Access to court information

By Attorney General John Hatzistergos

New South Wales is leading the nation with reforms that will ensure that court processes are open to public scrutiny. In July this year I presented the *Report on Access to Court Information* to the Standing Committee of Attorneys-General as a blueprint for consistent national rules on access to court information.

The NSW Government intends to implement the recommendations of the report through legislative amendments to the *Criminal Procedure Act 1986* and the *Civil Procedure Act 2005*. The reforms are anticipated to take effect next year.

Adherence to the principle of open justice is increasingly dependent on the capacity of the media and the public to access court documents and other information. Court reforms that have improved the efficiency of court procedures mean 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. In today's courtroom a person sitting in the public gallery will often come away with only a vague understanding of what took place.

The report provides a framework for a new uniform approach to access across all NSW courts. It will replace the current complex rules that allow court officials to exercise vague discretionary powers on access with a simple and uniform classification system.

Under the new system court information will be classified as either 'Open Access' or 'Restricted Access'. If information is classified as open access then any member of the public will be entitled to obtain a copy of the information without having to satisfy a court official that they have a sufficient interest in the proceedings or reason to be granted access. The report identifies the type of information that should be available to the public, which includes judgments, transcripts, statements, affidavits, indictments, fact sheets and pleadings in open court proceedings. These categories will be subject to exceptions. For example, sexual assault and children's court proceedings will be excluded, while sensitive information such as victim impact statements, medical, psychiatric and pre sentence reports will also be excluded.

If court information does not fall within the category of open access then it will automatically be considered restricted access. Access to restricted information will still be available if the court grants leave to access the information or where there is a special legislative right to allow access. The court will be required to have regard to various matters when determining access to restricted information including the extent to which the principle of open justice is affected if information is not released, whether the privacy or safety of an individual is compromised by the release of information and whether the release of information adversely affects the administration of justice.

The report also acknowledges the special role of the media in informing the public of what occurs in our courts. The media will have a right to access any information admitted into evidence that can readily be reproduced in documentary form unless the information is subject to a restriction against publication.

While the recommendations in the report significantly expand the rights to access court information, they also seek to protect personal and sensitive information. The new regime will allow parties to remove unique personal identifiers such as dates of birth, residential addresses, financial and other personal details from documents that are open to the public. Legal practitioners will need to be cognizant of the new regime when drafting pleadings and affidavits used in court proceedings and should omit unnecessary personal details or include this information in a restricted annexure to the document. Courts also recognise the need to protect against 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. Under the new regime all courts will be required to take a similar approach.

The report also reviews the impact of non-publication and suppression orders upon access to court information. Protections against the publication of sensitive information will be enhanced by providing a general restriction against the publication of personal unique identifiers, the identity of parties involved in domestic violence proceedings and family property disputes.

The report addresses concerns raised by media and law publishers that it is often difficult to confirm what information is subject to a non-publication

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order. 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 communication of this information is, in itself, a publication and could therefore be in breach of the order.

The terms 'non-publication' and 'suppression' are used interchangeably by both the courts and the legislature. The report recommends that a clear distinction should be drawn between the effect of a non-publication order and a suppression order. The purpose of making a non-publication order is to prevent the publication of information to the wider community. For example, the prohibition against publication in section 11 of the *Children (Criminal Proceedings) Act 1987* is intended to ensure that names of juvenile offenders are not broadcast by the media to the wider community. A suppression order, on the other hand, denotes a more extensive restriction and may prevent the disclosure of information to any person. A suppression order may be necessary in order to protect information that may compromise national security or to protect the welfare of an informant witness.

There have been some misunderstandings about the report's recommendations. For instance, in the *Sydney Morning Herald* on 2 August 2008 Matthew Moore argued that existing restrictions in relation to sexual assault cases are to be broadened into a blanket exemption. This is not the case. What the report recommends is that the current protections for sexual assault victims are maintained and reflected in the new regime. There is no point in a court using a pseudonym for a rape victim if an affidavit with her real name is made publicly available at the same time. While media access and open justice are important there are some areas, such as sexual assault, where victims deserve the right to protect their identities if they wish.

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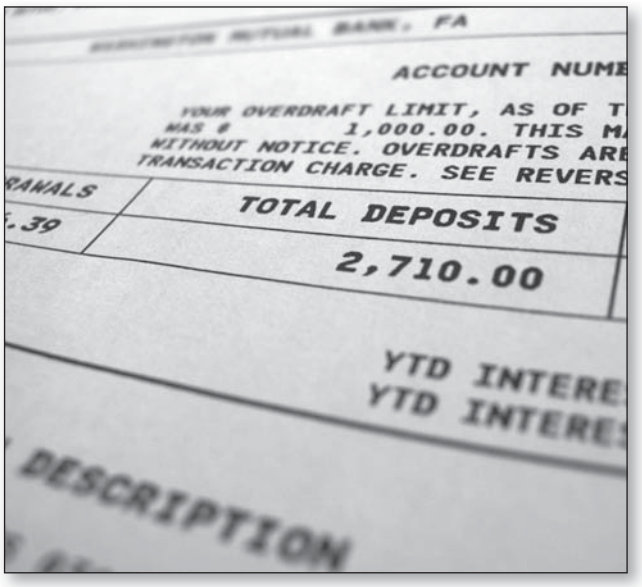
It was also suggested that the government intends banning the publication of prior criminal convictions and traffic fines. Again, this is not what the report recommends. While the report suggests that there needs to be some limitation on providing access to criminal records that are used in courts, it only recommends that criminal and traffic history records should not be published in their entirety. It will not prevent the publication of information on prior offences taken into account during sentencing.



Establishing a new regime where the majority of court information will be open to the public creates the opportunity for the court to review the way in which access is facilitated. The introduction of JusticeLink may provide the capacity for certain information to be obtained electronically. It will have the potential to streamline procedures and lessen the current geographic barriers associated with attending a court registry in person to obtain information.

The NSW Government and judiciary are committed to an open justice system. The reforms have been developed in consultation with legal stakeholders and the courts and reflect an appropriate balance between competing considerations of open justice and individual privacy. The reforms are supported by the courts and have been widely praised by media commentators.

The new access regime is the product of a continuing co-operative relationship between government and the judiciary that has delivered other major reforms such as the *Civil Procedure Act 2005* and Uniform Civil Procedure Rules. The new access regime will ensure that New South Wales courts continue to set the national benchmark in terms of progressive and innovative procedural reforms.

A copy of the *Report on Access to Court Information* is available at the Lawlink website: http://www.lawlink.nsw.gov.au/lpd