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8 April 2009

The Hon. John Hatzistergos, MLC
Attorney General for NSW
GPO Box 5341
SYDNEY NSW 2001

Dear Attorney General,

***Re: Report on Access to Court Information***

I understand that legislation is under consideration based on the recommendations contained in this Report.

The submission of the Litigation Law & Practice Committee of the Law Society on the Report is enclosed with this letter and I shall be grateful if this submission is given careful consideration during the preparation of the draft legislation.

Yours sincerely,

**Michael Tidball**
Chief Executive Officer

## Submission by the Litigation Law & Practice Committee of the Law Society

### NSW Attorney General's Report on Access to Court Information – June 2008

## A. INTRODUCTION

The Litigation Law & Practice Committee of the Law Society (the Committee) has completed its review of the Report on Access to Court Information ( the Report) published by the NSW Attorney General's Department (the Department). The Committee had previously provided comments on the *Review of the Policy on Access to Court Information* released by the Department in June 2006. The following comments and submissions are provided by the Committee regarding the present Report and particularly the recommendations contained in the Report.

## B. COMMENTARY

The Committee welcomes the Report's overall endorsement of the fundamental principle of open justice and readily accessible and publicly available court information. The Committee similarly embraces the ideal of simplification of access, with greater certainty in the access regime. The Committee also endorses the following over-arching concepts reflected in the Report, including, *inter alia*:

- a more liberal and open access regime;
- uniformity of access across all New South Wales courts;
- predictability, consistency and certainty in the access regime;
- the removal, where possible, of the exercise of discretion;
- the consolidation and simplification of provisions relating to suppression and non-access/non-publication;
- the elimination of unnecessary barriers to access;
- restrictions to access where based upon reasonable concerns for personal security and/or confidentiality or privacy interests; and
- sanctions for the unauthorised and improper release of court information.

Although the Committee embraces many of the principles upon which the Report is based, it urges caution in their application for fear of tilting the existing balance too far towards public access with a resulting prejudice to the legitimate interests of parties to court proceedings. Parties to such proceedings have a fundamental and primary interest, if not a right, to access to judicial systems free of unwarranted prejudicial effect. A judicial system more interested in public access than prejudicial effect for the participants is clearly not the desired

outcome. While access is commendable, it should not come at the expense of material prejudice to the parties to court proceedings.

The Committee also has concerns about the proposal in the Report for a special role for media interests, and an ability on the part of those interests to access a greater range of court information than that which is available to the general public. While it is acknowledged that the media can and does play a vital role in ensuring the communication of material already available under open justice principles to the general public, it is not readily apparent in the Report why that role necessitates greater access to court information than would generally be available to the public as a result of the proposed recommendations. To look at it conversely, on what basis can it be justified that the general public have less access to court information than media interests? The Committee highlights this as a particular area of concern.

It is submitted that the following guiding principles should govern any framework regime for access to court information:

1. There is a general public interest in ensuring that members of the public have a right of access to court information and that the court ensures the continuing accessibility of that information.

2. The public has an interest in protecting the privacy rights of individuals and other interests, such as national security, so that in a particular case or category of cases the public interest may outweigh the interests of completely open and unfettered access. There is a public interest in avoiding unnecessary prejudicial impact to persons or parties to proceedings resulting from the disclosure of court information and therefore it may, in some circumstances, be in the public interest to ensure that some court information is not accessible.

3. Parties to proceedings may have an interest in restricting access to court information relating to their proceedings and they should be permitted to be heard prior to the disclosure of certain court information.

4. Individuals may have a right to privacy in some personal information found within court records and should be protected from the unwarranted disclosure of their private information and should be permitted to be heard prior to the disclosure.

In addition to all of the above, the Committee makes the following comments and submissions in respect of the specific recommendations identified in the Report.

## C. LISTED RECOMMENDATIONS

### 1. General Framework

The Report makes the following recommendations:

*(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".*

***Consolidation***

The Committee agrees with the comment in the Report that the current legislative framework for access to court information in civil and criminal proceedings is spread across a multitude of rules of court, practice notes and statutory provisions. The simplification, through codification, of an access regime is desirable provided that such codification properly reflects the appropriate balance between interests. Any codification should also not neglect the significant impact of the common law in this area and the wealth of accumulated experience to be gained from it.

The Committee also highlights its previous submissions, in which it noted that to address the balance between the principle of open justice on the one hand, and other important public interests on the other, it is imperative that the full scope of existing provisions (including the common law) be taken into account, so as to avoid the very kind of uncertainty and confusion which the Report identifies, and to ensure that any changes flowing from the proposed consolidation in fact produce the desired gains in efficiency, transparency and predictability.

***National Scheme***

The suggestion in the Report for a national scheme of access is supported. Obstacles to developing such a scheme in the near term are, however, readily identifiable.

***Objective Statement***

The Committee supports the objective of enhancing and ensuring public access to the court process and associated information, provided that doing so does not unreasonably prejudice the interests of parties to proceedings. Any access regime must balance open access against the protection of other individual and public interests of safety, privacy and security and must do so through a mechanism of access in a readily identifiable and rationally predictable manner.

In all cases for which access to information is sought, parties to proceedings should have reasonable notice of requests for access with a reasonable opportunity to access a mechanism by which to challenge the release and disclosure of information on the grounds that such disclosure will be unduly prejudicial.

## 2. Open Access

The Report makes the following recommendations:

(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.*

***Court Documents***

It is proposed by the Department that court documents with an 'open access' classification be made publicly available upon request and subject to a fee. The Committee notes that court information is currently publicly available in civil proceedings pursuant to the *Uniform Civil Procedure Rules* - 36.12 - and this includes orders and judgments. The Report is not specific about precisely what types of documents will gain an 'open access' classification. However, provided that such documents are those that would currently fall within the context of the UCPR 36.12 provision, this recommendation would receive in principle support from the Committee. Similarly, access entitlement in criminal proceedings is generally governed by section 314 of the *Criminal Procedure Act* 1986. The Committee generally supports the recommendation that the information contemplated within section 314 forms the core of

'open access' classification records for the purposes of criminal proceedings with certain exceptions.

Regarding Fact Sheets, which are unsworn statements supplied by police and contain the police narrative of the allegations, the Committee notes the potential for prejudice to an accused in the event that such documents are publicly released and reported. As is self evident, reports of this kind within the media have the potential to be misconstrued as fact. The Report recommends that these documents be released publicly but only until such time as a trial date has been allocated. The Committee considers the logic of this recommendation to be flawed, as once the document has been publicly released, the damage has already been done. If the contents of a Fact Sheet are prejudicial to an accused, its release causes damage from the moment of its release. Designating a document as 'open access' only up until a certain point is reached in the proceedings should not be advocated. Such a recommendation simply increases complexity and opens up the possibility of error.

In the Committee's view, the position regarding Fact Sheets should be determinative - either Fact Sheets are open access documents or they are not. If there is any equivocation as to the potential prejudicial effect of Fact Sheets in proceedings generally, then this would seemingly advocate against the release of such documents at any time.

It is noted from the Report that it is not intended to include Briefs of Evidence within the open classification. This recommendation is supported.

The Committee is deeply concerned over the recommendation for prescribed fees to be imposed for access to court information. Fees can be a real barrier to access. If fees are to be imposed, they should not become a profit oriented initiative but should be imposed on a revenue neutral basis only.

The comments in the Report are endorsed by the Committee regarding absolute privilege governing pleadings and the prejudice likely to occur in the event that allegations, as yet unproven, are made publicly available and circulated and perceived as fact. It is accepted that there appears to be no absolute remedy for this; nevertheless, in extreme cases where particularly damaging and/or defamatory allegations are made, it stands to reason that some opportunity to challenge those allegations by way of a strike out application or otherwise, is warranted and should be provided for.

It is recommended that further consideration be given to the obligations to be imposed upon parties to litigation. Is it intended that parties to proceedings be under an obligation not to release pleadings or other court information, and is it also the intention that parties, or their legal representatives, be subjected to sanction in the event that the documents are released?

***Administrative Information***

The Committee is in agreement, in principle, with the recommendation that court administrative information be made available to the public. Within reasonable limits, and subject, of course, to the type of information being made available, standard court administrative information such as listing dates, timetables and case management orders should be readily accessible. Such information is readily made accessible by electronic means (such as internet or database access) with little to no ongoing or additional administrative burden. It is suggested that such court administration information could readily be maintained electronically and accessible by parties to the litigation and the general public alike. There is no reason why access to routine and non-contentious administrative information need be treated differently.

***Removal of Unique Personal Identifiers***

The Committee disagrees with recommendation in the Report that the Court and parties to legal proceedings be required to remove 'unique personal identifiers' from open access documents. This requirement would place a positive obligation on Courts (and parties to proceedings) to take steps to locate such information and remove and/or redact it. Apart from being prone to error, the concept is potentially time consuming and resource intensive, two elements which neither the Courts nor parties to litigation have in ample supply. Furthermore, the concept places the onus for providing open access to court information on parties to proceedings.

## 3. Restricted Access Information

The Report makes the following recommendations:

(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.*

***Restricted Classification***

It is proposed in the Report that any information that is not classified as open access will be deemed restricted access information. It is also proposed that restricted access information would only be available to non-parties upon application and in circumstances where the court deems access appropriate or alternatively where there is a statutory provision entitling a non-party to some limited right of access.

The Committee submits that where an application is made by a non-party for access to restricted information, the parties to the proceedings should be entitled to notice of such application and provided with an opportunity to challenge such access. In many circumstances, parties to proceedings may object to the release of restricted access information and parties should be provided with an opportunity to present their position for consideration prior to access being made available.

It is agreed that the following categories of information should be considered restricted access information:

- Transcripts in closed proceedings;
- Criminal history records; and
- Physical exhibits tendered in court proceedings.

With respect to documentary evidence other than statements or affidavits, the Committee agrees in principle that documents falling within this category are generally likely to be of a more confidential or sensitive nature. However, given the potential breadth of documents falling within this category of information, and the fact that the documents form evidence in proceedings,labelling the entire category as restricted access raises concern. As documentary evidence filed in the proceedings, the basis for restricting access to this category is unclear, particularly given the prior recommendations in the Report that affidavits and statements of evidence should be deemed open access. The basis for the distinction between the two positions is not readily evident.

It is also proposed in the Report that the following documents be restricted:

- Affidavits, pleadings and statements rejected or struck out;
- Spent convictions;
- Statements and evidence on a voir dire;
- Medical, psychiatric, psychological and pre-sentence reports;

- Evidence given in relation to non-publication and suppression orders;

- Proceedings relating to sexual assault, indecent assault, children's court proceedings, domestic violence proceedings, family disputes and adoption proceedings;

- Victim impact statements; and

- Letters of comfort.

It is acknowledged that the disclosure of evidence given in relation to a non-publication and suppression application can in some circumstances have the resulting effect of disclosing the very information that the application is brought to suppress. Nevertheless, a blanket restriction on the disclosure of such evidence, particularly where the application is ultimately unsuccessful, could conceivably result in evidence in support of an application for suppression being restricted from access, while the substantive evidence in the underlying proceedings, the subject of the suppression application, is not.

The Committee highlights that the Report recommends the designation of affidavit evidence in proceedings as open access information, while affidavits that are struck out by the court should be designated restricted access information. In practice this would be a difficult recommendation to implement, given that it is rare that an entire affidavit is struck out, but rather, only a portion, paragraph or even a few words in a particular sentence. The principle behind the recommendation is sound in theory. In practice, where portions of documents are struck out by the court, the documents remain in the physical possession of the court. Access to the document, unless thoroughly redacted, will provide access to the entirety of the document, including the struck out portion, irrespective of whether the court has ruled that portions of the document are inadmissible.

The Report proposes the following factors be considered in any application for access to restricted access information by a non-party:

- The extent to which the principle of open justice is affected if the information is not released;

- Whether the privacy or safety of an individual will be compromised by the release of the information;

- Whether the release of information adversely affects the administration of justice;

- The extent to which the person seeking access may be affected by the proceedings;

- The reason for which access is required; and

- Whether the court can reasonably facilitate access to the information.

The Committee supports the above as appropriate considerations in any application, but notes that the above factors, in conjunction with the approach recommended by the Department to restrict all information by default unless specifically classified as open, will not lead to a lessening of the exercise of discretion. The overall impact of the Report's recommendations is likely to have the opposite effect by significantly increasing the number of applications for access and in each of which the exercise of discretion will be determinative. In this respect, the recommendations set out in the Report and the mechanism suggested to govern access are at odds with the stated intention of generally

opening access to court information - rendering the process more predictable and lessening the exercise of discretion.

## 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).*

### *Media Rights to Access*

The Report recommends that the media be granted broader rights to access court information that the general public. The Committee opposes this recommendation.

It is acknowledged that the media play an integral role in informing the public about court proceedings. However, this role does not necessitate or entitle the media to any greater access to court information than is provided to the general public.

The Report acknowledges that 'the media' is any person or organisation that is engaged in mass communication and potentially includes any person publishing information on the internet. However, for the purposes of court access to information, the Report recommends that special media access should apply to only those persons employed by organisations involved in commercial mass communication through broadcasting and data casting services and newspaper services as defined by the *Broadcasting Services Act* 1992 (Cth). This is an unnecessary and unwarranted restriction and is not supported in the Report with any reasoning.

It is readily acknowledged that the media play a key role in giving effect to the general public interest in making justice visible and open. However, this role does not warrant access to a greater field of substantive information than would otherwise be available to the general public. The media may have a pecuniary interest in the ability to access information, and particularly in an ability to do so quickly. However, this does not warrant greater access, merely quicker access.

### *Statements Tendered But Not Admitted*

Statements that are tendered in court but are not admitted should not be accessible information. The determination by a court of the inadmissibility of the information reflects, on at least some level, the potential prejudicial impact of such information.

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

There is no basis provided within the Report to explain why closed court transcripts, which the Report recommends be designated restricted information, should be made specially available to media interests. It is logically inconsistent for the Report to recommend that the media be granted special access to transcripts of closed court proceedings when it is acknowledged in the report that such transcripts are inappropriate for designation as 'open access' documents. If the material information is inappropriate for access by the public, it makes little sense to allow media interests, presumably with an intent to report on the contents, special access.

The rationale relied upon in the Report for special medial access appears to be that such media interests can be appropriately regulated and therefore restricted from publishing sensitive details and personal information. This rationale is evident from the Report's recommendation that only employees of regulated mass media organisations be designated as 'media' for the purposes of access to court information. It is submitted by the Committee that this is a misguided approach, and that the emphasis should be placed on a clear delineation between accessible and restricted information, with clear sanctions for the inappropriate use of restricted information. It is suggested that it is both more appropriate and more practical to regulate the access and use to which court information may be put rather than assigning *some* media with special access rights in anticipation that those media can be regulated, are reputable and can be trusted not to misuse sensitive and potentially damaging information.

Notwithstanding the above, it is acknowledged that in some closed court proceedings, a media report on the proceedings (with applicable limitations on the disclosure of identities etc) may be the only available method by which the general public will become informed. It may be important for the proper and open administration of justice that the public be made aware of the nature of proceedings while the identities of those involved (and other confidential or sensitive information) is otherwise protected from disclosure. Nevertheless, this would appear to be a matter of procedure for the court exercising the discretion to close the courtroom. It is submitted that appropriate measures and orders can be made by the court in such conditions allowing media access with any appropriate limitations on the right of publication that the court deems appropriate in the circumstances. It would appear unnecessary and inefficient to attempt to contort the principles of a court information access regime to allow for preferential media access in such cases. Doing so leads to a complicated access regime that the Report is directed at avoiding.

***Media Access to Physical Exhibits***

The Committee endorses the Reports comments in relation to access to physical exhibits.

## 5. Protection of Privacy

The Report makes the following recommendations:

*(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.*

***Privacy Generally***

The Committee submits that simply participating in court proceedings should not mean that all information recorded within court documents should be immediately available to the public. Court information frequently contains proprietary information or information which may simply be embarrassing or sensitive.

There is a public interest in ensuring that the privacy rights of individuals are recognized and respected.

***Removal of Personal Identifiers***

The Report makes several recommendations in respect of the removal from open access documents of all personal identifiers including the removal of such identifiers by the court and also by parties to proceedings by redacting, or otherwise removing or obscuring, any personal identifiers from documents submitted to the court. The Report refers to personal identifiers including, inter alia:

- Social security and tax file numbers;
- Drivers license and motor vehicle registration numbers;
- Medicare numbers;
- Financial account numbers;
- Passport details;

- Personal telephone numbers;
- Date of birth details; and
- Home address details.

The requirement to remove personal identifiers, such as those identified above, will inevitably lead to a significant resource and logistical problems for both court administration and parties to proceedings. The removal or redacting of such information from transcripts, affidavits or other documentary records filed in support of proceedings would in many cases be an immense undertaking. Furthermore, errors and omissions would be inevitable. While it is readily acknowledged that privacy concerns are of great importance, proper consideration must be given to the practical (or impractical as the case may be) requirements to be imposed upon the courts and parties.

***Sanctions for Misuse of Court Information***

The Committee endorses the recommendation contained in the Report for appropriate sanctions in the event of the misuse of court information, including the use of information that was:

- contrary to a condition of release;
- used for a purpose other than for which it was requested;
- an unauthorised commercial purpose; and
- primarily intended to vilify, harass or intimidate an individual.

## 6. Non-publication Orders and Suppression Orders

The Report makes the following recommendations:

*(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.*

The Committee supports the recommendations contained at paragraphs 6(a) that the regime governing non-publication orders and suppression orders should be consolidated and a clear distinction created between the effect of the two concepts. Similarly, it agrees generally with the recommendations contained at 6(b), 6(c) and 6(f). With respect to the recommendation at 6(d), the recommendation gives rise to serious questions as to its intended breadth of application and the lack of provided detail. The Committee also queries the practicality of recommendation 6(d).

## D. CONCLUSION

The Committee endorses, in principle, many of the recommendations contained in the Report but in many cases queries the practicality and methodology of application and would welcome the opportunity to comment further on the implementation of the recommendations.

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