

28 May 2019

NSW Law Reform Commission
GPO Box 31
SYDNEY NSW 2001

By email: nsw-lrc@justice.nsw.gov.au

Dear Commissioner

Thank you for the opportunity to make a preliminary submission to the NSW Law Reform Commission's 'Open Justice Review'.

We recognise that the current review has wide terms of reference addressing many important issues. In this submission we address one specific issue: researcher access to court information, with a focus on the criminal justice system.

Our primary submissions are: i) academic researchers should enjoy the same access to court information as the media;¹ and ii) researchers/media representatives should, subject to suppression and non-publication restrictions, have the *right* to access court information, rather than be dependent on a favourable exercise of discretion by a relevant court officer.

Open justice is widely recognised as a fundamental principle in Australia² and internationally.³ The core of open justice is the open court principle: 'court proceedings should be subjected to public and professional scrutiny, and courts will not act contrary to the principle save in exceptional circumstances'.⁴ The concept of open justice also extends to the public availability of court documents, including judgments and transcripts. Just as that which occurs in open court should generally be open to the public, so too, documents arising out of what occurs in the courtroom should be available to the public. This is especially important in relation to media access, for reasons that are familiar and have been well-rehearsed. Less familiar, but also very important, is academic researcher access. The quality of the scrutiny which is at the heart of the principle of open justice is enhanced if non-party access rights are enjoyed not only by media organisations focused on the dissemination of information about a particular case, but also by academic researchers who seek to conduct rigorous, systematic and impartial analyses of multiple aspects of the operation of the court system.

Access especially important in criminal matters given that the state is a party to the proceedings (on behalf of the community), and in light of the purposes of punishment (including denunciation and deterrence) and the communicative function of the criminal law.

The current state of affairs in relation to access to court information has been described as 'an untidy collection of legislation, rules and practice, which change depending on the court, judicial officer and

¹ We note that existing rules provide certain access rights to media representatives that are superior to those of academic researchers (or members of the general public). For examples s 314 of the *Criminal Procedure Act 1986* (NSW),

² *John Fairfax & Sons Limited v Police Tribunal of NSW* (1986) 5 NSWLR 465, Australian Law Reform Commission, Traditional Rights and Freedoms—Encroachments by Commonwealth Laws, Final Report 129, 2016, [8.53]

³ International Covenant on Civil and Political Rights, Article 14(1).

⁴ *Commissioner of the Australian Federal Police v Zhao* (2015) 316 ALR 378, [44] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

registry concerned'.⁵ One of the negative consequences is that researchers can be deterred from carrying out empirical work on the operation of NSW courts, thus depriving policy-makers and law reformers of a valuable source of sound knowledge.

In the remainder of this submission, we address two types of courts information typically sought by researchers – judgments and transcripts – before briefly addressing other matters.

Judgments

In relation to judgments specifically, a fair assessment of the overall NSW courts picture is that media, researchers and members of the general public enjoy unprecedented access to judgments, when compared with earlier times, courtesy of services like <https://www.caselaw.nsw.gov.au> and <http://www.austlii.edu.au>. However, not all judgments are uploaded to these sites.

In 2018, only 9 Local Court criminal law judgments were published on <https://www.caselaw.nsw.gov.au>, compared to 174 District Court of NSW judgments, 280 Supreme Court of NSW judgments and 191 NSW Court of Criminal Appeal judgments. When these figures are compared with the number of matters finalised in NSW courts each year,⁶ the stark under-representation of the Local Court and, to a lesser extent, the District Court, in published judgments is clear.

Given that not all judgments are published online, the principle of open justice requires that judgments not published online should generally be available to the media, researchers and members of the public upon request (subject of course, to appropriate restrictions imposed by suppression and non-publication orders etc). Ironically, the confidence with which a researcher can expect such a request to be granted is in inverse proportion to the likelihood of a given court's judgment being in the public domain. An express presumption in favour of release is found in the rules governing access to Supreme Court documents. Although the leave of the Court is required,⁷ 'leave, access and permission to copy will normally be granted to judgments in concluded proceedings'.⁸

There is no such presumption in the rules governing access to documents (including judgments) in the Local Court⁹ and the District Court.¹⁰

In the NSW Local Court, a Magistrate or Registrar may give leave, and in deciding whether it is appropriate to do so, is to have regard to:

- (a) the principle that proceedings are generally to be heard in open court,
- (b) the impact of granting leave on the protected person or victim of crime,

⁵ T Dick, 'Open Justice and Closed Courts: Media Access in Criminal Proceedings in NSW' https://www.legalaid.nsw.gov.au/__data/assets/pdf_file/0010/25201/Open-Justice-and-Closed-Courts.pdf

⁶ In 2017, 130,145 (92%) of the 141,024 defendants who had charges finalise in the NSW criminal courts had their matter finalise in the Local Court, with 4541 in the District Court and 100 in the Supreme Court: NSW Bureau of Crime Statistics and Research, *Criminal Court Statistics 2017* (2018) https://www.bocsar.nsw.gov.au/Pages/bocsar_court_stats/bocsar_court_stats.aspx

⁷ Practice Note SC Gen 2, 'Access to Court Files'.

⁸ Ibid.

⁹ Local Court Rules 2009, Rule 8.10.

¹⁰ District Court Rules 1973, Rule 52.3(2).

- (c) the connection that the person requesting access has to the proceedings,
- (d) the reasons access is being sought,
- (e) any other matter that the Magistrate or registrar considers relevant.¹¹

Of course, the case load of the Local Court is such that it would be unreasonable to expect that judgments be written in all matters. However, where judgments *are* written, it is desirable that they be as available to non-parties as are judgments of the Supreme Court. To the extent that current rules and practices in the Local Court are inconsistent with this expectation, consideration should be given to change.

In the NSW District Court also, only a relatively small proportion of judgments (including sentencing remarks) are published. Applicable rules appears to provide an even weaker basis for researchers seeking to access court information, with the opportunity to apply for access expressed in the negative. Rule 52.3(2) of the District Court Rules 1973 provide that:

A person other than a party to any proceedings, or the solicitor for the party, shall not search the file kept by the registrar in respect of the proceedings except by leave of the Court or registrar.

In summary, and in line with the laudable goals of ‘open access to the public’ and promoting ‘transparency and a greater understanding of the justice system’,¹² it would be preferable if researchers¹³ who seek access to a copy of an unpublished judgment (of any court) did not have to advance a special case as to why access should be allowed.

Transcripts and Other Court Documents

In addition to the issue of access as of right versus access by leave, additional access barriers exist in relation to transcripts and other court documents. Even if leave is granted, costs can be very high. Under the *Criminal Procedure Regulation 2017* (NSW) sch 2 item 11, the cost of a transcript of recent proceedings is \$91 for up to 8 pages and \$11 for each page thereafter. The costs for proceedings older than 3 months is even higher (\$111 + \$13). The result is that a research project with a methodology that includes analysis of transcripts for a single case will require a budget of many thousands of dollars. If the study is a large one that involves examining transcripts in multiple cases the costs may be hundreds of thousands of dollars and almost always prohibitive. Fee waiver is possible under current arrangements (cl 16) but entirely a matter of discretion, exercisable by a registrar *Criminal Procedure Regulation 2017* (NSW), cl 16). Whether generally, or at least where access is sought for a non-commercial purpose – like academic research – there is a strong argument that substantive open justice demands that fees should be waived or significantly reduced.

We note that audio access might be another (possibly cheaper) option – where a transcript has not already been produced.¹⁴

¹¹ Rule 8.10(5).

¹² *Court Information Act 2010* (NSW), s 3 (not commenced).

¹³ We make this submission with specific reference to the question of access afforded to academic researchers but, arguably it applies equally to members of the public (ie non-parties) generally.

¹⁴ The Victorian Magistrate’s Court makes available, on application, a copy of the audio recording of most criminal, civil, family law, family violence and victims of crime matters held in open court for a fee of \$55.00 per day <https://www.mcv.vic.gov.au/going-court/documents-and-recordings>

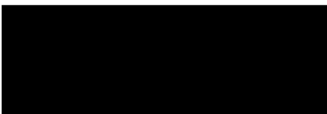
Other Matters

Two other features of an optimal open justice system are: access to information on the court register database; and a simple, clear application process for access to information.

On the first issue, researchers often want to pursue studies of an area of law (eg sexual assault, manslaughter, offensive language etc) by analysing actual cases within a particular time period or a representative sample of such matters. A common difficulty experienced by researchers is locating the names of matters – a step that is clearly necessary before an application for access can occur. We note that in Victoria a relatively simple and cheap process is available in the Magistrate’s Court to ‘search the court register’.¹⁵ The court register contains a database of ‘information about charges, penalties and final orders’ and ‘can be searched at any Magistrates’ Court venue.’ It may be that NSW has an equivalent register that can be searched but there is no external visibility of such a database. Capacity to search the register, for example, by charge would significantly assist researchers determining the parameters of requests for access to information for research.

Finally, we would submit that NSW needs a clear, publicly available, simple application process for access to data (whether it be for transcripts, judgments or other). Rules contained in Supreme Court practice notes or legislation governing access to information do not actively promote what process is to be followed and their relative invisibility might act as a deterrent. It also results in *ad hoc* processes being pursued by researchers – with anecdotal evidence suggesting that requests for access to case files or transcripts via letters to Registrars are met with variable results. The Victorian County Court has a relatively simple form which can be downloaded from the Court’s website in order to seek access to criminal or appeal files for example. We note too, that the County Court provides academic researchers with an email contact to the Publications Manager, to provide assistance to academic research.

Yours sincerely



Dr Luke McNamara
Professor and Co-Director, Centre for Crime, Law and Justice
Faculty of Law, University of New South Wales
Email: luke.mcnamara@unsw.edu.au



Dr Julia Quilter
Associate Professor
School of Law, University of Wollongong
Email: jqulter@uow.edu.au

¹⁵ Via the Magistrate’s Court of Victoria website, ‘Documents and recordings’ accessible at <https://www.mcv.vic.gov.au/going-court/documents-and-recordings>. A \$24.70 fee applies.