



THE LAW SOCIETY
OF NEW SOUTH WALES

Our Ref: MM:RRM:LI:CO.

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15 February 2010

Ms Megan Greenwood
Chief Executive Officer & Principal Registrar
Supreme Court of New South Wales
DX 829 - SYDNEY

Dear Ms Greenwood,

Re: Draft Practice Note SC Gen 2: Supreme Court – Access to Court Documents

You had requested comments on the draft Practice Note from the Law Society on behalf of the Chief Justice by email dated the 19 December 2009.

I appreciate your liaising with the Law Society and thank the Chief Justice for consulting with the Law Society on this important issue. The following comments are provided by the Litigation Law and Practice and Criminal Law Committees.

Definitions

Media Representative

The definition of media representative uses the words "*recognised media organisation*", which is clearly problematic. It raises several questions including (amongst others) what does 'recognised' mean, recognised by whom, and also what constitutes a 'media organisation'. A further difficulty which arises is what constitutes "professional identification". Problems can be easily foreseen with the practical application of the definition, particularly when a party that considers themselves to belong to a legitimate 'media organisation' with what they consider to be 'professional identification' confronts the registrar who may disagree entirely with the former's position. Subject to the comments in the following paragraph, if it is necessary to retain this definition, it would be prudent to revise the definitions.

The Committees also note that the definition of "media representative" appears only to be relevant to the Practice Note in so far as it relates to "Criminal Open Access Documents", namely, transcripts in closed court proceedings (pages 5 and 7). The Committees have in their previous comments on the draft legislation proposed by the Attorney General, adopted the "in principle" position that 'media organisations' should not receive any greater access to court documents than members of the public are afforded. This is consistent with the principle of open and equal access. This having been said however, the Committees recognise that this definition is a reflection of the

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current legislation in place, specifically section 314 of the *Criminal Procedure Act* which provides special access rights for media to transcripts. Nevertheless, it appears that the Practice Note need not address special media access, given that its only current relevance (for the purposes of the proposed Practice Note) is dealt with by that one piece of legislation which relates specifically to criminal matters. For this reason it does not appear necessary for the Practice Note to address media representatives (see page 7 of the practice note as it relates to transcripts in criminal proceedings) and given the difficulties inherent in defining the phrase 'media representatives' the Committees recommend that the Practice Note should not attempt to do so.

Unique Personal Identifiers

The definition identifies several types of personal identifiers, but leaves out what constitutes a 'personal identifier' open to interpretation. For greater certainty, the Committees recommend greater particularisation of the precise personal identifiers to be removed or redacted from documents.

Open Access / Restricted Access Documents

The Committees do not raise any objections or comments about the specific wording of the practice note itself (paragraphs 5 through 13) insofar as the practice note addresses open/restricted access documents. The following comments however arise from the wording of Schedule 1 and the precise categories of open/restricted access documents.

Schedule1- Civil Jurisdiction

Case Management

'Case management information' is an open access category however what constitutes case management information is unclear. For greater certainty, the Committees recommend greater particularisation of the information that constitutes 'case management information'.

Evidence

The Committees have previously commented (in relation to the legislation proposed by the Attorney General on Access to Court Documents) that only those affidavits (or portions thereof) as accepted by the Court into evidence should be considered open access.

In the view of the Committees, physical exhibits should not be considered open access. The Committee otherwise agrees in principal with the proposed recommendations and categorisation of open and restricted access documents and notes the availability of parties and non-parties alike to apply to the Court (and the Court on its own motion) for an order altering the classification of any document from an open/restricted access category (paragraphs 8 and 13 of the practice note respectively).

Schedule 1 -Criminal Jurisdiction

The Criminal Law Committee has no objections to the information contained in the schedule.

Schedule 2

The Committees note an apparent error in the document "*Application for Access to Court Documents*". The last item in Section 2 refers to the requirement for a non-party to the proceedings to complete section 4. However, it should refer to Section 5 and not Section 4. Section 4 relates to the undertaking required of all applications, while Section 5 is the appropriate section applicable to a non-party seeking access.

Fees

The Committees oppose the charging of further "access fees" in addition to photocopying fees.

I look forward to the Court's response to these comments.

Yours sincerely,


Mary Macken
President