policy on access to court information including:

- debate about the extent to which privacy principles are relevant when dealing with court records;
- differing approaches by individual NSW courts;
- divergent views on the extent to which exhibits should be available; and
- processes to review decisions regarding third party access.

The issue was referred to the Attorney General’s Department and in June 2006, the Department released a paper “Review of the Policy on Access to Court Information” for public consultation.

Nineteen individuals and agencies made submissions to the review (see Appendix 1). This report takes into account the submissions received and makes recommendations for a new approach to access to court information to apply to NSW courts that exercise jurisdiction under the *Criminal Procedure Act 1986* and the *Civil Procedure Act 2005*.

## Executive Summary

Submissions received in the course of this review advocated a range of views, from broad, unfettered access rights to more restrictive arrangements that emphasise individual privacy rights. The recommendations in this report attempt to balance the competing considerations of open justice and individual privacy.

There was significant support across the board for substantial reform of the existing access to court information regime. There was widespread support for:

- removing unnecessary discretion and creating greater certainty in relation to non-party rights of access;
- a uniform approach to access across all NSW courts;
- consolidating provisions relating to suppression and non-publication orders; and
- the overarching concept of classifying all court information as either open (it is available to any member of the public on request as of right) or restricted (it is available subject to seeking leave).

Submissions took different approaches to the appropriate classification of particular documents, in particular, Fact Sheets, pleadings in pending civil cases and exhibits. There were also divergent views on how to deal with personal information contained in a document that would otherwise be classified as open access.

Both the government and courts are committed to an open justice system. The current access regime is complex and creates unnecessary barriers to court information. The recommendations in this report will provide a framework for access to court information that represents a substantial shift in favour of increasing the availability of court information while also enhancing the protection of personal information.

The recommended approach recognises that open justice requires liberal access to court information. Information should be restricted only where there are compelling reasons not to allow access. Restriction may be necessary to protect national or personal security, privacy interests, commercial trade secrets, or vulnerable people in contact with the court. As far as possible, the recommended regime attempts to create certainty on the extent of these restrictions.

Overall, the recommendations in this report provide a more liberal approach to access to court information than was previously proposed in the consultation paper.

For example, this report recommends that a Fact Sheet be classified as open access unless a date for trial by jury is allocated. Similarly, the proposal to grant access to civil pleadings and originating process only where cases are concluded has been replaced with a revised recommendation that pleadings and originating process be available as of right after the first court listing date

(including any preliminary call-over) or, in the absence of a court listing, from the time that a judgment is given. This recommendation will allow access during the pre trial period while still ensuring that parties may seek orders preventing inappropriate information contained in pleadings from being published.

This report also recognises that while the public should have a right to access court information, the media retains a special role in terms of reporting court proceedings to the community. More liberal access can be provided to the media than the general community because of the capacity of the court to safeguard against the publication of sensitive information that may be contained in restricted documents. In addition to information that is classified open access, this report allows the media to access transcripts of evidence in closed court proceedings and information admitted into evidence that can readily be reproduced in documentary form.

While the recommendations in this report significantly expand the rights to access court information it also seeks to protect personal and sensitive information in a number of ways. The report recommends that the court and the parties be able to delete certain personal identifiers from documents classified as open access and recommends the introduction of legislative non publication provisions that prevent unnecessary publication of personal identifiers. The report also recommends that sanctions should exist to prevent the improper release and use of court information and that parties should be informed of the possible use and disclosure of court information.

The objectives of these safeguards is to allow people involved in court proceedings to have greater control over the personal information contained in the public court record and to ensure that people accessing court information do so for legitimate and proper purposes.

The report also recommends that legislative provisions relating to non-publication and suppression of court information be consolidated as far as possible. Restrictions against publication should be legislatively consolidated so that they are easily accessible by the media to avoid inadvertent publication of restricted information.

The objective of this report is to ensure that the principle of open justice is maintained by ensuring that court information is available to the media and the general public except in clearly defined and limited circumstances. These circumstances include where concerns for individual welfare and privacy, commercial confidentiality, national security or the attainment of justice in the proceedings outweigh the principle of open justice.

## List of Recommendations

### Recommendation 1 – General Framework:

- (a) The framework for access to information in criminal and civil proceedings should be consolidated and supported by regulations and rules of court. Appropriate places to locate the consolidation may be the *Criminal Procedure Act 1986* and the *Civil Procedure Act 2005*.
- (b) The legislation should identify the objectives of the access regime as:
  - 1. To support the principle of open justice; and
  - 2. To restrict access to court information to the extent necessary where interests of individual privacy and safety, commercial confidentiality, national security and the attainment of a just outcome in the proceedings override the principle of open justice.
- (c) The information and material that comprises the court record should be clearly defined.
- (d) The legislation should clarify that the court has control and custody of the court record and may copy, publish or allow access to information contained on the court record.
- (e) All information that comprises the court record should be classified as either “open to public access” or “restricted public access”.

### Recommendation 2 – Open Access:

- (a) Court information classified as open to public access should be available to the general public as of right. The legislation or regulations should identify the key categories of open access information. For example, these could include:
  - in criminal matters:
    - 1. Transcript of evidence of open court proceedings
    - 2. Statements and affidavits admitted into evidence
    - 3. Record of adjudication or order
    - 4. Indictment or court attendance notice
    - 5. Police Fact Sheet (except where a date for a trial by jury has been allocated)
  - and in civil matters:
    - 1. Judgments and Orders
    - 2. Originating process and pleadings (after the first listing date, or after judgment is given, whichever first occurs)
    - 3. Transcript of evidence of open court proceedings
    - 4. Statements and affidavits admitted into evidence
    - 5. Court listing and case management information

- (b) The Police Fact Sheet should be retained as part of the court record whenever it is tendered as evidence in proceedings on a bail application.
- (c) Administrative information relating to court listings, such as listing dates, the presiding judicial officer, case management directions and the appearance of parties should be publicly available.
- (d) Open access information should be subject to any court order restricting access to information in specific proceedings or a legislative provision restricting access to a specified class or classes of information.

**Recommendation 3 – Restricted Access:**

- (a) Any information that is not classified as open access will be classified as restricted access. In addition, access to sensitive information that would otherwise be classified as open access should be restricted. This includes the following information:
  1. affidavits, pleadings and statements rejected or struck out
  2. spent convictions
  3. statements and evidence on a *voire dire*
  4. medical, psychiatric, psychological and pre sentence reports
  5. evidence given in relation to non-publication and suppression order applications
  6. information subject to a non-publication and suppression order
  7. proceedings relating to sexual assault, indecent assault, children's court proceedings, domestic violence proceedings, family disputes and adoption;
  8. victim impact statements
  9. letters of comfort
- (b) Access to restricted information should only be available where there is a specific entitlement provided by law or where the court or registrar grants access.
- (c) In considering an application for non party access to restricted documents the court or registrar should have regard to such factors as:
  1. the extent to which the principle of open justice is affected if the information is not released
  2. whether the privacy or safety of any individual will be compromised by the release of the information
  3. whether the release of information adversely affects the administration of justice
  4. the extent to which the person seeking access may be affected by the proceedings
  5. the reason for which access is required
  6. whether the court can reasonably facilitate access to the information.
- (d) The court may impose conditions on any permission it gives to access restricted information.

- (e) Regulations or rules of court may prescribe agencies entitled to access restricted information and the basis of that access.

#### **Recommendation 4 - Media Access**

- (a) In addition to open access information, the media should be entitled to access the following information:
  1. transcripts of evidence in closed court proceedings
  2. information admitted into evidence that can readily be reproduced in documentary form.
- (b) The right of the media to access information referred to in (a) should be subject to any suppression order or a non-publication order or statutory provision that requires information to be suppressed or not published.
- (c) Prosecuting agencies may permit media access to physical exhibits in their possession if the exhibit has been admitted in evidence.
- (d) The term “media” should have the same definition as provided under the Broadcast Services Act 1992 (Cth).

#### **Recommendation 5 - Protection of privacy**

- (a) Legislation should clearly state that privacy legislation does not apply to court information. However, the court should adopt the following safeguards that prevent personal information contained in court records from being unnecessarily accessed or published:
  1. informing parties of the possible use and disclosure of court information and their right not to disclose certain information in open access documents.
  2. ensuring proper storage and security of court records
  3. preventing improper release of information
- (b) Parties and the court should edit out certain unique personal identifiers from open access documents they prepare, including the following:
  1. social security and tax file numbers
  2. drivers license and motor vehicle registration numbers
  3. medicare numbers
  4. financial account numbers
  5. passport details
  6. personal telephone numbers
  7. date of birth details except the year of birth
  8. home address details except the suburb, city and state

- (c) The court should be able to impose conditions on the release of court information and legislation should create offences to prohibit the improper release and use of court information.

### **Recommendation 6 - Suppression of information**

- (a) Existing legislative provisions relating to non-publication and suppression of information should be consolidated. A clear distinction should be drawn between the effect of a suppression order and a non-publication order.
- (b) The test for the imposition of non-publication and suppression orders should be consistently applied. Orders should be made on the basis that it is necessary to do so to secure the proper administration of justice in proceedings.
- (c) In addition to existing provisions,
  1. the identity of parties in proceedings under the *Property (Relationships) Act 1984* and Part 4 of the *Crimes (Domestic and Personal Violence) Act 2007* should be subject to a legislative non-publication order; and
  2. information relating to adoption proceedings should be suppressed.
- (d) Personal unique identifiers should be protected by legislative restriction against publication. In addition, sensitive documents, including the following, should be subject to a legislative restriction against publication:
  1. Criminal and traffic antecedents
  2. Medical and health records
  3. Psychiatric and psychological reports
  4. Pre-sentence reports
  5. Victim impact statements
  6. Letters of comfort
- (e) A co-operative approach should be developed to allow the court to inform publishers if the court is of the view that a publicly available web based article contains information that is likely to be prejudicial to the conduct of an imminent jury trial, so that the publisher may remove or exclude the information from internet search engines until the conclusion of the trial.
- (f) Restrictions on publication or suppression of court information should be subject to an expiry date. If a court does not state an expiry date then restrictions should cease to have effect after 75 years in relation to criminal, adoption and care proceedings, and after 30 years in relation to civil proceedings.

## **1. General Framework**

### **Legislative Framework for Access to Court Information**

The current legislative framework for access to court information is a composite of statutory provisions, rules of court and practice notes. The legislative framework lacks cohesion, has gaps where there are no provisions dealing with access and applies different statutory tests for accessing information.

The submissions received by the Attorney General's Department unanimously supported the proposal to simplify the legislative framework.

One option would be to consolidate provisions relating to access to court information in criminal proceedings in the *Criminal Procedure Act 1986* and access to court information in civil proceedings in the *Civil Procedure Act 2005*. This approach would allow legislative provisions to be supported by regulations and rules of court.

Submissions on behalf of the media suggested that consideration should be given to developing a nationally harmonised scheme. At present, the rules relating to access to court information in other states and territories vary significantly. Access provisions in other jurisdictions are summarised in Appendix 3. If nationally uniform rules are adopted then it may be preferable to incorporate provisions in a single separate piece of legislation, such as the *Evidence Act 1995* or a new Act. While a national approach may be desirable this is a matter that may be more appropriately considered by the Standing Committee of Attorneys General (SCAG).

### **Objectives of Access Regime**

Except in limited circumstances, proceedings before courts in New South Wales are open to the public. The principle of open justice is fundamental in ensuring that courts remain transparent and accountable for their decisions. Public access to court decisions and processes promotes public respect for, and confidence in, the court system.

Open justice has been described as a principle and not a freestanding right and other principles or policies may have to be taken into account<sup>1</sup>. Where information is relied on by the court there is a strong presumption in favour of public disclosure except where the interests of justice require a different course<sup>2</sup>.

There are a number of competing interests that will impinge on the principle of open justice, such as the need to protect the welfare of people involved in court proceedings and the need to secure the administration of justice. There

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<sup>1</sup> *John Fairfax Publications Pty Ltd v Ryde Local Court (2005) 62NSWLR512*

<sup>2</sup> *Australian Competition and Consumer Commission v ABB Transmissions and Distribution Ltd (No3)[2002]FCA 609* at [7]

are a number of recognised categories of exception to the rule in favour of publicity<sup>3</sup>:

- Cases involving the care of children or the mentally ill
- Cases where trade secrets are involved
- Blackmail cases
- Cases involving police informants
- Cases involving national security
- Protection of court proceedings (eg: non-publication of evidence given on a *voire dire*)

In addition, statutory exceptions operate to protect vulnerable people involved in court proceedings, including children, sexual assault victims, parties involved in family law disputes and adoption proceedings.

In relation to each of these exceptions there is a competing interest that outweighs the principle of open justice.

While courts have constantly reinforced the need for open justice, there is little guidance on what open justice requires in terms of access to court information. Existing provisions enabling access to court information do not make reference to the principle of open justice. The absence of any express reference to open justice in the context of access to court records raises the question as to whether the principle of open justice requires anything more than the conduct of proceedings in an open forum.

Historically, the principle of open justice may have been achieved by allowing open public access to the courtroom. Recent developments in court procedure that have been designed to improve the efficiency of case management, such as the introduction of paper committals and admission of statements and affidavits not read onto the record, have had a consequential impact on the openness of court proceedings by limiting the availability of information within the courtroom.

Legal Aid NSW made the general observation that members of the public in today's courtroom will often come away with only a "vague understanding of the proceedings" without access to associated court documents and information. Its submission argued that government policy should be directed to ensuring fair and liberal access to court information by non-parties because, without such access, court proceedings cannot truly be characterised as "public" and "within open view".

*In the Matter of an Application by the Chief Commissioner of Police (Vic) [2005] HCA 18 (20 April 2005)* the joint judgment of the High Court stated;

*"It is not sufficient for the assurance of open justice in this country that the doors of a court should be unlocked. Fair and accurate reports of what occurs in courtrooms is an essential attribute of the administration of justice in Australia."*

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<sup>3</sup> See Kirby P in *Raybos Australia Pty Ltd v Jones* [1985] 2 NSWLR 47 at 54

The legislative regime for access to court information should allow broad rights to access court information to give effect to the principle of open justice. The right to access information should be restricted only where there is a clear competing and overriding interest to protect individual safety, privacy, commercial confidentiality, national security and the court process. As far as reasonably possible, these restrictions should be defined in legislation.

**The Court Record – defining court information and identifying who controls access to it**

Some submissions indicated that it was desirable for legislation to define what comprises court information. Submissions also supported a legislative statement that clarifies the responsibility of the court to control access to court information.

The court is the keeper of the court record and facilitates access. Although the court has custody and control over records this does not mean that the court has rights of property over all court records. In terms of intellectual property, copyright in court documents created by parties vests in those parties. Property rights in relation to exhibits remain with the person producing the document or thing.

Crown copyright vests in documents produced by the court, including court judgments, orders, court lists and transcripts of evidence. Since 1995, the Attorney General has waived copyright in relation to court judgments. The recommendations in this report do not alter this waiver.

The recommendation in this report refers to the right of the court to have control and custody over court records rather than a proprietary right. The authority of the court to allow access, publish or release copies of court information, notwithstanding any other subsisting intellectual right in the property, should be expressly stated in legislation.

One submission suggested that it would be helpful to define what constitutes the court record. It is possible to identify the court documents that normally constitute the court record by reference to documents that are filed in proceedings, tendered in court or prepared by the court.

It was also suggested that access should be defined on the basis of information rather than documents. Courts will be moving to electronic records and electronic filings and a definition in terms of information would be more consistent with this approach.

With this in mind, it is recommended that the court record be defined as information and material relating to court proceedings that has been:

- filed by the parties
- heard in court
- prepared by the court
- recorded for the purposes of court listing and case management
- admitted into evidence by the court

### **Certainty – limiting the exercise of discretion**

A key objective of this review is to promote a consistent approach to rights of access to court information across all courts in New South Wales and to create greater certainty in relation to access rights.

The majority of submissions agreed that this could be achieved by limiting the reliance on the broad and vague discretionary powers applied by courts in relation to the majority of applications for access.

Access to court information is essential to give effect to open justice. The requirement to demonstrate an interest in the proceedings or show a sufficient reason for access creates, in many instances, unnecessary barriers to access.

It is proposed that the current access regime be replaced by a scheme that classifies court information as either open or restricted access. Information classified as open access would be available to any person as of right.

Some submissions raised concerns that this classification system may work arbitrarily. If information contained in a document that is classified as open access is highly sensitive then parties will be able to apply for, and the court will be able to make, a non-publication or suppression order.

The court should retain the discretion to order that a document that would otherwise be classified as open access be restricted and to decide whether or not to release any information classified as restricted.

The exercise of discretion in relation to applications for access would be retained only in relation to information that is not open to the public, that is, restricted access information and the exercise of the discretion would be subject to clearer legislative guidance.

**Recommendation 1 – General Framework:**

- (a) The framework for access to information in criminal and civil proceedings should be consolidated and supported by regulations and rules of court. Appropriate places to locate the consolidation may be the *Criminal Procedure Act 1986* and the *Civil Procedure Act 2005*
- (b) The legislation should identify the objectives of the access regime as:
  - 1. To support the principle of open justice; and
  - 2. To restrict access to court information to the extent necessary where interests of individual privacy and safety, commercial confidentiality, national security and the attainment of a just outcome in the proceedings override the principle of open justice.
- (c) The information and material that comprises the court record should be clearly defined.
- (d) The legislation should clarify that the court has control and custody of the court record and may copy, publish or allow access to information contained on the court record.
- (e) All information that comprises the court record should be classified as either “open to public access” or “restricted public access”.

## **2. Open Access**

There are a number of legislative provisions that allow unrestricted rights to access certain information<sup>4</sup>. The proposal to classify certain information as open access examines whether it is possible to expand on the range of information and documents that could be available on an unrestricted basis.

Court documents or information within the open access classification would be available to any member of the public on request subject to payment of any prescribed fee and any constraints such as the time taken to prepare transcripts or the capacity to facilitate access. Regulations or rules of court would specify information that is classified as open access information.

In addition to court documents, it is proposed that administrative information recorded for the purposes of court listings and case management be publicly available. This would include information on listing dates, the presiding judicial officer and case management directions.

One barrier to allowing a wider range of court information to be open to the public is the concern for privacy interests. A number of safeguards have been recommended in Chapter 5 of this report to address this concern, including requiring parties and the court to remove unique personal identifiers from open access documents.

### **Open Access – Criminal Proceedings**

Presently, the media have an entitlement to access certain information under section 314 of the *Criminal Procedure Act 1986*. Section 314 refers to the following information:

- Transcripts of open court proceedings
- Indictments or court attendance notices
- Judgments or Orders
- Brief of Evidence
- Witness Statements
- Fact Sheets

With some modification, the information contained in section 314 should form the core of information that should be available to all members of the public.

The current restriction in the *Criminal Procedure Act 1986* on the right to access court records within 2 days after the conclusion of the case should be removed to allow continuing access to open access information subject to the *Criminal Records Act 1991*.

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<sup>4</sup> See, for example, Rule 36.12 Uniform Civil Procedure Rules 2005 access to orders and judgments and section 314 of the Criminal Procedure Act 1986 for media access to certain documents in criminal proceedings.

### *Fact Sheets*

The Fact Sheet is an unsworn statement prepared by the police officer in charge of the case that provides a brief narrative of the circumstances surrounding the alleged offence. The Fact Sheet is provided to the Court in bail applications and on sentencing hearings where an accused person enters a plea of guilty.

Submissions from the media strongly advocated the importance of the availability of the Fact Sheet to report on decisions relating to bail. Other submissions did not favour increasing the availability of Fact Sheets on the basis that they often contain information that is prejudicial to the defendant. The issue of information being prejudicial to a defendant is relevant only where there is likely to be a trial before a jury. If proceedings are dealt with summarily, then magistrates called on to decide the facts in issue are expected, as professional judicial officers, to be able to disregard prejudicial information that may have been published at an earlier time.<sup>5</sup>

A Fact Sheet only has the potential to be prejudicial to the future conduct of proceedings if a trial by jury is imminent. The publication of an unsworn narrative of the prosecution's version of the events surrounding the alleged offence immediately before a trial is more likely to influence a potential juror. To limit this potential, the Fact Sheet should not remain as open access information once a trial date has been allocated.

A secondary concern raised during the original review was the practice of most Local Courts not to retain a Fact Sheet that has been tendered during a bail application. This practice developed to avoid possible perceptions of bias through magistrates being influenced by the contents of the Fact Sheet retained on the court record if called upon to conduct a summary defended hearing or a committal hearing. While this practice may have been appropriate in the days when magistrates were not independent, skilled judicial officers, this is no longer the case. A Fact Sheet admitted into evidence in proceedings on bail is part of the record of the court and should be retained by the court.

### *Witness Statements*

One submission suggested that the reference to "statements and affidavits admitted into evidence" should be altered to "information admitted into evidence that can be readily reproduced in documentary form". This change would have the effect of widening the scope of information that is classified as open access. The term "information admitted into evidence that can be readily reproduced in documentary form" would include records of interview involving defendants and children as well as transcripts of conversations recorded under surveillance warrants. The wider definition would result in other information not capable of being redacted being classified as publicly available, including banking and commercial records.

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<sup>5</sup> See McHugh JA in *Vakauta v Kelly* (1988) 13 NSWLR 502;

### *Brief of Evidence*

A number of submissions sought clarification regarding the availability of the brief of evidence. While the brief of evidence is available to the media as of right, several submissions did not support the entire contents of a brief of evidence being publicly available. Briefs of evidence may contain a wide range of evidentiary documents, including records of interview, medical and financial records, search warrant records and photographs. Some of these records may contain sensitive and personal information. It is not proposed to classify briefs of evidence as open access information.

### **Open Access – Civil Proceedings**

Orders and judgments are already publicly available under *Uniform Civil Procedure Rule 36.12*.

### *Availability of the originating process and pleadings*

A number of submissions argued that this information should be available immediately after filing, as is the case, for example, in the Supreme Court of Victoria and the Federal Court. Others believe that it is appropriate that these documents not be immediately available. They argued that it was necessary to delay the release of originating process and pleadings so that parties involved in proceedings first had the opportunity to apply to the court to remove pleading containing scandalous or vexatious information.

The review proposed that originating process and pleadings should not be available until after the proceedings had concluded, in line with the Supreme Court and District Court practice notes which currently create a presumption in favour of allowing access to pleadings where proceedings have concluded. Arguments made in support of this approach were that making this information immediately available could mean that information is published prior to a party in proceedings either being served with the document or having an opportunity to apply to the court to strike out information that is frivolous, vexatious or oppressive. The effect of making information immediately available on filing would diminish the effectiveness of safeguards contained in rules of court against abuse of process and scandalous information being contained in court documents.

It is appreciated that concerns regarding scandalous information will arise only in exceptional cases and there is likely to be no harm caused by allowing open access to pleadings immediately after filing in most instances. However, the publication of information filed in court proceedings is subject to an absolute privilege against defamation. If highly defamatory information is published, prior to an opportunity for it to be struck out, there will be no remedy available for the defamed person.

It is appropriate that a delay exist between the filing of this material and it becoming available as open access information, as a means to preserve existing safeguards. The review suggested that originating process and pleadings not be available until after the conclusion of the case. In view of the submissions received, it is conceded that this information could be available

at an earlier point in time. The safeguards available to the parties may be exercised on the first occasion that the proceedings are listed before the court.

The first listing date of the proceedings is an appropriate time for originating process and pleadings to be publicly available. It is not until this time that the court is involved in managing or adjudicating the proceedings and the principle of open justice does not apply to circumstances where the court has not yet had the matter before it. If the proceedings are not contested then there may be no court listing. In these circumstances, originating process and pleadings should be available after judgment.

#### *Exceptions to Open Access*

The classification of certain documents and information as open access will be subject to some exceptions. Some documents that might otherwise be classified as open access may contain sensitive or confidential information that makes it inappropriate to be publicly available. For example, statements tendered on a *voire dire* that are not available to the jury should not be available to the general public. Statements in sexual assault proceedings should not be open to the public due to the sensitive nature of this information and the potential that public access to information may further distress the victim and deter other victims from reporting crimes.

The exceptions to open access will be limited. As far as possible, the exceptions will be identified by legislation. However, the legislative scheme may not be able to deal with all contingencies and the court should retain the discretion to order a document in particular proceedings to be restricted from public access.

The exceptions to open access are dealt with Chapter 3.

**Recommendation 2 – Open Access:**

(a) Court information classified as open to public access should be available to the general public as of right. The legislation or regulations should identify the key categories of open access information. For example, these could include:

in criminal matters:

1. Transcript of evidence of open court proceedings
2. Statements and affidavits admitted into evidence
3. Record of adjudication or order
4. Indictment or court attendance notice
5. Police Fact Sheet (except where a date for a trial by jury has been allocated)

and in civil matters:

1. Judgments and Orders
2. Originating process and pleadings (after the first listing date, or after judgment is given, whichever first occurs)
3. Transcript of evidence of open court proceedings
4. Statements and affidavits admitted into evidence
5. Court listing and case management information

(b) The Police Fact Sheet should be retained as part of the court record whenever it is tendered as evidence in proceedings on a bail application.

(c) Administrative information relating to court listings, such as listing dates, the presiding judicial officer, case management directions and the appearance of parties should be publicly available.

(d) Open access information should be subject to any court order restricting access to information in specific proceedings or a legislative provision restricting access to a specified class or classes of information.

### **3. Restricted Access Information**

Restricted access information is any information on the court record that is not classified as open to the public. Restricted access material would only be available to non-parties either where the court allows access or where a statutory provision confers a limited right of access.

In addition, access will be restricted to information that, although within the general class of open access information, is subject to a legislative exception or court order which requires the information to be restricted.

#### **Access Restricted by Omission from Open Access Categories**

In identifying categories of documents that are appropriately classified as open access the recommendations in this report have excluded court information that is likely to contain information that is sensitive or confidential. Open Access information does not include the following information:

##### *a) Transcripts in Closed Court Proceedings*

Closed court or in-camera proceedings restrict the right of the public to enter the courtroom to view court proceedings. A direction that a court be closed to the public is usually made in aid of orders restricting the publication of information.

##### *b) Criminal History Records*

The criminal history record is a compilation of a person's criminal history outlining particulars of offences and the penalty imposed. The court has regard to this record when determining bail and when sentencing. A person's criminal history may be either an aggravating or mitigating circumstance considered by the court when determining a sentence. Repeat offences may alter the presumption in relation to the grant of bail.

Courts are reluctant to release copies of criminal history records. Similarly, public sector agencies that compile this information do not allow the records to be publicly available.

Open justice requires that adequate reasons be provided for judicial decisions. A court will refer to previous convictions that it has taken into account in its reasons for decision.

The public release of criminal history records may have adverse consequences on individuals. Widespread availability of this information may undermine the effectiveness of spent conviction regimes, as information could be accessed and republished on the internet and remain published for an indefinite period. It may also increase the opportunity for information to be used for improper purposes such as embarrassment, victimisation or intimidation.

There is a public benefit in fostering rehabilitation and providing an opportunity for a person to be accepted within the community once they have

completed their sentence. Publicly available criminal records create the potential for people being unreasonably refused employment or membership to associations and clubs on the basis of previous criminal conduct.

*c) Documentary Evidence other than Statements and Affidavits*

Chapter 2 identified statements and affidavits as documents that should be classified as open access. This does not extend to other documentary exhibits. Documentary exhibits include a potentially unlimited range of information such as financial statements, company records, medical records, transcripts of interviews, as well as diagrams and photographs.

Several submissions sought clarification on whether records of interviews, conversations recorded under the *Listening Devices Act 1984*, expert's certificates and character references were to be classified as open access.

Documentary exhibits are more likely to contain personal or confidential information that cannot be edited from the document. Photographs may contain images that are distressing or intimate.

These documentary exhibits should be classified as restricted access.

*d) Physical Exhibits tendered in Court Proceedings*

Physical exhibits include any thing or material other than exhibits that can be produced in documentary form.

A number of submissions considered that the principle of open justice requires access to be provided to physical exhibits and that the general presumption in favour of the release of exhibits should be retained. In contrast, a number of other submissions expressed caution as access to sensitive exhibits, such as photographs of crime scenes, video footage of criminal behaviour or interviews of defendants as these may cause additional distress to victims of crime.

Access to physical exhibits, as opposed to documentary exhibits, raises a number of additional unique considerations.

Increasingly, prosecuting authorities are relying on video and audio records in court proceedings. Prosecution material will often include photographs, videos of crime scenes, videos of property seized under search warrants, videos of interviews and CCTV footage.

There is a concern that the public dissemination of videotaped interviews may deter people from participating in a record of interview because the contents may be disseminated to the public rather than being limited to those involved in the trial process.

Videotaped records of interview obtained by the media during the committal stage of proceedings could have a greater impact on potential jurors if broadcast shortly before a trial, particularly where there is only a short period between committal and trial.

Access to weapons, drugs and physical material raises a number of practical considerations. In many instances, the material will be returned to the prosecution at the conclusion of the case and it will not be possible for the court to facilitate access. Handling of physical material may, in some instances, compromise the integrity of the exhibit or raise issues of health and safety.

### **Access Restricted through Exceptions to Open Access Information**

Some open access documents contain information that is particularly sensitive. This may be due to the personal nature of the particular documents, for example, medical reports, pre sentence reports and victim impact statements.

Certain classes of proceedings are inherently sensitive. Court information relating to proceedings involving sexual assault or indecent assault should not be open access as this may cause additional distress to victims of assault. Similarly, open access should not apply to court information relating to other proceedings that involve vulnerable people, such as children and victims of domestic violence.

In addition to the personal nature of information there may be other reasons that would prevent certain documents being publicly available, such as the protection of court proceedings (for example, statements relating to a *voire dire* or an application for a suppression order) or to protect the safety of an individual (for example, letters of comfort) or by virtue of restrictions to access information under the spent conviction regime.

It is proposed that certain documents that would otherwise be classified as open access should be restricted. The following sensitive documents should be restricted access:

1. affidavits, pleadings and statements rejected or struck out;
2. spent convictions;
3. statements and evidence on a *voire dire*;
4. medical, psychiatric, psychological and pre sentence reports;
5. evidence given in relation to non-publication and suppression order applications;
6. information subject to a non-publication and suppression order;
7. proceedings relating to sexual assault, indecent assault, children's court proceedings, domestic violence proceedings, family disputes and adoption proceedings;
8. victim impact statements;
9. letters of comfort.

### **The test for access to restricted information**

A number of legislative provisions enabling access to court information require the applicant to demonstrate that they have a sufficient interest or a proper interest in the proceedings. Rule 36.12 of the Uniform Civil Procedure Rules

2005 allows the Registrar to provide access to a person having “sufficient interest in the proceedings”. In the criminal jurisdiction of the Local Court, a non-party must demonstrate a “proper interest in the proceedings”. The test of “sufficient cause” applied in relation to criminal proceedings within New South Wales until July 2003 under sections 40 and 73 of the *Justices Act 1902*.

These tests are inadequate as a guide to the relevant considerations that should be applied when assessing whether a non party should be entitled to access court information. The test of “sufficient interest” requires the court or registrar to consider only the relationship of the person seeking access to the proceedings. The test of “sufficient cause” requires the court or registrar to consider only whether the purpose for which access is sought has sufficient merit. Neither of these tests require the court or registrar to balance other relevant considerations, in particular, the extent to which the principle of open justice is compromised if access is not granted.

Having regard to the views expressed in the submissions, it is accepted that neither the test of “sufficient interest” or “sufficient cause” provides an adequate description of the matters that require consideration when determining requests to access court information. There are a number of relevant considerations that apply whenever a court or registrar is required to consider whether a non-party should be entitled to access court information, including the principle of open justice, the reason why access is sought and the impact of access on the privacy or safety of any other individual. In addition, the court must consider whether it can reasonably facilitate access. For example, access to a physical exhibit that might be dangerous or compromised if handled may not be granted by the court.

A better test for access to restricted information requires the consideration of the following relevant factors:

1. the extent to which the principle of open justice is affected if the information is not released;
2. whether the privacy or safety of any individual will be substantially compromised by the release of the information;
3. whether the release of information adversely impacts on the administration of justice;
4. the extent to which the person seeking access may be affected by the proceedings;
5. the reason for which access is required;
6. whether the court can reasonably facilitate access to information.

### **Access to Restricted Information**

Access to court information is routinely sought and given to agencies that support the justice system. These agencies are usually public sector agencies that, when receiving court information, are subject to the *Privacy and Personal Information Act 1998*.

One submission to the review sought clarification that the proposal to classify certain information as restricted access would not impact on current

arrangements between courts and justice agencies. Access to information by a variety of agencies is necessary to ensure that the court receives pre sentence and other reports, that appropriate legal representation is provided to parties and that court orders are enforced.

While not an exhaustive list of current arrangements, examples of agencies that currently obtain access to restricted information include:

1. Probation and Parole which access court records when preparing pre sentence reports and supervising bonds and community service orders;
2. Department of Corrective Services, which accesses information regarding custodial orders;
3. NSW Police Criminal History Section, which receives details of outcomes on criminal prosecutions;
4. NSW Police Warrant Unit, which receives personal information when executing warrants of apprehension;
5. State Debt Recovery Office, which receives personal information on outstanding court fines;
6. Bureau of Crime Statistic and Research, which accesses court records for the purpose of collating statistical information;
7. Roads and Traffic Authority, which accesses court information when compiling information on traffic prosecutions;
8. Director of Public Prosecution, which accesses the court records to determine whether an appeal should be lodged or whether to take over proceedings;
9. Legal Aid NSW, which accesses court information for the purposes of assessing a legal aid application;
10. Mental Health Review Tribunal, which accesses court information for the purpose of assessing fitness for trial.

The current legislative scheme on access to court information does not recognise any special right of these agencies to access court information. In a legal sense these agencies need to apply for access in each individual case. As a matter of practice and convenience, however, courts recognise the necessity of allowing these agencies to access court information to facilitate the administration of justice.

The purpose of this review is to clarify the rights of access to court information. It is also consistent with privacy principles that parties involved in court proceedings should be aware of the possibility that personal information may be disclosed to other government agencies for a particular purpose.

Agencies that have a legitimate need to routinely access restricted access information for a specific purpose should have a clear right to do so.

In addition to justice agencies there may be other individuals or groups that have a particular connection to proceedings. For example, victims of crime should be entitled to obtain access to information on the court record even where some of this information may be classified as restricted access. The charter on victim's rights establishes appropriate standards for the treatment

of victims of crime. The charter provides that a victim should be entitled to information about the prosecution of the accused person. It is consistent with the rights of victims that they should be entitled to access this information directly from the court.

**Recommendation 3 – Restricted Access:**

- (a) Any information that is not classified as open access will be restricted access. In addition, sensitive documents and information that would otherwise be classified as open access should be restricted. This includes the following information:
1. affidavits, pleadings and statements rejected or struck out;
  2. spent convictions;
  3. statements and evidence on a *voire dire*;
  4. medical, psychiatric, psychological and pre sentence reports;
  5. evidence given in relation to non-publication and suppression order applications;
  6. information subject to a non-publication and suppression order;
  7. proceedings relating to sexual assault, indecent assault, children's court proceedings, domestic violence proceedings, family disputes and adoption;
  8. victim impact statements;
  9. letters of comfort.
- (b) Access to restricted information should only be available where there is a specific entitlement provided by law or where the court or registrar grants access.
- (c) In considering an application for non party access to restricted documents the court or registrar should have regard to such factors as:
1. the extent to which the principle of open justice is affected if the information is not released;
  2. whether the privacy or safety of an individual will be compromised by the release of the information;
  3. whether the release of information adversely affects the administration of justice;
  4. the extent to which the person seeking access may be affected by the proceedings;
  5. the reason for which access is required;
  6. whether the court can reasonably facilitate access to the information.
- (d) The court may impose conditions on any permission it gives to access restricted information.
- (e) Regulations or rules of court may prescribe agencies or groups entitled to access restricted information and the basis of that access.

#### **4. Media Access**

Submissions made on behalf of the media considered that any review of access to court information should aim to improve, not hinder, the media's ability to report court proceedings fairly and accurately. The media considered that the proposals in the review did not go far enough and the proposed regime was more restrictive than the regimes operating in the Supreme Courts of Victoria, the ACT, Queensland and the Federal Court of Australia.

The review questioned whether there was a need to retain any "special right" for the media to access court information in light of the proposal to expand rights of access to the public at large. Most of the information presently referred to in the media's special right of access under section 314 of the *Criminal Procedure Act 1986* would be classified as open access information under the recommendations contained in this report.

A number of submissions recognised that the media does have a special role in reporting on court proceedings and that it was possible to grant a special right to the media to access information over and above the information that would be open to the general public.

It is proposed to provide the media with broader rights to access court information than the general public. The reason that the media may be given greater access is not by virtue of any special right to know what takes place in court proceedings, but rather by virtue of the special role of the media in informing the public about court proceedings.

This report recommends that access to court information by the media is more effectively managed by placing clearer restrictions on what should not be published rather than restricting media access to information.

The court should make reasonable arrangements to facilitate access by the media. Where practical, access should be permitted on the day that access is requested, however, access is subject to administrative constraints such as the time necessary to prepare a transcript of court proceedings or other documents and the restrictions on the capacity of the registry to facilitate access to information while court is in session or while information is being used for purpose relating to the proceedings.

The access to court information regime should define the term "media" to make it clear to whom these rights extend. In a generic sense, media includes any person or organisation that is engaged in mass communication and potentially includes any person publishing information on the internet. In the context of access to court information, the term "media" should be limited to those organisations subject to regulatory control. It is suggested that the right of media access should extend only to persons employed by organisations involved in commercial mass communication through broadcasting and datacasting services and newspaper services as defined by the *Broadcasting Services Act 1992 (Cth)*.

A number of submissions sought clarification of the right of the media to access the following:

1. Statements tendered to the court but not admitted;
2. Transcripts of evidence in closed court proceedings;
3. Information admitted into evidence that can be produced in documentary form;
4. Briefs of evidence;
5. Physical exhibits tendered in court proceedings.

#### **Statements tendered to the court but not admitted**

Information tendered but not admitted in evidence during proceedings is not within the ambit of open access information. If information is tendered but not admitted then it does not form part of the court record and is not information on which the court makes a determination. From the perspective of open justice there is no compelling reason to grant access to information tendered in court proceedings but not relied on in the court's decision-making process to the media.

#### **Transcripts of Evidence in Closed Court Proceedings**

An order that a hearing be conducted in a closed court does not, of itself, prevent the publication of what occurs in court. While a decision to conduct proceedings in a closed court may be made in conjunction with the making of a non-publication order to facilitate the protection of confidential information, there are circumstances where closed court proceedings, or at least a portion of those proceedings, may still be published.

Proceedings before the Children's Court are conducted in a closed court, however, section 10 of the *Children's (Criminal Proceedings) Act 1987* provides that the media may remain in court and are entitled to report on these proceedings, subject to limitations on publication of the identity of juveniles.

Similarly, the court has the power to take evidence in certain sexual assault proceedings in a closed court under Part 5 Division 1 of the *Criminal Procedure Act 1986*. Section 291C of the Act, however, makes it clear that a media representative is entitled to access information to report on proceedings.

Accordingly, while it is not appropriate for transcripts of evidence of closed court proceedings to be available as open access, the media should be entitled to access transcripts of closed court proceedings subject to their adherence to any restriction on publication.

#### **Briefs of Evidence and Information admitted into evidence that can be produced in documentary form**

One submission suggested that open access information should include "information admitted into evidence that can readily be reproduced in documentary form". This issue was discussed in Chapter 2 of this report where it was concluded that it would be inappropriate for this broader

description of information to be available publicly as it would result in personal information (for example, health and financial records) being released.

While it is not appropriate that this wider range of information be publicly available, it is accepted that the media should be entitled to this information provided that restrictions apply to prevent the media from publishing personal and sensitive information.

The media currently have a right to access the entire brief of evidence tendered in proceedings under section 314 of the *Criminal Procedure Act 1986*. The brief of evidence can include statements, transcripts, surveillance material, record of interviews, drug analyst certificates, diagrams, maps and photographs. The term "brief of evidence" is commonly used in relation to summary and committal proceedings in the Local Court. The term is not usually applied to information that is admitted into evidence in the District Court or Supreme Court. The right of the media to access information contained in the brief of evidence should be extended to apply generally to any information that is admitted in evidence that can be produced in documentary form.

The right of the media to access information should be subject to any order or statutory provision that restricts publication of entire documents or suppresses information.

### **Media Access to Physical Exhibits**

Submissions by the media strongly supported access to physical exhibits. As discussed in Chapter 3, access to physical exhibits raises unique considerations, including the potentially dangerous nature of the exhibit, the need to preserve the integrity of the exhibit and concerns that the release of video and audio recordings may have an adverse impact on victims of the crime. For these reasons, it is not appropriate to create a right of access by the media to physical exhibits.

Physical exhibits should be classified as restricted access. Access to physical exhibits should be determined having regard to the considerations referred to in Chapter 3. In many instances, the media will be able to satisfy this test.

This report relates primarily to role of the court in allowing access to court information. However, physical exhibits will often not be retained by the court. In particular, the court will not normally retain drugs, weapons or other articles owned by a third person. Physical exhibits will often be released into the custody of the party producing the exhibit at the conclusion of the trial. While the court has the power to permit access by media to physical exhibits, the question arises as to whether the party possessing of a physical exhibit is separately entitled to permit media access.

In October 2005, the Crown Prosecution Service in the United Kingdom introduced a protocol for the release of prosecution material to the media. The objective of the protocol is to ensure that open justice is maintained while

balancing the rights of the defendant to a fair trial and the rights of victims, witnesses and their families not to have sensitive information released.

The protocol provides that prosecution material that has been relied on in criminal proceedings should normally be released to the media. Such material includes:

- Maps/photographs;
- Videos showing crime scenes;
- Videos of property seized;
- Transcripts of interviews as read out in court;
- Videos or photographs showing reconstructions of the crime;
- CCTV footage of the defendant, subject to any copyright issues.

The protocol provides that certain material should only be released in consultation with relevant police, victims, witnesses and family members including:

- CCTV footage or photographs showing the defendant and victim, or the victim alone, that has been viewed by the jury and public in court, subject to any copyright issues;
- Video and audio tapes of police interviews with defendants, victims and witnesses;
- Victim and witness statements.

In New South Wales prosecuting authorities are reluctant to permit access by the media to physical exhibits in their possession because of the primary role of the court to determine access. However, there is no reason to believe that prosecuting agencies could not appropriately consider request by media to access physical exhibits. In many instances, prosecuting agencies may be in a better position to facilitate access as they will have custody of the material, and are more likely to have facilities to produce copies. Prosecuting agencies may also liaise with police, victims, and others to ascertain whether there may be any adverse consequences resulting from the release of the material.

The legislative regime should permit, but not require, prosecuting agencies to release material to the media in addition to the power of the court to allow access to exhibits.

#### **Recommendation 4 - Media Access**

- (a) In addition to open access information, the media should be entitled to access the following information:
  1. transcripts of evidence in closed court proceedings;
  2. information admitted into evidence that can readily be reproduced in documentary form.
- (b) The right of the media to access information referred to in (a) should be subject to any suppression order or a non-publication order.
- (c) Prosecuting agencies may permit media access to physical exhibits in their possession if the exhibit has been admitted in evidence.
- (d) The term “media” should have the same definition as provided under the *Broadcast Services Act 1992 (Cth)*.

## **5. Protection of Privacy**

Courts have generally taken the view that the principle of open justice overrides competing interests of individual privacy. Courts usually decline to make non-publication orders for the purpose of protecting against disclosure that may “embarrass” or “distress” a person involved in court proceedings. Non-publication orders designed to protect individual privacy may be made only where there is a real risk that “the embarrassment or damage that publicity might occasion is such that it would prevent or deter a person from prosecuting or defending a proceeding in the court”<sup>6</sup>.

In recent decades governments have recognised privacy as a distinct right and introduced legislative measures that protect personal information. The *Privacy and Personal Information Protection Act 1998* provides safeguards against the misuse by public sector agencies of private information. The Court is considered to be a public sector agency under the Act by virtue of the requirement that financial records of the Court are subject to audit by the Auditor General. As a consequence the Act has application to the Court.

However, section 6(1) of the Act exempts a Court or Tribunal from the provisions of the Act when exercising the Court’s or Tribunal’s judicial functions. The Act states:

*“(3) In this section, “judicial functions” of a court or tribunal means such of the functions of the court or tribunal as relate to the hearing or determination of proceedings before it.”*

The question of whether access to court information and documents falls within the judicial functions exemption of section 6(1) is uncertain. Access to court information or documents will be captured by the exemption if it is a function that relates to the hearing or determination of the proceedings before it.

A number of High Court decisions have considered that the term “relates to” is a wide term and that it will depend upon the context whether it is necessary that the relationship is direct or substantial or whether an indirect or less substantial connection will suffice<sup>7</sup>.

There has been limited consideration of the phrase in the context of the *Privacy and Personal Information Protection Act*. In *NZ v Director General, Attorney General’s Department (GD)* [2005] NSWADRAP 62, the Administrative Decisions Tribunal gave broad interpretation to the words “relate to” in section 6(3) of the Act and found that the actions of the Registry staff in providing access to Court files falls within the meaning of “judicial functions”.

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<sup>6</sup> *Johnston v Cameron* (2002) 124 FCR 160 at 180.

<sup>7</sup> See, for example, *Re Dingjan; Ex parte Wagner* [1995] 128 ALR81

In 2006, the New Zealand Law Reform Commission expressed the view that an equivalent provision contained in New Zealand privacy legislation did not apply to access to court information on the basis that there is a continuing judicial function in relation to the supervision of court records.

The application of the *Privacy and Personal Information Protection Act 1998* to the release of court information is problematic. Many of the provisions of the Act are specific to public sector records and do not address the unique issues relevant to court information.

Irrespective of whether the Act applies to court information, the question remains as to what extent privacy interests should be recognised in the context of access to court information.

A number of submissions to the review appreciated the need for the access to court information regime to have regard to privacy considerations. Rather than apply the provisions of the *Privacy and Personal Information Act 1998*, it has been suggested that it is open for the court to adopt more appropriate privacy principles.

Submissions on behalf of privacy groups argued that people should not feel that they must sacrifice all rights to privacy when they become involved in legal action and the review provides a valuable opportunity to achieve an appropriate balance.

While it is not practical to apply existing privacy legislation to court records there are a number of privacy principles that should be incorporated into the access to court information regime. These include:

1. Informing parties of the potential disclosure of court information
2. Informing parties of the right to omit personal identifiers
3. Ensuring the proper storage and security of information
4. Protecting against inappropriate disclosure of restricted information

Certain information is protected expressly through statutory provisions and non-publication powers designed to protect children, sexual assault victims and vulnerable persons.

These express protections do not extend to other court information that may be considered highly sensitive, including medical reports, psychological reports, family background reports and criminal antecedent records. The court or registrar will generally decline to allow access to these documents based on considerations of the sensitivity of private information.

### **Protecting personal identifying information – the risk of identity theft**

Courts recognise the need to safeguard against the unnecessary release of personal information. On 10 December 2007, the Supreme Court introduced a policy on the anonymisation of personal information that is recorded in transcripts and judgments to prevent the risk of identity theft. The policy allows unique personal identifiers such as residential addresses, dates of birth, anniversary dates, Medicare numbers, bank account numbers, tax file

numbers and driver licence numbers to be omitted from court transcripts and judgments. The Local Court implemented a similar practice on 3 April 2008<sup>8</sup>.

One of the major barriers to classifying certain court information as open access is the concern that it will result in personal information being publicly available. The disclosure of personal identifiers may increase the possibility of information being used for identity fraud or for compiling a profile of personal information to be used for other purposes.

In the context of court proceedings, the disclosure of sufficient personal information to identify participants is consistent with open justice. Notwithstanding this, the court has a responsibility to protect private information and to take steps to prevent the unnecessary release and misuse of information.

The review proposes that parties to proceedings should remove personal identifiers from court documents that they prepare. If parties do not redact personal information the court may delete information from open access documents or, where appropriate, refuse access to documents.

### **Responsibility for deleting personal identifying information**

It would provide an excessive burden on court resources to expect the court to be responsible for editing this information from court records prior to release.

Two complementary approaches should be used to protect this information:

- (a) each person responsible for preparing open access documents should be responsible for ensuring that personal identifying information is not included in court documents (or if it is necessary to include it, it is contained on a separate, removable and clearly marked page); and
- (b) a legislative non-publication provision should apply to certain personal identifiers

It should be the responsibility of the parties to redact information from any document or information prepared by or on behalf of a party and to include this information in a restricted access annexure.

The court should, so far as is possible, edit personal identifiers from documents that it prepares such as transcripts, judgments and orders. If the court is able to produce copies of documents filed electronically by the parties those documents should omit unique personal identifiers

### **What Personal Identifiers should be removed?**

The purpose of allowing the removal of unique personal identifiers is to protect against identity fraud or the misuse of personal information. It is not intended to operate to hide the identity of individuals generally involved in court proceedings. The following personal identifiers should be edited from open access information:

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<sup>8</sup> See Local Court Practice Note 1 of 2008

1. social security and tax file numbers;
2. drivers license and motor vehicle registration numbers;
3. medicare numbers;
4. financial account numbers;
5. passport details;
6. personal telephone numbers;
7. date of birth details except the year of birth;
8. home address details except the suburb, city and state.

### **Controlling the use of Court Information**

One of the relevant considerations of the court or the registrar when releasing court information to a non-party is the purpose for which the non-party seeks access. At present, once information is released to a non-party, the court has limited control over the subsequent use of that information for other purposes.

The court should be able to control the use of court information in order to ensure that it is not used in a way that has unintended impacts on a person's privacy.

There have been instances where the court has placed conditions on the use of court information. For example, individuals or organisations conducting research projects have been granted access to court information on the condition that they do not publish information identifying the parties involved in proceedings and that steps are taken to secure information accessed. Similarly, conditions have been placed on credit rating organisations to remove from their searchable database any information relating to judgments that have subsequently been set aside.

Courts should retain a power to control restricted access information to ensure that it is used for the purpose that it was intended.

### **Sanctions for improper use of court information**

One submission to the review indicated that the legislation should include restrictions on the use of court information by defining improper purposes and creating sanctions to protect against improper use of information. The court can more effectively control the use of information if sanctions for improper use are introduced.

Increased public availability of court information creates the potential for information to be data mined and used for commercial purposes, such as the unauthorised compilation and sale of civil judgments and criminal convictions.

Court records contain information that is sensitive and a potential source of embarrassment. The potential exists for court information to be used by some individuals or organisations as a vehicle for improper purposes, such as vilification, harassment, intimidation, embarrassment or to promote scandal.

Access to court information is predicated on the understanding that access is to be exercised for bona fide purposes. In some instances, access by the

court will have been granted based on representations that a non-party will use the information for a specific purpose. There is presently no recourse if court information is used for a purpose other than for which access was granted.

The legislative scheme should create criminal sanctions for the improper use of court information. Improper use of court information would include the use of information:

1. that was contrary to a condition of release;
2. that it was used for a purpose other than for which it was requested;
3. that was an unauthorised commercial purposes;
4. that was primarily intended to vilify, harass or intimidate an individual.

In addition to the improper use of court information, legislation should provide that people who have access to restricted court information should not release that information for personal gain, benefit or advantage (financial or otherwise).

#### **Recommendation 5 - Protection of privacy**

- (a) Legislation should clearly state that privacy legislation does not apply to court information, however, the court should adopt the following safeguards that prevent personal information contain in court records from being unnecessarily accessed or published:
1. informing parties of the possible use and disclosure of court information and their right not to disclose certain information in open access documents;
  2. ensuring proper storage and security of court records;
  3. preventing improper release of information.
- (b) Parties and the court should edit out certain unique personal identifiers from open access documents including the following:
1. social security and tax file numbers;
  2. drivers license and motor vehicle registration numbers;
  3. medicare numbers;
  4. financial account numbers;
  5. passport details;
  6. personal telephone numbers;
  7. date of birth details except the year of birth;
  8. home address details except the suburb, city and state.
- (c) The court should be able to impose conditions upon the release of court information and the legislation should create offences to prohibit the improper release and use of court information.

## **6. Non-publication orders and suppression orders**

### **Effect of a Non-Publication Order or Suppression Orders**

A number of submissions to the review were concerned that it was difficult for legal publishers and the media to confirm what information is subject to a non-publication order. While this request is reasonable, it highlights the uncertainty surrounding the extent of the restrictions created by non-publication orders and suppression orders.

If the term “publication” is taken in its wider meaning, it prevents the court from conveying to the media or legal publishers what information is subject to the order as the communication of this information is, in itself, a publication and could therefore be in breach of the order.

The Crown Solicitor has advised that there is no clear guidance as to what constitutes a “publication”. If the term “publication” applies in its wider meaning, it prohibits the display of a courtlist in the court precincts, the communication of the information to law enforcement agencies or Legal Aid or other communications to the media and legal publishers made in the ordinary course of proceedings.

The Court of Criminal Appeal considered the effect of a legislative non-publication restriction in *R v Kaddour*<sup>9</sup>. In that case, the Court considered whether the restriction against identification of a juror in section 68 of the *Jury Act 1977* prevented the disclosure by the court. The Court held that the restriction against publication applied to a “person” and that did not extend to include the court. It is doubtful whether this exception could extend to administrative steps taken by the registrar in disclosing information subject to a non-publication order to either the media or to law enforcement agencies.

The purpose of making a non-publication order is often intended to prevent the publication of information to the wider community. Clearly, a non-publication order is not intended to prevent the release of information to the extent that it frustrates the operation of court processes.

The making of a non-publication order should not prevent the media or legal publishers from obtaining information that is subject to a non-publication order. This information will assist the understanding by these organisations of what may and may not be published. In many instances, documents that are accessible by the media may contain information that is subject to a non-publication order. The media should be able to access that document with a clear understanding of the information in the document that is subject to the restriction against publication.

Section 121 of the *Family Law Act 1975 (Cth)* outlines the effect of a non-publication order in the family law jurisdiction. It identifies what constitutes a publication and expressly permits disclosure of information to lawyers,

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<sup>9</sup> *R v Kaddour* (2005) NSWCCA 361, 148 A Criminal Review 597

communications involving people concerned in the proceedings, Legal Aid, publication of court lists or other publications at the direction of the court.

Non-publication orders are often intended to protect the identity of individuals, such as victims of sexual assault, children and suspects subject to forensic procedures. Submissions from the media have suggested that people subject to this protection should be able to consent to publication of their identity.

The breach of a non-publication order can attract criminal sanctions. The legislation should define the effect of a non-publication order in terms similar to the provisions of the *Family Law Act 1975* to ensure that the media and others understand the restrictions created.

The term non-publication and suppression is often used interchangeably when referring to orders restricting the release of court information. However, whereas a non-publication order seeks to prevent any unnecessary publicity, the making of a suppression order prevents disclosure of information to any individual. A suppression order may be necessary to protect the welfare of an individual, for example, the use of a pseudonym to protect the identity of an informant or to protect information that may compromise national security if released.

The legislation should clearly define the effect of making a non-publication order and a more restrictive suppression order.

### **Consolidate provisions allowing the court to make non-publication orders and the basis upon which such orders may be made**

The review noted that there are numerous legislative non-publication and suppression provisions contained in different legislation. A schedule of various provisions relating to suppression and non-publication of court information is attached at Appendix 2 of this report.

Submissions to the review agreed that the proliferation of legislative provisions restricting publication of court information in various statutes may lead to confusion.

By way of example, there are numerous Acts of Parliament that specifically protect against the publication of the identity of children involved in court proceedings. Consolidating a number of these provisions would simplify the obligations on the media and reduce the potential for an inadvertent breach of a restriction against publication.

A number of statutory non-publication/suppression provisions apply differing tests and overlap in their application. The New South Wales Law Reform Commission (LRC) Contempt by Publication Report 100 (2003) highlighted different statutory tests that applied in a range of legislative provisions. Various tests identified in the LRC report included “desirable in the public interest”, “necessary in the public interest” or the “confidential nature” of the evidence. Some non-publication provisions contain no test. The LRC

recommended the repeal of certain provisions and suggested that a standard test apply so that restrictions against publication are made on the basis that it is “necessary to do so for the administration of justice in the proceedings”.

### **Information that should be subject to Non publication/Suppression**

Parliament has introduced legislative restrictions on the publication of court information based variously on considerations such as individual welfare, protection of vulnerable people in society, protection of parties involved in domestic relationship disputes or to protect national security, confidential or sensitive information or to protect the fairness of the trial to an accused person. A number of provisions apply automatically while others apply at the discretion of the court.

#### *Individual Welfare*

The protection of individual welfare often requires the making of suppression orders that prevents any disclosure of identity of a person involved in court proceedings. Court orders have been made to protect the following people:

1. Informants in criminal proceedings;
2. Victims of blackmail;
3. Witnesses in protection programs.

#### *Protection of Vulnerable People*

A number of provisions protect against the publication of information identifying vulnerable people involved in court proceedings. The purpose of the protection is to ensure that these people are not subject to unnecessary additional distress through publication of information to the wider community. Restrictions exist to protect the identity of the following:

1. Children involved in court proceedings;
2. People involved in adoption proceedings;
3. Victims of sexual assault;
4. People involved in mental health inquiries;
5. People involved in guardianship proceedings.

The Legislative Council Standing Committee on Law and Justice held an inquiry into the current prohibition on the publication of names of children involved in criminal proceedings. Its report was published in April 2008. The Government’s response to their recommendations is due in October 2008. Accordingly, this *Report on Access to Court Information* does not deal with the issues covered by the Committee’s inquiry.

#### *Domestic Relationship Proceedings*

The publication of information relating to proceedings involving inherently personal and family disputes may lead to adverse consequences such as litigants experiencing shame or embarrassment. They may be disinclined to seek legal redress if they were subject to identification. A number of provisions restrict publication of the identity of people involved in family disputes. Provisions protecting against identification of parties in family related disputes include:

1. Family court proceedings;

2. Adoption proceedings;
3. Care proceedings involving children.

There are limited protections that exist in relation to the publication of the identity of people involved in apprehended domestic violence proceedings. In addition, there is no restriction on the publication of the name of parties involved in disputes under the *Property (Relationship) Act 1984*. Submissions to the review supported the introduction of a general provision protecting against publication of the identity of people involved in these proceedings.

#### *Sensitive Information*

Court proceedings dealing with offences relating to sexual conduct, pornography or violence will inevitably involve evidence that is of a highly graphic or sensitive nature. In some instances, it is appropriate to prevent the publication of certain material tendered in proceedings on the basis that to do so could offend or upset the community as well as victims involved in the particular proceedings. The following evidence is protected by legislative non-publication orders:

1. Evidence that is struck out or rejected;
2. Evidence given in support of a non-publication or suppression order;
3. Evidence that is obscene, pornographic or sensitive within the meaning of Chapter 5 Part 2A of the *Criminal Procedure Act 1986*.

#### *Confidential Information*

The publication of confidential information may cause adverse consequences to individuals and commercial enterprises. Parties may be prevented from seeking redress through the court if commercial trade secrets are published. At common law, courts have the power to order the non-publication of confidential information in order to ensure that disclosure would not defeat the attainment of a just outcome in the proceedings.

#### *Protection of National Security Interests*

The increase of the threat of terrorism has resulted in a number of provisions being introduced to ensure that government information relating to national security is not published. The Commonwealth has introduced a number of legislative suppressions. In NSW, the *Terrorism (Police Powers) Act 2002* allows the court to order that evidence not be published.

#### *Protecting the Fairness of a Trial by Jury*

Provisions that restrict the publication of court information all assist the proper administration of justice by giving effect to competing interests that occasionally override the principle of open justice. There are other circumstances where Courts may make non-publication orders for the purpose of ensuring a fair trial before a jury. Non-publication orders usually apply to evidence taken at trial in the absence of the jury. If the Court of Criminal Appeal permits a retrial of an accused person who was previously acquitted, section 111 of the *Crimes (Appeal and Review) Act 2001* allows the court to prohibit the publication of any matter that would give rise to a substantial risk of prejudice to the administration of justice in the retrial.

The right of an accused to a fair trial can be affected by unfettered publication of information available in open court. Publication of information arising in earlier court proceedings, or preliminary hearings relating to bail, may be prejudicial to an accused person. In addition, the publication of information relating to a co-accused or information not available to a jury, may be prejudicial. Close proximity of the publication to the trial will increase the likelihood of prejudice.

There are a number of safeguards available to limit the potential for prejudice to be caused by publication of earlier court proceedings. The court may regulate the conduct of trials by either adjourning proceedings to a later date, or granting a stay of proceedings where recent media reports may impact on a trial. The court may manage proceedings involving a co-accused to ensure that there is a reasonable lapse of time between trials to avoid the report of the earlier trial impacting on the subsequent trial of the co-accused. Recent amendments to the *Jury Act 1977* allow the examination of a juror to assess whether they have been influenced by prejudicial material published during a trial and prohibit jurors from making inquiries to obtain information relevant to the accused person or the trial.

Non-publication orders may be made to prevent the publication of prejudicial information, however, this option should only be used as a last resort where other safeguards will not adequately safeguard the risk of prejudicial information.

The effectiveness of safeguards designed to protect the fairness of jury trials should be re-examined in the context of increasing lifecycles of media reports and online communications. Web based media reports of earlier court proceedings remain accessible in the public domain long after the initial report was published.

In *John Fairfax Publications Pty Ltd v District Court of New South Wales [2004] NSWCCA324* at 65, Spigelman CJ proposed that steps should be available to remove information from the internet to avoid prejudice during a trial:

*“In Burrell at [39] I indicated that it may be desirable for the Crown to conduct searches in advance of a trial and, where necessary, request Australian-based websites to remove references to an accused for the period of a trial.”*

The nature of information on the internet limits the practicality of the Chief Justices proposal. Multiple copies of internet pages may be cached rendering it impossible to completely remove information on the internet. Notwithstanding this, a co-operative practice should be developed to allow the court to inform publishers if the court is of the view that a publicly available web based article contains information that is likely to be prejudicial to the conduct of an imminent jury trial, so that the publisher may remove or exclude the information from internet search engines until the conclusion of the trial.

The protection intended by this restriction is better achieved by preventing the prospective publication of prejudicial information in close proximity to the

conduct of a trial. The court, during preliminary case management of proceedings committed for trial, should consider whether non-publication orders are necessary to protect against the publication of information that may be prejudicial to the conduct of an imminent trial. Generally, the making of non-publication orders for this purpose should extend only to the conclusion of the trial.

### **Protection of Information on the basis of Privacy Considerations**

The introduction of broader rights of access to the media should be balanced by the need to protect against the unnecessary publication of personal information.

The court has a primary obligation to ensure that personal and sensitive information contained in court records is not used for improper purposes. For this reason, the legislative regime should contain a legislative prohibition against publication of the personal unique identifiers referred to in Chapter 5.

In addition to personal unique identifiers, there are a number of court documents that contain highly personal information. A number of these were discussed in Chapter 3 as specific exclusions against open access information. While these documents are excluded from open public access, the media may be entitled to access this information by virtue of its “special right” to access information that may be produced in documentary form. That right is subject to legislative restrictions against publication.

The following information and documents should be subject to a legislative restriction against publication:

1. personal unique identifiers;
2. criminal and traffic antecedents;
3. medical and health records;
4. psychiatric and psychological reports;
5. pre-sentence reports;
6. victim impact statements;
7. letters of comfort.

### **Impact of suppression orders on court information classified as State Archives**

The State Records Office NSW is responsible for preserving the official archives of the State of New South Wales. State Records have classified a range of historic court records as State Archives. Supreme Court records become open State Records after the lapse of time approved by the Court, being a time when the Court records are no longer administratively required and when considerations of personal privacy and confidentiality become diminished by the historic nature of the records. The current time frame set by the Supreme Court is 75 years. The State Records office has determined that Local Court records created after December 1982 are no longer required as State Archives. State Records has not made a determination regarding District Court records.

Powers relating to suppression orders and non-publication orders rarely have any limitation on their duration. Unless a court directs that the suppression order or non-publication order is lifted that order will continue indefinitely. Consequently, even after records are declared to be State Archives, the release of information will be contrary to court orders. Given that people protected by the making of suppression and non-publication orders are likely to have died after a period of time, the need for the continued operation of these orders is inappropriate.

#### **Recommendation 6 - Suppression of information**

- (a) Existing legislative provisions relating to non-publication and suppression of information should be consolidated. A clear distinction should be drawn between the effect of a suppression order and a non-publication order.
- (b) The test for the imposition of non-publication and suppression orders should be consistently applied. Orders should be made on the basis that it is necessary to do so to secure the proper administration of justice in proceedings.
- (c) In addition to existing provisions,
  1. the identity of parties in proceedings under the *Property (Relationships) Act 1984* and Part 4 of the *Crimes (Domestic and Personal Violence) Act 2007* should be subject to a legislative non-publication order; and
  2. information relating to adoption proceedings should be suppressed.
- (d) Personal unique identifiers should be subject to legislative restriction against publication. In addition, the sensitive documents should be subject to a legislation restriction against publication including:
  1. criminal and traffic antecedents;
  2. medical and health records;
  3. psychiatric and psychological reports;
  4. pre-sentence reports;
  5. victim impact statements;
  6. letters of comfort.
- (e) A co-operative approach should be developed to allow the court to inform publishers if the court is of the view that a publicly available web based article contains information that is likely to be prejudicial to the conduct of an imminent jury trial, so that the publisher may remove or exclude the information from internet search engines until the conclusion of the trial.
- (f) Restrictions on publication of court information should be subject to an expiry date. If a court does not state an expiry date, then restrictions should cease to have effect after 75 years in relation to criminal, adoption and care proceedings, and 30 years in relation to civil proceedings.

## Conclusion

The court and registrar currently play a gatekeeper role in relation to access to information. Consequently, while court hearings are normally open to the public, court records are not public documents. This seemingly contradictory statement on the nature of court proceedings and information is a source of confusion to the community.

The recommendations in this report propose a new approach to accessing court information in criminal and civil proceedings. By removing restrictions on access to the majority of information contained in court records, this information will, for the first time, be treated as public information.

The recommendations adopt the general framework of open and restricted access proposed in the original review. Where the recommendations depart from the original review is in the detail of what information should be publicly available and the right of the media to access information. This report reduces the restrictions originally proposed in relation to accessing Fact Sheets and originating process and pleadings in civil proceedings. It also recognises that the media should be entitled to certain information that is not open to the general public.

The proposal to allow open access to a wide range of court information creates the opportunity for the court to review the way in which access is facilitated. The introduction of JusticeLink may allow electronic searches of court information and the capacity to obtain certain information online. It has the potential to lessen the current geographic barriers associated with attending a court registry in person to obtain information. The removal of the individual decision making process in relation to the release of certain documents will assist the timeliness associated with providing access to information and documents. The fee structure will be reviewed when changes to services relating to access to court information and documents take place.

While the report recommends significantly wider access to court information this is balanced by mechanisms that safeguard against the misuse of personal information. Court administrators will be required to actively inform litigants of their right to delete certain personal information from open access documents. The report also consolidates the basis upon which non-publication orders are made and clarifies the effect of a non-publication order. These safeguards maintain an appropriate balance between open justice and privacy considerations.

The recommendations are framed with the objective of promoting a consistent and uniform approach to access to court information. It achieves this by removing unnecessary discretion and by identifying the factors relevant to determining access where discretion is retained.

## **Appendix 1 - Submissions received**

Submissions were received from the following individuals and agencies:

Apprehended Violence Legal Issues Consultative Committee (AVLICC)  
Australasian Legal Information Institute  
Australian Press Council  
Australian Privacy Foundation  
Chief Magistrate Local Courts of NSW  
Consumer Credit Legal Centre (NSW) Inc  
Director of Public Prosecutions  
Free TV Australia/John Fairfax Holdings Ltd  
Homicide Survivors Association Inc.  
IMF (Australia) Ltd  
Law student (private)  
Law Society of New South Wales/NSW Young Lawyers  
Legal Aid Commission NSW  
Local Court Registrars  
Ministry for Police  
NSW Department of Juvenile Justice  
NSW Privacy Commissioner  
Public Interest Law Clearing House Inc  
State Records NSW  
Supreme Court JusticeLink Committee

## Appendix 2 - Current NSW law governing non-publication and suppression

Source of suppression	Cause of action	Details of non-publication or suppression	Comment
Judicial officer			
	Any civil or criminal matter	<p>The kinds of proceedings often involved include:</p> <ul style="list-style-type: none"> <li>• voir dire proceedings in the absence of the jury;</li> <li>• guardianship;</li> <li>• custody or maintenance of an infant;</li> <li>• -where the proceedings do not involve the appearance of anyone before the court;</li> <li>• criminal, adoption or protective matters;</li> </ul> <p>Can order suppression of a case or any aspect of a case, including:</p> <ul style="list-style-type: none"> <li>• name of matter;</li> <li>• names of parties or witnesses or the use of a pseudonym;</li> <li>• details of case;</li> <li>• cause of action;</li> <li>• -transcripts;</li> <li>• judgments; and</li> <li>• reporting on a matter.</li> </ul>	Common law powers of the court
Legislative provisions			
	Adoptions	<p>It is an offence to publish in the media anything that may lead to the identification of a natural parent, an adoptive parent, a guardian or child up for adoption in proceedings.</p> <p>In any proceedings concerning Chapter 8 before any court or tribunal, the court or tribunal may make an order forbidding publication of all or any of the information mentioned in the proceedings relating to an adopted person, birth parent, adoptive parent, relative or other person.</p>	<p>S 180, <a href="#">Adoption Act 2000</a></p> <p>S 186(2) <a href="#">Adoption Act 2000</a></p>
	Bail Surety	A person must not publish or broadcast the fact that a person is specified in a condition imposed on the grant of bail. This restriction does not apply to an accused person or certain other persons.	<a href="#">S36C Bail Act 1978</a>
	Civil proceedings	<p>The Court can make a non-publication order against disallowed questions put to a witness and prohibit the publication and disclosure of any information revealing the identity of any parties.</p> <p>The court may, by order, prohibit the publication or disclosure of any information tending to reveal the identity of:</p>	<p>Ss 41 and 195, <a href="#">Evidence Act 1995(NSW)</a> and s 72, <a href="#">Civil Procedure Act 2005</a></p> <p>S 72 <a href="#">Civil Procedure</a></p>

		<p>(a) any party to proceedings, or</p> <p>(b) any witness in proceedings,</p> <p>if it is of the opinion that it is necessary to do so to secure the proper administration of justice in the proceedings.</p> <p>Without limiting any action the court may take to limit the possible harm, or extent of the harm, likely to be caused by the disclosure of evidence of a protected confidence or protected identity information, the court may:</p> <p>(b) make such orders relating to the suppression of publication of all or part of the evidence given before the court as, in its opinion, are necessary to protect the safety and welfare of the protected confider.</p> <p>Without limiting section 14, the recognised court may, by order:</p> <p>(a) direct that the proceeding, or a part of the proceeding, be conducted in private, or</p> <p>(b) require a person to leave a place in New South Wales where the giving of evidence or the making of submissions is taking place or is going to take place, or</p> <p>(c) prohibit or restrict the publication of evidence given in the proceeding or of the name of a party to, or a witness in, the proceeding.</p>	<p><a href="#">Act 2005</a></p> <p>S 126E(b) <a href="#">Evidence Act 1995</a></p> <p>S 15 <a href="#">Evidence (Audio and Audio Visual Links) Act 1998</a></p>
	Assets recovery	<p>The Supreme Court has discretionary powers to order the non publication of proceedings under the following scenarios:</p> <p>a) if a serious crime has been committed and proceedings have not commenced.</p> <p>b) if a serious crime has been committed and proceedings have commenced but have not been completed.</p> <p>c) if the following orders have been instituted - restraining order, assets forfeiture order or a proceeds assessment order.</p>	<p>S 62, <a href="#">Criminal Assets Recovery Act 1990</a></p>
	Assumed identities	<p>It is an offence to publish the identity of a participant in these proceedings. Broadcasting of any information that could lead to the identification of such persons is an offence.</p>	<p>S 28, <a href="#">Law Enforcement (Controlled Operations) Act 1997</a> and s 14, <a href="#">Law Enforcement and National Security (Assumed Identities) Act 1998</a></p>

	Children involved in AVO proceedings	The publication of names and identifying information of children under the age of 16 involved in AVO proceedings is prohibited, except where the court consents, and where the name is contained in an official report of the proceedings.	S 45 (1), <a href="#">Crimes (Domestic and Personal Violence) Act 2007</a>
	Children-related proceedings	If, in relation to a child or young person or a class of children or young persons, a person makes a report in good faith to the Director-General or to a person who has the power or responsibility to protect the child or young person or the class of children or young persons:  (f) the identity of the person who made the report, or information from which the identity of that person could be deduced, must not be disclosed by any person or body, except with:  (i) the consent of the person who made the report, or  (ii) the leave of a court or other body before which proceedings relating to the report are conducted	<a href="#">Children and Young Persons (Care and Protection) Act 1998</a> s 29(1)(f)
	Conveyancers & receivership of their property	The Supreme Court may, whether or not at the instance of a party, prohibit the publication of any report relating to the evidence or other proceedings or of any order made on the hearing of an application for the appointment of a receiver.	S 107(2) <a href="#">Conveyancers Licensing Act 2003</a>
	Coronial matters	The coroner has broad powers to prohibit publication of evidence given at an inquest.	S 44, <a href="#">Coroners Act 1980 (NSW)</a>
	Criminal contempt - Question of law proceedings	Publication of reports of such proceedings and the identity of alleged contemnors is prohibited.	S 101A (8), <a href="#">Supreme Court Act 1970</a>
	Criminal proceedings – sexual assault	The court may make orders to limit the possible harm, or extent of the harm, likely to be caused by the disclosure of evidence of, or the contents of a document recording, a protected confidence, the court may:  (a) make such orders relating to the production and inspection of the document as, in the opinion of the court, are necessary to protect the safety and welfare of any protected confider, and  (b) make such orders relating to the suppression of publication of all or part of the evidence given before the	S 302(1) <a href="#">Criminal Procedure Act 1999</a>

		<p>court as, in its opinion, are necessary to protect the safety and welfare of any protected confider</p> <p>(c) make such orders relating to disclosure of protected identity information as, in the opinion of the court, are necessary to protect the safety and welfare of any protected confider.</p> <p>(d) order that all or part of the evidence be heard or document produced in camera, and</p> <p>(e) make such orders relating to the production and inspection of the document as, in the opinion of the court, are necessary to protect the safety and welfare of any protected confider, and</p> <p>(f) make such orders relating to the suppression of publication of all or part of the evidence given before the court as, in its opinion, are necessary to protect the safety and welfare of any protected confider, and</p> <p>(g) make such orders relating to disclosure of protected identity information as, in the opinion of the court, are necessary to protect the safety and welfare of any protected confider</p>	
	<p>Criminal proceedings (appeals &amp; retrials)</p>	<p>1) A person must not publish any matter for the purpose of identifying or having the effect of identifying:</p> <p>(a) an acquitted person the subject of a police investigation referred to in section 109 (or of an application for authority for such an investigation), or</p> <p>(b) an acquitted person the subject of an application for a retrial under Division 2 or an appeal under Division 3, or</p> <p>(c) the acquitted person the subject of an order for retrial under this Part or who is being retried under this Part,</p> <p>unless the publication is authorised by order of the Court of Criminal Appeal or of the court before which the acquitted person is being retried.</p> <p>(2) The court may make an order under this section only if the court is satisfied that it is</p>	<p>S 111  <a href="#">Crimes (Appeal and Review) Act 2001</a></p>

		<p>in the interests of justice to do so.</p> <p>(3) Before making an order under this section, the Court is to give the acquitted person a reasonable opportunity to be heard on the application for the order.</p> <p>(4) The Court may at any time vary or revoke an order under this section.</p> <p>(5) The prohibition on publication under this section ceases to have effect (subject to any order under this section):</p> <p>(a) when there is no longer any step that could be taken which would lead to the acquitted person being retried under this Part, or</p> <p>(b) if the acquitted person is retried under this Part, at the conclusion of the trial, whichever is the earliest.</p> <p>(6) Nothing in this section affects any prohibition of the publication of any matter under any other Act or law.</p>	
	Criminal proceedings - sexual assault cases	The Court can prohibit the publication of evidence given in certain sexual assault matters.	S 292, <a href="#">Criminal Procedure Act 1986</a> (NSW)
	Criminal proceedings – where young people are involved	The name of any person involved in such proceedings who was under the age of 18 at the time of the offence in question, must not be published without the permission of the court. The prohibition applies both before and after the proceedings have been disposed of, and even if the person is no longer a child. The Judge may order that the name of a person who is or was a child at the time the offence be published when the person is sentenced.	S 11, <a href="#">Children (Criminal Proceedings) Act 1987</a> (NSW) and s 65, <a href="#">Young Offenders Act 1997</a> (NSW)
	Criminal proceedings – witnesses in sexual offence cases	It is an offence to publish the name, or any information that identifies a complainant in certain sexual offence cases, even after the case has concluded, regardless of the age of the victim. This section applies unless: <ul style="list-style-type: none"> <li>• the judge orders otherwise;</li> <li>• the complainant (if over the age of 14) consents to the publication;</li> <li>• the publication is authorised by the court under s 11 of the Children (Criminal Proceedings) Act 1987 in respect of a complainant who is under the age of 16 years at the time of publication;</li> <li>• it is an official law report of the proceedings;</li> <li>• it is contained in the supply of transcripts to persons with a genuine interest in the proceedings; or</li> </ul>	S 578A, <a href="#">Crimes Act 1900</a> (NSW)

		<ul style="list-style-type: none"> <li>the publication is made after the complainant's death.</li> </ul>	
	Detention Orders	<p>(1) The Court may, in or in connection with any proceedings under this Act, make an order prohibiting persons generally, or any named person or persons, from publishing or broadcasting the name of any person:</p> <p>(a) who is a defendant or witness in the proceedings, or</p> <p>(b) to whom the proceedings relate, or</p> <p>(c) who is mentioned or otherwise involved in the proceedings.</p> <p>(2) Such an order has effect both during the proceedings and after the proceedings are disposed of.</p> <p>(3) For the purposes of this section, a reference to the name of a person includes a reference to any information, photograph, drawing or other material that identifies the person or is likely to lead to the identification of the person.</p>	S 18 <a href="#">Community Protection Act 1994</a>
	Divorce & matrimonial proceedings	The Court or any judge presiding at a trial on circuit may in any suit at any stage thereof and from time to time make an order forbidding the publication of the evidence therein or any report or account of such evidence either as to the whole or portions thereof.	S 81(1) <a href="#">Matrimonial Causes Act 1899</a>
	Family proceedings	Publication in the media of any information that identifies a party, witness, or anyone associated with a party to Family Law proceedings is an offence. Certain exceptions apply.	S 121, <a href="#">Family Law Act 1975</a> (Cth)
	Forensic procedures	It is an offence for a person to publish information leading to the identification of suspects in these proceedings. Section 43 does not prohibit the court from publishing its reasons for a judgment because a court is not a 'person' (see R v Kaddour (2005) NSWCCA 361, 148 A Criminal Review 597). Judge has a duty to administer justice including giving reasons for a judgment.	S 43, <a href="#">Crimes (Forensic Procedures) Act 2000</a>
	Listening devices and lie detectors	The Court may forbid the publication of unlawfully obtained evidence from lie detectors and listening devices. It is an offence to publish such material when a non-publication order is in place.	S 6, <a href="#">Lie Detectors Act 1983</a> and s 13, <a href="#">Listening Devices Act 1984</a>
	Mental health patients	Publication of the identity of persons involved in an inquiry relating to mentally ill persons or non	S 44, <a href="#">Mental Health Act</a>

		official reports that identify people involved in such proceedings is prohibited.	<a href="#">1990</a>
	Minors (contractual, testamentary, property matters)	Subject to paragraph (a) of subsection (4), the court may make such orders as it thinks fit for the purpose of preventing or limiting publication of a referee's report filed under this section (NB: s 43 relates to reference of questions of benefit to a referee).	S 43(5) <a href="#">Minors (Property and Contracts) Act 1970</a>
	Sentencing procedures	Restrictions apply to the publication of names specified in parole orders and non association orders.	S 51B, <a href="#">Crimes (Sentencing Procedure) Act 1999</a>
	Proceedings involving children	Restrictions are placed on the publication of reports of proceedings involving children. Broadcasting anything that may identify a child in the proceedings is an offence. Certain exceptions apply.	S 105, <a href="#">Children and Young Persons (Care and Protection) Act 1998</a> (NSW) and s 25, <a href="#">Status of Children Act 1996</a>
	Property, stock & business agents (receivership of their property)	The Supreme Court may, whether or not at the instance of a party, prohibit the publication of any report relating to the evidence or other proceedings or of any order made on the hearing of an application for the appointment of a receiver.	S 140(2) <a href="#">Property, Stock and Business Agents Act 2002</a>
	Protected persons	The addresses of protected person must not be stated in applications or complaints for an apprehended personal violence order. The following exceptions apply <ul style="list-style-type: none"> <li>• the protected person consents to this being known,</li> <li>• the address is required for the compliance of the order</li> <li>• the defendant is known to be aware of the address.</li> </ul>	S 562AG and s562AL, <a href="#">Crimes Act 1900</a>
	Public health	Publication of the identity of persons or non official reports that identify people involved in such proceedings is prohibited.	S 35, <a href="#">Public Health Act 1991</a>
	Registrable persons	Publication of any information that identifies a registrable person or their victims is an offence. Certain exceptions apply.	S 18, <a href="#">Child Protection (Offenders Prohibition Orders) Act 2004</a>
	Terrorism	All court proceedings are conducted in a closed court. The Court may make orders for the non publication of the entire proceedings, part of or	Ss 26P and 27ZA, <a href="#">Terrorism (Police</a>

		<p>evidence in the proceedings.</p> <p>It is also an offence to publish documents involved in these proceedings such as</p> <ul style="list-style-type: none"> <li>• search warrants</li> <li>• a report prepared under s27S</li> <li>• an occupier's notice</li> </ul> <p>Certain exceptions apply.</p>	<p><a href="#">Powers) Act 2002</a></p>
	Witness protection	<p>Certain court proceedings are closed to the public and the court can make orders for the non-publication of evidence. Such court orders are in force until further order of the court, regardless of whether the trial has concluded.</p> <p>A person must not communicate to any other person any information concerning the making of an entry in a register of births, deaths or marriages in order to provide a person with a new identity, except in certain circumstances.</p>	<p>Ss 16, 23, 26 and 31E, <a href="#">Witness Protection Act 1995 (NSW)</a></p>

## Appendix 3 – Comparative Provisions on Access to Court Information

Jurisdiction	Legislative Provision	Description of Access provisions
High Court	High Court Rules rule 58.8	<p>Any person, on payment of the prescribed fee, may during office hours inspect and take a copy of any document filed except:</p> <p>a) affidavits and exhibits not received in evidence</p> <p>b) documents containing information disclosing the identity of a person where disclosing the identity is prohibited by law or order of the court.</p>
Federal Court	FCR Order 46 rule 6	<p>A person may inspect the following documents in a proceeding unless the court or judge has ordered that the document is confidential:</p> <ul style="list-style-type: none"> <li>• Application or originating process, notice of appearance</li> <li>• Pleadings, notice of motion</li> <li>• Submission, judgment or order</li> <li>• Additional documents may be obtained with leave of the court.</li> <li>• A non-party may only inspect and copy documents with leave of the court or registrar.</li> </ul>
Victoria	<p>Supreme Court (General Civil Procedure) Rule r28.05</p> <p>Supreme Court (Criminal Procedure) Rules 1.11</p> <p>County Court Miscellaneous Rules 5.01</p> <p>County Court Civil Proceedings Rule 28.05</p> <p>Magistrates Court</p>	<p>Civil jurisdiction: A person may access any document filed in proceedings except where the court has ordered that it remain confidential.</p> <p>Criminal jurisdiction: A document is not open for inspection unless the court, prothonotary or registrar so directs.</p> <p>Unless the court otherwise orders the registrar shall permit any person to search any documents filed in any proceedings. The rule does not apply to proceedings under Adoption Act 1984.</p> <p>Civil Proceedings: A non party may not without leave of the court inspect or obtain a copy of a document which in the opinion of the registrar ought to remain confidential to the parties.</p> <p>Only parties to the proceedings are permitted to obtain a copy of transcripts of proceedings. Generally only a party to proceedings may obtain an extract from of a judgment contained in the register (Magistrate's court</p>

		website).
Queensland	Civil Proceedings – Section 981 Uniform Civil Procedure Rules  Criminal Procedure Rules 1999	Any person may inspect a document in a court file unless the court has made an order restricting access.  Subject to a court order restricting access a person may inspect a court file or a document unless the proper officer considers giving the details may risk a person's safety. A person may apply to the court to access an exhibit for the purpose of publication.
South Australia	Supreme Court Act s131 District Court Act s54 Magistrates Court Act s 51	The court must allow the applicant to obtain a copy of: Any process relating to proceedings and forming part of the court's records; <ul style="list-style-type: none"> <li>• A transcript of proceedings.</li> <li>• Any documentary material admitted into evidence</li> <li>• A judgment or order.</li> </ul> A person may only access the following information with leave of the court: <ul style="list-style-type: none"> <li>• Material not taken or received in open court</li> <li>• Material that the court has suppressed from publication</li> <li>• Material placed before the court during sentencing proceedings</li> <li>• Material filed in connection with a preliminary examination</li> <li>• A photograph, slide, film, video tape, audio tape or other form of recording</li> <li>• A report prepared to assess eligibility for an intervention program.</li> <li>• Material of a class prescribed by regulation.</li> </ul> The court may permit inspection of material subject to any condition it considers appropriate including a condition limiting the publication or use of the material.
Australian Capital Territory	Supreme Court and Magistrates Court - Court Procedure Rules 2006 rule 2901	The register must not give a copy of an order or document to a person who is not a party to proceedings unless the person has a sufficient interest in the order or document.
Western Australia	Supreme Court Criminal Procedure Rules Rule 51	A person who is not a party to a case may apply to a register for leave to inspect or obtain a copy of the record, or certified transcript of the record of any proceedings or any other record in the possession of the court including documents and other things tendered in evidence in the case.  A register may order the applicant to serve another party to the case, with the application and a notice entitling the other party to be heard on the application.

	Supreme Court Rules 1971 (Civil jurisdiction)	<p>A registrar, if satisfied that the applicant has sufficient cause, may grant the application subject to the applicant making arrangements to pay the cost of supplying the copy.</p> <p>Any person may take a copy of any writ and statement of claim, originating application under Corporations Act 2001, any appeal notice, any judgment or order. With leave of the court or registrar, any other document.</p>
Tasmania	<p>Supreme Court Rules 2000 rule 33</p> <p>Magistrates Court (Civil Division) Rules 1998 rule 155</p>	<p>Except with leave of the court a person who is not a party to a proceeding may not search in a registry for, or inspect the following:</p> <p>a) with respect to proceedings in chambers, any judgment order, transcript of proceedings or other document</p> <p>b) any affidavit, interrogatories, list of documents given on discovery, admissions, evidence taken on deposition, subpoena or document lodged in answer to a subpoena</p> <p>c) any document which the registrar considers ought to remain confidential</p> <p>A registrar is to make available for inspection:</p> <ul style="list-style-type: none"> <li>• A transcript of evidence and submissions by counsel</li> <li>• Any documentary material admitted in evidence</li> <li>• Any judgment entered or order made</li> </ul> <p>Evidence is not to be made available for inspection if:</p> <ul style="list-style-type: none"> <li>• The evidence was not given in open court, or</li> <li>• The court has suppressed the evidence</li> <li>• The court has determined that the evidence is not to be made available for inspection</li> </ul> <p>Except with leave of the court a person who is not a party to proceedings is not to search for or inspect any of the following</p> <ul style="list-style-type: none"> <li>• Any affidavit</li> <li>• Any interrogatory or answer to interrogatory</li> <li>• Any list of discovered documents</li> <li>• Any admission</li> <li>• Any evidence taken on deposition</li> <li>• Any summons to witness or document lodged in answer to a witness</li> <li>• Any other document which the registrar considers ought to remain confidential.</li> </ul>
Northern Territory	Supreme Court Rules Rule 28.05	<p>A person may, on payment of the proper fee, inspect and obtain a copy of a document filed in proceedings. Notwithstanding the above no person may inspect a document which the court has ordered remain confidential. A person may not without leave of the court inspect a document with the registrar believes ought to remain confidential.</p>