1 February 2013

The Hon Greg Smith SC MP
Attorney General and Minister for Justice
Level 31
Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000

Dear Attorney General,

Courts and Other Legislation Further Amendment Bill 2012

We write regarding the *Courts and Other Legislation Further Amendment Bill 2012* (the Bill). Our specific concern relates to item 1.8 of Schedule 1 to the Bill (as outlined at section (e) of the Explanatory Memoranda) and the effect on it will have on the ability of journalists to communicate proceedings 'contemporaneously' from the place where court is sitting. The signatories to this letter are of the view that the proposed amendment has the potential to undermine the principle of open justice.

The media play an essential role in providing instantaneous, local and comprehensive news coverage. A fundamental aspect of this service is providing information about the administration of law and court proceedings as they are unfolding.

This submission requests that the Bill be amended to specifically exempt journalists from the operation of the new provision.

The principle of open justice

The principle of Open Justice as applied in Common Law jurisdictions requires that justice be administered in open court.[1]

As Lord Scarman said, *'Justice is done in public so that it may be discussed and criticised in public'*[2].

Further, *'Whatever* [the media's] *motives in reporting, their opportunity to do so arises out of a principle that is fundamental to our society and method of government: except in extraordinary circumstances, the courts of the land are open to the public. This principle arises out of the belief that exposure to public scrutiny is the surest safeguard against any risk of the courts abusing their considerable powers. As few members of the public have the time, or even the inclination, to attend*

[1] Dr Daniel Stepniak, The Therapeutic Value of Open Justice, http://www.aija.org.au/TherapJurisp06/Papers/Stepniak.pdf
[2] *Home Office v Harman* [1982] 1 All ER 532, 547

courts in person, in a practical sense this principle demands that the media be free to report what goes on in them'.[3]

The special role of the media in informing the community about court proceedings has been recognised in the common law of NSW over many years.[4] The Honourable J J Spigelman, former Chief Justice of New South Wales has spoken on a number of occasions about the importance of open justice, including the existence of a right to publish a report of court proceedings.[5]

Detailed concerns regarding the amendment

No requirement for new rules

We make the observation what the Bill is seeking to 'fix' is not adequately evidenced. In the case that a legislative response is required, we would expect that good public policy making requires the problem to be evidenced rather than described.

In the absence of identification and quantification of the 'problem', from a point of principle, we do not see a requirement for new rules – particularly as the rules affect the principle of open justice. Any laws that impact on the ability of the public and the media to access and report on court proceedings should be carefully considered, and subject to extensive consultation.

Notwithstanding this principled view, if it is the case that the Government pursues the Bill and the particular amendment, we submit that the proposed section 9A be amended to provide – by legislative provision – that journalists are exempt from the operation of the section. The reasons for this are set out below.

Broad amendment with multiple consequences for legitimate professions

Section (e) of the Explanatory note of the Bill states that the object of the amendment to the Courts Security Act 2005 is:

> *to amend the Court Security Act 2005 to prohibit the unauthorised use of any device (including a phone) to transmit sounds, images or information forming part of the proceedings of a court from a room or place where a court is sitting to a place outside that room or* place[6].

This is a broad amendment with troubling consequences, including prohibiting journalists communicating proceedings 'contemporaneously' from court. Such communication includes filing stories and uploading stories, as well communicating via social media. Platforms such as Twitter are increasingly used by journalists to communicate breaking news.

It is not only journalists that suffer from the consequences of the overreach of the relevant amendment of the Bill. We note that the Law Society of NSW has also written to request an amendment to provide an exemption for legal practitioners from the operation of the section.

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[3] http://www.judcom.nsw.gov.au/publications/benchbks/civil/media_access.html#p1-0200

[4] See, for example: *Attorney-General for New South Wales v Mayas Pty Ltd* (1988) 14 NSWLR 342 at 356 per McHugh JA

[5] See: Spigelman JJ *The Principle of Open Justice: A Comparative Perspective* Address to the Media Law Resource Centre Conference, London 20 September 2005- Available at: http://www.supremecourt.lawlink.nsw.gov.au/agdbasev7wr/supremecourt/documents/pdf/spigelman_speeches_2005.pdf

[6] http://www.legislation.nsw.gov.au/bills/docref/2baef9d0-41b3-c9fa-d80c-9f32bd6d8cdf, p2

Breadth of the amendment overreaches the intent of the amendment

Furthermore, we note the Second Reading Speech, articulates the types of behaviour that the amendment actually seeks to address – which is quite specific, and in fact is a subset of the parties and behaviours that the prohibition expressed in the Explanatory note will affect.

> *These amendments [Schedule 1.8 of the Bill which amends the Court Security Act 2005] address recent security incidents in courts that have highlighted the fact that the existing legislation does not capture the capability of recent technology – for example, people in court transmitting witness evidence by smartphone to another witness waiting outside the court to give evidence*[7].

Given the details above, the breadth of the Bill as it relates to section 9A overreaches the intent of the amendment as captured in the Explanatory note, and is therefore unwarranted.

We therefore submit that the proposed section 9A be amended to provide that journalists are exempt from the operation of the section. Journalists should be entitled to use live, text-based communications to enable the media to communicate proceedings, and therefore preserve the principle of open justice.

Communication by journalists is an acknowledged consequence of the Bill, and as such must be exempted in the amendment and not in regulations

The Second Reading Speech goes on to acknowledge that the Bill will affect journalists:

> *Although not common, there may be circumstances in which journalists wish to use electronic devices to report on proceedings contemporaneously through new media, such a Twitter or blogging. While these circumstances are not expressly covered in the proposed statutory exceptions, there is a regulation-making power that will allow appropriate exemptions to cover these sorts of circumstances.*

Given that it is recognised that a consequence of the Bill is the ability of journalists to communicate 'contemporaneously' – whether that be by 'new media' or filing and uploading stories – it is appropriate that an exemption for journalists be addressed by amendment to the legislation.

If not an intended consequence of the legislation, it should be the case that the amendment should be redrafted to specifically exclude such a consequence, this would be best achieved – and remove all doubt – by redrafting to include a specific exemption for journalists.

Communication by journalists should not be hampered in the digital age

We note that the Second Reading Speech refers to the practice of journalists reporting from court as 'not common'. It is actually the case that a journalist communicating from court is not uncommon, and in today's digital age it is becoming increasingly frequent.

Given that journalists are currently able to communicate proceedings 'contemporaneously', using devices and platforms and intermediary services to file stories and communicate and report efficiently, it is worrying that the Bill does not include an exemption for journalists to continue to do so.

[7] http://www.parliament.nsw.gov.au/prod/parlment/hansart.nsf/V3Key/LA20121121004, p17244

Information, including news and reporting, is being communicated within communities, states and nations, and across international boundaries in ever increasing volumes and with velocity. It is being communicated increasingly frequently, and as events and news happens.

In a keynote address, *Seen to be Done: The Principle of Open Justice* at the Australian Legal Convention, the Honourable J J Spigelman, then Chief Justice of New South Wales, said:

> *Fundamental values - like the principle of open justice – on which these successful institutions are based, have served us well. The expression of these values in actual institutional arrangements and practices will continue to adapt – as they have been adapting for centuries – to changing demands and social conditions. The preservation of those values requires continued vigilance*[8].

It is the digital era which is bringing changes not seen before, and fundamental values, such as the principle of open justice, are as important now as they ever were. The corollary is that the institutional arrangements and practices – as then Chief Justice Spigelman refers – must continue to adapt and evolve to ensure these values and principles are maintained.

Inconsistent with international best practice

In 2011, Lord Judge, the Lord Chief Justice of England and Wales, issued guidance on using devices to communicate directly from courts in England and Wales. That guidance is *Practice Guidance: the use of live text-based forms of communications (including Twitter) from court for the purposes of fair and accurate reporting*[9] (the Guidance). The Guidance was the result of interim guidance issued in 2010 and subsequent consultation and undertaken by the Lord Chief Justice which included the Secretary of justice, the Attorney General, members of the public and the media.

In announcing the Guidance, the Lord Chief Justice said:

> *A fundamental aspect of the proper administration of justice is open justice. Fair, accurate and, where possible, immediate reporting of court proceedings forms part of that principle.*[10]

Importantly, the Guidance draws a distinction between journalists and members of the public in the use of live, text-based communications from court. The Guidance allows for a member of the public, who, while in court, wants to use live text-based communications to make an application – whether formally or informally – for permission to use such.

It is the principle of open justice, and the presumption that journalists no not pose a threat to the administration of justice, which are specifically acknowledged within the Guidance.

> *[Section 10] It is presumed that a representative of the media or a legal commentator using live, text-based communications from court does not pose a danger of interference to the proper administration of justice in the individual case. This is because the most obvious purpose of permitting the use of live, text-based communications would be to enable the media to produce fair and accurate reports of the proceedings. As such, a representative of the media or a legal commentator who wishes to use live, text-based communications from court may do so without making an application to the court.*

[8] http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1800451
[9] http://www.judiciary.gov.uk/Resources/JCO/Documents/Guidance/ltbc-guidance-dec-2011.pdf
[10] http://www.judiciary.gov.uk/publications-and-reports/guidance/2011/courtreporting

Similar to the example provided in the Explanatory note to illustrate the behaviour the Bill is seeking to address, the Guidance goes on to note at Section 13:

> *The danger to the administration of justice is likely to be at its most acute in the context of criminal trials eg where witnesses who are out of court may be informed of what has already happened in court and so coached or briefed before they then give evidence, or where information posted on, for instance, Twitter about inadmissible evidence may influence members of the jury. However, the danger is not confined to criminal proceedings; in civil and sometimes family proceedings, simultaneous reporting from the courtroom may create pressure on witnesses, distracting or worrying them.*

In addressing the issue outlined above, the Guidance states that it may be appropriate for the judge to disallow the public from using live, text-based communications, and continue to allow such use by journalists.

The conclusion drawn in the Guidance at Section 15 is most pertinent:

> *Subject to these considerations, the use of an unobtrusive, hand held, silent piece of modern equipment for the purposes of simultaneous reporting of proceedings to the outside world as they unfold in court is generally unlikely to interfere with the proper administration of justice.*

Returning to the NSW context, we therefore submit that it is most reasonable for the Bill to be amended to incorporate an exemption for journalists – and enshrine such in legislation – which will truly preserve the principle of open justice, as referenced in the Second Reading Speech. Such an approach will ensure, as Justice Spigelman said, *that the expression of these values in actual institutional arrangements and practices will continue to adapt – as they have been adapting for centuries – to changing demands and social conditions.*

<u>Consistency with existing provisions, including exemptions, is required</u>

Section 9 of the *Security Act 2005* refers to the use of recording devices in court premises, specifically that a person must not use a recording device to record sound or images in court premises. However, this section of the *Security Act 2005* includes exemptions, including for journalists.

The exemption proposed for new section 9A will promote internal consistency in the legislation, as well as addressing the concerns raised in this letter.

Yours sincerely

Joint media organisations