WINSTON CHURCHILL MEMORIAL TRUST

Balancing the privacy interests of legal system participants with open access to court information on the Internet

Report by Megan O’Brien
2009 Churchill Fellow

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Signed: _______________________________

Date: _______________________________
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1. Introduction

a. Publication of judicial decisions, and its new iteration - online publication, is part of the mechanics of an open and transparent justice system, yet in recent years there has been a lingering questions of its impact on people's privacy interests.

b. The transition from paper to electronic access has raised many issues, some that were incapable of being foreseen, some have developed as society changed its use of technology or while in the physical paper based world, others were known but had natural limitations. The focus of my fellowship is the interaction between the principle of open justice, developed over centuries, relating specifically to publishing judgments and the reality of our young electronic information era.

c. In New South Wales (NSW), judicial decisions are made available on a website called NSW Caselaw. This website contains over 37,000 judicial decisions from 14 jurisdictions administrated by the Department of Justice and Attorney General. Over a number of years, there had been an increase in certain types of websites linking to NSW Caselaw. These sites offered services such as background, adoption or ‘know who you are dealing with’ searches. While the information contained on NSW Caselaw is public and freely available, these websites and the increase in identity theft triggered some activism from the Supreme Court of NSW. The Court developed and applied a prevention of identity theft and anonymisation policy to judgments and transcripts. In addition, since its inception, NSW Caselaw had always implemented the Robots Exclusion Protocol to shield the individual judgments from global Internet indexers such as Google and Yahoo.

d. Recently, other concerns emerged such as ‘jigsaw’ identification, the role of the contextual information within judicial reasons and the impact of anonymisation on readability, and other hopes such as a possible technical answer in redaction technologies, raised queries for me as to whether a policy and the Robots Exclusion Protocol were adequate.

e. I have worked with our counterparts within Australia to address some of the common problems that arise when supporting the publishing of judgments and decisions online. This Churchill Fellowship project created an opportunity to broaden the scope of inquiry and perspective and to learn of other approaches. Secondly, it allowed me to assess our work against an international yardstick. The insights and networks gained from this fellowship will play out over the coming year and will benefit not only my work but also that of my counterparts in other jurisdictions. I hope that those who I visited will also benefit, as I am
very appreciative of the time they freely gave. This research report is not intended to undertake a scholastic or theoretical analysis of the issue but to provide an overview of how others have approached dealing with the issue pragmatically.

f. The report provides an outline of some of the themes of the fellowship. The organisations within each country were chosen for their role in the progressing particular approaches. The report begins with answering some of the critical background questions then proceeds to examine each of the themes. I have also made some observations about recurring related subjects. The views expressed in this report are my own, based on my observations, discussions and reading. They do not represent the views of NSW Courts and Tribunals or the Department of Justice and Attorney General.

g. I am very grateful to the Winston Churchill Memorial Trust for this opportunity. I would like also to acknowledge the support from the Department of Justice and Attorney General, who allowed me to take study leave and provided encouragement to undertake this fellowship. I would like to specifically thank Ms Donna Reece, who provided feedback, guidance and wisdom on demand, my referees for their faith in this project and my abilities, my husband and extended family for their unfailing support and my little girls who waited, ever so patiently, for their mummy to come home.
2. Executive Summary

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a. The aim of the fellowship was to examine different approaches to balancing the privacy interests of court participants with allowing open access to court information, specifically judgments. My fellowship spanned four weeks over September and October 2009 visiting agencies, organisations and courts in the United States of America, Canada and United Kingdom.

b. I have divided the report into a number of sections, firstly a discussion to outline the issue, secondly an examination of each countries approach, followed by other issues raised and the recommendations. Each country provided an insight into this developing issue and it was timely to consider some of the ways their approaches had developed. From this project the major lessons learnt were: consistency in approach across all jurisdictions, education as to the issue and the required response and the need for publishing policies for courts and tribunals.

c. This fellowship gave me a new perspective on the way that change in this area could come about and ideas on how Australia could connect with other jurisdictions that are working on this issue. I have started to make available the findings of my fellowship and will continue over the coming months. I will use the following ways:

- disseminate my report to key organisations;
- speaking at seminars and other appropriate events;
- informing counterparts from other states and jurisdictions at network meetings;
- writing articles for Australian journals; and
- reporting back to various governance mechanisms for courts and tribunals.
3. Programme

(in alphabetical order)

Administrative Office of the United States Courts
Washington, District of Columbia, United States of America

British and Irish Legal Information Institute
London, England, United Kingdom

Court of Session
Edinburgh, Scotland, United Kingdom

Courts Technology Conference
Denver, Colorado, United States of America

Department of Judicial Information Technology
Richmond, Virginia, United States of America

LexUM
Montreal, Quebec, Canada

Ministry of Justice
London, England, United Kingdom

National Centre for State Courts
Williamsburg, Virginia, United States of America

National Judicial Institute
Ottawa, Ontario, Canada

Office of the Privacy Commissioner of Canada
Ottawa, Ontario, Canada

Oxford Internet Institute
London, England, United Kingdom

Self Represented Litigants Network
Washington, District of Columbia, United States of America

Supreme Court of Canada
Ottawa, Ontario, Canada
## 4. Glossary

<table>
<thead>
<tr>
<th>Term</th>
<th>Meaning</th>
</tr>
</thead>
<tbody>
<tr>
<td>Data mining</td>
<td>Bringing together many small fragments of information to form a large picture of a person's activities or information.</td>
</tr>
<tr>
<td>Electronic information</td>
<td>Electronic for this paper means information created, controlled and is contained in a computer or network such as the Internet.</td>
</tr>
<tr>
<td>In camera</td>
<td>Latin for 'privately'. It refers to a hearing where it is considered in the interests of justice to close the courtroom by order to specific or all persons for the whole or part of the proceedings.</td>
</tr>
<tr>
<td>Judicial Decision/ Judgment/ Decision</td>
<td>Judgment is generally the term that covers reasons and orders, sentence remarks or reasons for determinations. In this report, judgment, judicial decision and decision are interchangeable.</td>
</tr>
<tr>
<td>Optical Character Reference (OCR)</td>
<td>Optical character recognition is the mechanical or electronic translation of images of handwritten, typewritten or printed text into machine-editable text.</td>
</tr>
<tr>
<td>Personal information</td>
<td>Personal information is information about an identifiable person. It can include information such as date of birth, unique personal identifiers such as bank account details, Medicare number, address or telephone number, or can include physical descriptors or ethnicity.</td>
</tr>
<tr>
<td>Robots exclusion protocol</td>
<td>A convention to prevent cooperating web spiders and other web robots from accessing all or parts of a website which is otherwise publically available.</td>
</tr>
<tr>
<td>Sealed records</td>
<td>Record sealing is the process of removing certain document from open access in a court case.</td>
</tr>
<tr>
<td>Social networking</td>
<td>Social networking is defined as web based service that allows individuals (and organisations) to create a profile within the service. This profile can range from being completely public and available to everyone on the Internet to partially private and available only to selected people within the service.</td>
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</tbody>
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5. Background

5.1. What is privacy?

a. As the over used phrase says, privacy means different things to different people. The short explanation provided by the Privacy NSW website states that privacy has:

"sometimes been described as:

- the right to be left alone, or
- the right to exercise control over one’s personal information, or
- a set of conditions necessary to protect our individual dignity and autonomy."

b. To illustrate the application of privacy, the Privacy NSW website states:

"we often think about privacy in different ways, for example:

- physical privacy - such as bag searching, use of our DNA
- information privacy – the way in which governments or organisations handle our personal information such as our age, address, sexual preference and so on.
- freedom from excessive surveillance – our right to go about our daily lives without being surveilled or have all our actions caught on camera."

c. As seen from the last example, privacy is a modern day issue that is entwined with the increased use of technology. Technology can diminish an individual’s control, dignity and the ability to be left alone. Technology can be used for creating profiles on individuals by aggregating different sources of information, storing information indefinitely via data warehousing or facilitating cyber stalking.

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2 Ibid

3 Most academic material reviewed consider Samuel Warren and Louis Brandeis’s article, ‘The Right to Privacy’ *Harvard Law Review* 193, published in 1890 as the beginning of the idea of privacy. A reference to privacy was included in Article 12 of the *Universal Declaration on Human Rights*, established by the United Nations in 1948. The privacy debate quickly developed in the 1960s with advance of information storage and retrieval on computers and grew rapidly in the 1990s with the arrival of the Internet. Power and control are philosophical undercurrents in the privacy discussion therefore fiction such as Orwell G, 1984, or architecture such as Bentham’s ‘panoptical’, add to the origins of the concept. Class is also an added societal element e.g. current intrusion into the lives of the ‘unworthy poor’ but does rate much in the academic discussion.

4 [www.123people.com](http://www.123people.com) creates a page on individuals that displays photos they were tagged in, their email addresses, their phone number, if they were mentioned in blogs, if they were mentioned on social networking
d. With rapid creation and application of technology, so to are the boundaries of privacy recreated and reapplied. This is evident over the last decade as the subject of privacy is constant fodder for law reform commissions. The reviews and rewrites of the privacy concept display a telling conflict between the convenience of technology and the concerns of privacy protection.

5.2. The role of personal or sensitive information in the court process

a. Courts need information, facts and details in order to make a determination. Even if details were embarrassing or intrusive, this would not influence the courts position of needing to know the specifics in order to properly administer the law.

b. In a House of Lords decision Scott v. Scott, it was maintained that the court does not defer to the privacy concerns of participants in the proceedings. The House of Lords rejected any suggestion that litigants should be spared the humiliation, pain or embarrassment of having private matters publicly disclosed. Lord Shaw of Dunfermline quoting Bentham outlined the reason for this:

"Publicity is the very soul of justice. It is the keeest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial’.

‘The security of securities is publicity’ but amongst historians the grave and enlightened verdict of Hallam, in which he ranks the publicity of judicial proceedings even higher than the rights of Parliament as a guarantee of public security, is not likely to be forgotten: Civil liberty in this Kingdom has two direct guarantees; the open administration of justice according to known laws truly interpreted, and fair constructions of evidence; and the right of Parliament, without let or interruption, to inquire into, and obtain redress of, grievances. Of these, the first is by far the most indispensable; nor can the subjects of any State be reckoned to enjoy a real freedom, where this condition is not found both in its judicial exercise and in their constant exercise.”

sites and even displays their wish list from Amazon.com. Their business model is to aggregate this information and provide access for free but you can also pay a monthly fee for this organisation to hide this information.


6 [1913] AC 417.

7 ibid at p 477-8
The judges also found that there are only three exceptions to this rule: litigation affecting wards (children in modern day terms), lunacy proceedings (mental health in modern day terms), and disputes over trade secrets.

c. Reasons for decisions usually contain personal and factual information so the litigants, lawyers and the public can understand how the judge applied the law to the situation. This can include the sensitive details about the litigants involved. But these details must be retold by the judge so there is transparency and openness in the decision making process.

5.3. Why put court information on the Internet?

a. Much has been written and spoken about the open justice principle. This principle requires that justice must not only be done but must be seen to be done. The principle is a check that the justice system is operating in a transparent and accountable way. As stated by the Honourable JJ Spigelman, Chief Justice of New South Wales:

"The principle of open justice, in its various manifestations, is the basic mechanism of ensuring judicial accountability. The cumulative effect of the requirements to sit in open court, to publish reasons, to accord procedural fairness, to avoid perceived bias and to ensure fairness of a trial, is the way the judiciary is held accountable to the public."  

b. As stated, a requirement of this principle is publishing reasons but with the creation and take up of the Internet, an extension of the open courts principle has been to publish judicial decisions online.

c. In 1999, the NSW Caselaw website was created to facilitate a "cradle to grave judgment production, management and distribution system". It was developed to reflect the need for a higher level of consistency between courts and tribunals in the manner in which decisions were produced and to enhance access to judicial decisions and legal information generally. It has created considerable benefits to those who practice law, for the media and for the public. Before online access, this information was only available by subscribing to a law report (generally reports only publish 10 per cent of all judgments delivered), attending

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10 Mark Burdack, 'Automated publication of judicial decisions in New South Wales', Paper presented at law via the Internet '99, Sydney, 22 July 1999
at the court to purchase a paper copy from the registry or viewing a copy at the Court’s library.

d. Publishing judgments electronically enables justice to be seen to be done in a very modern way.

5.4. **What role does a court have as an information manager?**

a. This electronic open access has come with its own set of issues for courts regarding information management. Monetary and physical barriers of paper copies created de facto privacy protections for those involved in court proceedings. But the publication of judgment information on the Internet has allowed third parties to quickly gather information about individuals involved in court proceedings. This leaves the individual open to victimisation through identity theft, fraud or data mining.

b. These new challenges require rethinking about the court’s role as information managers.\(^\text{11}\)

As Peter A Winn has observed:

"We have lived in a very forgiving world. The ‘practical obscurity’ of paper judicial records largely sheltered us from the danger of information misuse, while we prided ourselves on our ‘public’ judicial system. The world of electronic information is far less forgiving place. It is not forcing us to recognise - by our actions, if not yet by our words – that simple abstract rules developed for a world of paper based information may no longer suffice to resolved the complex problems of judicial information management."\(^\text{12}\)

c. Being an information manager is not a new role for courts. Courts have created many rules to manage the information that flows into a courtroom. These are evidentiary rules that have been created to give an accused a fair trial and to create a 'level playing' field for the litigants. These rules have been developed over centuries and have an underlying principle of fairness.

d. There have also been exceptions created to the flow of information out of courts. Courts can have sealed records; there are legislative restrictions on the naming of children\(^\text{13}\), victims of specific offences or matters that deal with national security. In NSW, decisions such as

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John Fairfax Publications Pty Ltd v Ryde Local Court\textsuperscript{14} have indicated that the principle of open justice guides the Court in considering what information can be made available but it does not act as a right to access court information.

e. There is a precedent for courts to consider themselves as information managers and as the electronic world develops the consequences of online publication need to be considered from an information management perspective.

\textsuperscript{14} [2005]NSWCA 101.
6. Fellowship

a. Each country visited provided relevant and interesting insights for this project within their context. I have outlined a broad focus for each country with the headings of data minimising and shielding, redaction and consultation.

6.1. Canada (Data minimisation and shielding)

a. The approach in Canada has been two fold, data minimisation through the techniques of deindentification with content responsibility resting with the judicial officer, or data shielding with the use of robot exclusion protocols.

6.1.1. Use of Personal Information in Judgments and Recommended Protocol

a. The Canadian Judicial Council (CJC) considers the responsibility for a judicial decision to comply with publication bans and non-disclosure requirements rests with the judge that drafts that decision.\(^\text{15}\)

b. The CJC stated that the:

"reasons for judgment in any type of proceeding before the court can contain personal information about parties to the litigation, witnesses, or third parties with some connection to the proceedings. Beyond the restrictions imposed by legislative and common law publication bans, some have begun to question the need to disseminate sensitive personal information in judgments which are posted on the internet."\(^\text{16}\)

c. Work began in 2004 to develop a protocol in response to the wide dissemination of judicial decisions over the Internet and the privacy concerns this created.

d. The protocol published in 2005 has a number of objectives that must be considered when determining what information should be included or omitted in a judicial decision:

- ensuring full compliance with the law;
- fostering an open and accountable judicial system;
- protecting the privacy of justice system participants where appropriate; and
- maintaining the readability of reasons for judgment.


\(^\text{16}\) Ibid para 16.
e. The protocol has three levels of protection:

"A. Personal Data Identifiers: omitting personal data identifiers which by their very nature are fundamental to an individual’s right to privacy;

B. Legal Prohibitions on Publication: omitting information which, if published, could disclose the identity of certain participants in the judicial proceeding in violation of a statutory or common law restriction on publication; and

C. Discretionary Protection of Privacy Rights: omitting other personal information to prevent the identification of parties where the circumstances are such that the dissemination of this information over the Internet could harm innocent persons or subvert the course of justice."

f. The types of protection are clearly outlined; Type A data examples are articulated as being Personal Data Identifiers such as day and month of birth, social insurance numbers, credit card numbers and financial account numbers. Type B are the legislative provisions or common law restrictions in Canada that shield the identity of participants. What is useful about the protocol for Type B protections is it outlines that just concealing the name alone is usually not sufficient to shield a person's identity. The Protocol recommends drafting a judgment using general information rather than specific. Specific information is typically information about the person's acquaintances, names of communities, official positions participants' hold or atypical or extraordinary information about the participants such as sporting ability or high income.

g. The Protocol was expected to diminish the undesirable consequences of online publication such as threats to personal privacy and security and the discouraging effect on judges to post decisions.

6.1.2. Implementation

a. The implementation of the protocol has taken the form of adoption by training provided to the judicial officers of Canada within either technology or judgment writing seminars. Judicial officers are given experience in de-identifying information from their judgments. The judicial education is based on peer group and experience training. Participants are asked to complete exercises that use tools such as Google to give a 'hands on' experience of some of the retrieval technologies.

b. But implementation and usage of the protocol is not universal. For example, the Canadian Judicial Council only has authority over federally appointed judges but not lower level state
judges and tribunal members. If all courts don’t take the initiative for dealing with personal information contained within judgments this generally means the publishers must decide what the appropriate standard to apply is.

c. Publishers, such as LexUm, have the position that publishing a complainant’s name in a sexual assault case is a criminal offence. Since the court does not consistently communicate to the electronic world that a non-publication order has been made, then the publishers have normally erred on the side of caution and anonymised the sexual assault complainant’s name. This is obviously not desirable as inconsistencies arise, as different series of reports will have different text and sometimes difference case titles. The ideal situation would be for judgment to come from the court with either a notification that a non-publication order is in effect or with the information redacted.

6.1.3. Tribunals

a. The collision of online publication of decisions and personal information has been further illustrated in Canada with recent work undertaken by the Office of the Privacy Commissioner (OPC).

b. As mentioned the ‘Use of Personal Information in Judgments and Recommended Protocol’ only applied to federally appointed judges and the position was not extended to other forums, such as tribunals, who made their decisions available. This created some difficulty in recent years. In 2007-2008, the OPC investigated 23 complaints regarding the disclosure of personal information via tribunal decisions available on the Internet.\(^\text{17}\)

c. The Commissioner, while accepting the importance of transparency in the proceedings, posed the question: “But is it in the public interest to make considerable amounts of an individual’s sensitive personal information indiscriminately available to anyone with an Internet connection?”\(^\text{18}\)

d. The point made about these types of decisions was that they normally contained sensitive information due to the nature of the proceedings before the tribunals. These tribunals had jurisdiction over matters such as social security appeals or public service promotional appeals. The Privacy Commissioner took issue not with personal information legitimately required for the decision making process but with other details which are seemingly irrelevant, including the names of the participant’s children and home addresses. The


\(^{18}\) Ibid p12.
Commissioner relates that complainants were upset that this information was published to the Internet, typically with no notice given to them. The Commissioner raises the risks associated with publishing personal information on the Internet such as:

- Identity theft due to the disclosure of financial details
- Discrimination
- Harassment
- Stalking
- Information reuse from data brokers who compile profiles.

e. Another concern raised included that access to justice could suffer as those who seek a redress become reticent to participant in the justice system or feel they are beholden to the process, so must sacrifice their personal information in order to participate.19 The application of the open justice principle for tribunals was further complicated as many of the administrative and quasi-judicial bodies fell under the regime of the Privacy Act. The Privacy Commissioner stated that in passing the Act the parliament intended to extend the influence of the regime to the tribunals. This amounted to the parliament setting limits of the open courts principle for tribunals.20

f. The conclusion reached by the Privacy Commission was that there could be a balance between providing information to the public and compliance with the obligations under the Act. These measures include:

- Depersonalising any decisions online by replacing names with random initials.
- Legislative change
- Discretionary disclosure in the public interest.

g. As the Commission states "the open court principle is intended to subject government institutions to public scrutiny, and not the lives of the individuals who appear before them."21 The Commission concludes that there is no intractable conflict between the open courts principle and privacy requirements.

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20 Unlike New South Wales, Section 6 of the Privacy and Personal Information Protection Act 1998 [PPIP Act] provides that nothing in the Act affects the manner in which the judicial functions of a court or tribunal are exercised.
21 See above n16 p13.
Lessons learnt

- Just as there is communication of a publication restriction within the open courtroom, there is the need for communication in the open electronic world. This could be done as a standardised publication restriction notice.

- A protocol should be developed across all jurisdictions as to dealing with personal information in judgments. Ideally this protocol should be developed, endorsed and implemented for consistency across all jurisdictions at a court and tribunal level and at a state and federal level.

- The Canadian Judicial Council had decided that ultimate responsibility of judgment content rests with the authoring judge. To support judges in this role, judicial training has been provided.

6.2. USA (Redaction)

a. In the USA, unlike Canada and Australia, there is not a strong tradition of self-publication of judicial opinions. Opinions are generally found within the court record systems.

6.2.1. What is redaction?

a. Redaction is defined as the removal of non-disclosable information from a document. This process can be done manually or can be done with software. The manual process involved photocopying a document, using a black marker pen to cross out the information needing redaction then photocopy the amended document. In the last five years, the improvements in accuracy of search engines, database processing capabilities and Optical Character Recognition (OCR) technologies has made great improvements to redaction technologies.

b. The development of redaction software was also in response to the legislative requirements for redaction of Social Security Numbers (SSN), birth dates and other unique identifiers. Current configuration of the products allows an organisation to create specific rules for the program to identify high-risk documents. The products can be configured to identify specific terms 'date' 'birth', combination of words 'day' 'date' 'birth' or other phrases to identify high-risk documents.

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22 Questions regarding the value of redacting social security numbers has been raised after researchers were able to predict SSNs with high accuracy using publicly available data see Acquisti A. and Gross R., 'Predicting Social Security numbers from public data', PNAS 7 July 2009, vol. 106 no. 27, 10975-10980.
6.2.2. Accuracy of redaction software

a. The Supreme Court of Virginia conducted a Redaction Project to remove SSNs from Land Record documents. For judgments, the redaction was only the first five social security number digits. The business need for the project derived from a change in the Code of Virginia\textsuperscript{23}, which stated that no court clerk shall:

"post on a court-controlled website any document that contains the following information: (i) an actual signature; (ii) a social security number; (iii) a date of birth identified with a particular person; (iv) the maiden name of a person's parent so as to be identified with a particular person; (v) any financial account number or numbers; or (vi) the name and age of any minor child."

b. The project outlined several redaction principles:

- "Redaction should always be carried out on copies and never result in the removal of text from an original document.
- Redaction should be limited to SSNs and performed on a 'day-forward' and on a 'back-file' basis...
- Decisions regarding redactions need to be documented and stored."

c. The software classified documents and identify fields of interest through OCR engines. After processing, the flagged document the software produced a 'clean' version' which was loaded to the publically available database. After processing over three million documents, the accuracy rate was 98%.

6.2.3. Application of redaction software to a narrative

a. Speaking with a number of vendors\textsuperscript{24}, they have not identified the need for nor has a request been made to provide further redaction or data shielding on a more sophisticated level. It is, however, within the potential of the programs to scan the documents for markers such a reference to specific legislation. The document could be searched for references to specific sections of an Act; if a reference was found this would flag a document for further review or could invoke a more stringent automatic review script. These types of features would assist the authoring judge in reviewing judgments before publication.

\textsuperscript{23} 2.2-3802.2 of the Code of Virginia.

\textsuperscript{24} Vendors at the Court Technology Conference 10, Denver, September 2009. Vendors included: Extract Systems, Computing System Innovations (CSI) and Abode Acrobat.
6.2.4. When to redact – before submission or before publication?

a. Many jurisdictions require the attorney to redact information before submitting it to the court. For example, US Courts issued an enhanced notice of Attorney Redaction responsibilities in August 2009. The notice detailed the responsibilities of attorneys and detailed modifications to the Case Management and Electronic Court Filing system to remind the attorneys of their responsibilities. The reminders are given in two ways – a display of their responsibilities upon log in and another reminder message when the attorney finalises the submission. The text of the reminder is "IMPORTANT NOTICE OF REDACTION RESPONSIBILITY: all filers must redact: Social Security or taxpayer identification numbers; dates of birth; names of minor children; financial account numbers."\(^{25}\) For district and appellate courts the text has been added to note, "in criminal cases, home addresses" must also be redacted.

b. There is merit for placing the onus of redaction with the parties. Sensitive information never enters the court system to begin with so there is less chance of data leakage. The attorney’s are also best placed to know what information is key to the proceedings and what is superfluous. There is also benefit in having less information for the judge to process. However, there has been criticism to placing the obligation of redaction on the filer. While there has been attorney education on redaction there has been anecdotal evidence that the person who physically files the document is generally a legal secretary or paralegal. The feedback given was that these people receive little instruction regarding redaction requirements.\(^{26}\)

6.2.5. Inconsistency in redaction

a. There was some confusion relating to the SSN redaction in the USA. Some state courts redacted just the last four digits of the SSN number\(^ {27}\) and other courts such in the Federal system\(^ {28}\) redacted the first nine digits leaving the last four. These could be reflective of


\(^{26}\) Feedback received during some of the sessions at the Court Technology Conference 10, Denver, September 2009. There were a number of sessions on electronic filing where court staff across the USA explained the difficulties these courts experienced when parties were required to redact the sensitive information. Many reported low compliance rates.


different administrative bodies that govern courts but provide the opportunity reconstruct
the information through 'jigsaw' identification. 'Jigsaw' identification, as the name suggests,
is where two or more sources of information are put together to reveal the concealed
information.

Lessons learnt

- There needs to be consistency in redaction across different jurisdictions. The redaction rules
  need to be coordinated across the jurisdictions.
- When developing redaction standards expertise is needed to verify that the suggested
  redaction practice is correct.
- The level of sophistication of redaction software has not yet reached the requirements of
  Australian jurisdictions for redaction of contextual or factual information, but there is
  potential for development.
- If the onus of redaction is on the filer, auditing is still needed by the court or tribunal to
  ensure compliance.

6.3. United Kingdom (Consultation)

a. Some agencies and courts in the United Kingdom (UK) have dealt with the issues of
  publication and personal information through quite different methods.

b. As per other common law jurisdictions, generally justice in the UK is administered in public.
   However, some jurisdictions did not conduct their proceedings in public and were subject to
   extensive criticism for this practice.\(^\text{29}\)

c. In the UK, most family cases were heard in camera, which fuelled a perception that 'secret
   justice' operated in those courts.\(^\text{30}\) The 'secrecy' created a crisis in confidence as to whether
   the court could look after some of the most vulnerable members of society. The
   Department of Constitutional Affairs responded by conducted a consultation to suggest
   changes to the access rules of these courts. Some of the suggested reforms included the
   media would have access 'as a right'. This generated a very unresponsive reaction from
   children and from organisations that worked with children.

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\(^\text{29}\) Sarah Harman, 'Family court secrecy is bad for children', The Times, (London, United Kingdom) November 2

\(^\text{30}\) United Kingdom, Confidence and confidentiality: Improving transparency and privacy in family courts, Cm
d. After the second consultation conducted by the newly formed Department of Justice, the reform process identified several main objectives regarding attendance at and reporting of family cases:

- "To improve public conference in the family justice system through public scrutiny;
- To improve knowledge and understanding of the workings of the family courts among court users and the general public
- To provide arrangements that are simple, easily understood, consistent and workable; and
- Maintain an appropriate balance with the rights of the litigants to privacy concerning their family life."

e. In December 2008, the responses of the second consultation were published. There were three key principles to govern the new approach in family courts. These broadly were to improve confidence in the courts, provide more support systems for adults involved in this jurisdiction and protect the interests of children. To achieve the first principle, the Ministry of Justice is to pilot the placing of anonymised judgments online so there is public access to the reasons of the court. This will not be an easy task and will take many resources.

f. The consultations presented the viewpoints of child participants and from my research this was the first time that these participants voiced their perspective on the issue. Many stated that these matters concerned their lives and they did not want open access provided to the distressing, private and horrible details.

6.3.1. Transparency in court policy

a. In a global review, there were very few jurisdictions that communicated their position or policy on anonymising court decisions. One jurisdiction that did was the Court of Session in Scotland.

b. In 2007, the Court of Session in Scotland published a practice note declaring the policy of the court on anonymising Court Session opinions that are published online. The practice note outlines the court adheres to the general principle that judicial proceedings are heard and determined in public and this includes access to the judicial determinations. The

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32 United Kingdom, Confidence and confidentiality: Openness in family courts – a new approach, Cm 7121 (2007).
33 Practice Note No 2 of 2007.
The practice note also states "the circumstance that publication on the Internet gives readier access to opinions to a wider public does not affect that principle." The practice note then outlined the circumstances in which anonymisation would be applied and, in some cases, how it will be applied. This practice note explained the position of court quite succinctly and would give certainty to those dealing with the court.

### 6.3.2. Consistency between jurisdictions

a. One of the issues also raised in my meetings with representatives from not only the UK but from Canada and the USA was the inconsistency of anonymising decisions between courts and tribunals that were separately administrated but linked by appeal process.

b. This issue was also raised by the Law Society of Scotland’s response to Court of Session Scottish Civil Courts Review. The Mental Health and Disability subcommittee stated:

"The reporting of court judgments has caused the Committee some concerns, as the Scottish Court Service appears to have an inconsistent policy on protecting the anonymity of people involved in mental health and incapacity cases."  

The subcommittee outlined the inconsistency across jurisdictions and requested that "the Scottish Courts Services ... develop a consistent policy on protecting anonymity in these types of sensitive cases."

The examples given were appellant courts receiving judgments where anonymisation was not applied and found difficulties quoting from the trial judgment and similarly the trial jurisdictions had found the superior courts had disregarded policies or practices and this presented difficulties in referring to or quoting from the precedent.

### Lessons learnt

- The position of transparency for courts should extend to publishing policies. The Court of Session has provided a good example of communicating to the public the approach of the court to anonymising judgments.

- Consistency across jurisdictions even those separately administered is vital.

- A simple but comprehensive set of guidelines are needed to assist judges and their staff properly and in a timely way release their decisions to the public.

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34 Court of Session Scottish Civil Courts Review - The Response of the Mental Health and Disability Sub Committee of the Law Society of Scotland, April 2008.


36 Ibid p8.
7. Other emerging issues

7.1. Safety concerns

a. There was some anecdotal information of circumstances where those who are vulnerable for a particular reason e.g. long standing restraint orders, former occupant of a specific role, were not notified that their information would be published online via a judgment. These individuals were involved in proceedings independent of their position or situation. For example, they were a witness of a crime or were a plaintiff in a tort. While obvious information such as addressees was generally omitted, contextual information about the participant provided enough information to reinitiate stalking or harassment for former associates.

b. One issue remained in a number of jurisdictions that there was no trigger point in which to raise this issue with the judge. The Administrative Office of US Courts had given a form of notice to participants but this practice had stopped several years ago. The notice stated that information about their proceedings would be made available on the Internet and if there were any concerns that they should be raised with the court. There was no feedback as to whether the notice had assisted court participants with their safety concerns. There needs to be a mechanism were the participants are given the capacity to raise this issue with the court.

7.2. Personal information reuse by the court

a. Very few court websites detail how a person’s name or details are used within the court environment, for example, case law relies on the participants name to form the case title. Very few court or tribunal websites address the use of personal information in judgments and certainly no website detailed what pieces of information the court puts into the public domain.

b. Drawing on my and other jurisdictions experiences, those who complain about their personal information online generally did not have any concept that their name would be used in such a way or that the information provided in court would be made available on the Internet. Courts and tribunals should provide general information about what it proposes to do with personal details and explain better why the information is required in the judicial decision that will eventually be come available on the Internet.
7.3. Redemption

a. Though it is out of the scope of this fellowship project, one issue was raised in discussions repeatedly – redemption. As Internet publishing of judicial decisions matures in NSW, there have been occurrences of former prisoners wishing to have their names removed from decisions or remarks. Typically the offences took place years ago; there has been some, albeit self-disclosed, reform and the offence falls outside the scope of current criminal record legislation. Informal ‘employment’ or ‘accommodation’ checks using publically available decision databases are undertaken and the former prisoner finds that their application has been rejected with reference made to the old offence.

b. This is a debate that the community needs to have about place of rehabilitation, redemption and forgiveness in the justice system. It is hard to predict how this issue will evolve in the electronic world. Within the privacy/electronic community there are differing views, there is one view that within a decade all of us will have 'digital baggage' so a previous criminal conviction will be irrelevant compared to other electronic 'faux pas' or the other view that public access to judgments could create a 'criminal underclass' where the rest of your life will be about a moment of poor judgment, of immaturity or carelessness. A debate would assist in developing sound practices for publishing court information.

7.4. Social networking and profiles

a. Social networking is a new media available on the Internet. Social media is dependent on disclosure from the participants for content. Social networking has a number of pitfalls for the legal world. These pitfalls can relate to disclosure of prohibited information such as juror deliberations, trial proceedings or pending outcomes, it will also present a difficulty for courts when concealing the identity of participants.

c. Aggregators index social networking sites and compile the information to create profiles. While aggregators are quite rudimentary at the moment, the technology is quickly improving. Courts will quickly find that anonymising a name or number or substituting initials instead of name may not be sufficient in the future to prevent reconstructing of a participant’s identity or information.


d. Related somewhat to the issue of redemption and social networking is also the rise of the electronic profile. This issue has been discussed in a number of publications and concerns have been raised about a 'dossier society'. The main concerns include the compilation of bits and pieces of information about people from disparate sources, taken out of context, and then used to form conclusions and make decisions about them. Other concerns related to the distorted persona this creates, as it is only the electronic not physical world represented and that this information is partially true and unauthorised but used as a basis for others to make important decisions about the person in question. Courts need to be aware of their role in the 'dossier society'.

8. Conclusion

a. There is vigorous, if not passionate, debate on this issue and the debate is still evolving within courts. Balancing these two complementary but sometimes conflicting needs is very challenging. But judicial systems do not operate in isolation; they are reflective of the communities in which they operate. The open justice principle should not perpetrate it own injustices otherwise the community will lose confidence in the system, just as it has done with courts that operate behind closed doors. I hope that my observations and recommendations will provide ideas and assist in developing the appropriate balance.

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9. Recommendations

a. Based on my research, visits and discussions, the following are my key recommendations:

1. Information should be provided on court websites that explains the position of courts and why certain information will be contained in judgments. Courts should be encouraged to publish, via their website or in other publications, the principles and practices that govern its approach to publishing judgments. The form of the information could be a comprehensive practice note or policy document and it would outline what type of information is contained in judgments, the purpose of publishing judgments online and what procedures are available to participants to raise any security concerns with the court. This information could be promoted through the profession and could become a resource that practitioners or self-represented litigants can refer to when proceedings are initiated.

2. Investigate and champion the adoption of a standard protocol across the federal and state courts and tribunals on dealing with personal information within judicial decisions. This would provide an opportunity for courts to consult and receive the views of the community. Any protocol developed needs to outline the 'reasonable' level of obscurity that should be applied to judgements in certain circumstances. Along with any protocol, there would be needed guidelines to assist courts in applying the protocol.

3. A seminar on redaction should be organised for courts. This should include experts from the law enforcement community, academics and entities such as Australian Taxation Office and Centrelink to attest latest developments on identity theft and correct prevention techniques. This information for courts would assist in providing consistency in redaction methods across jurisdictions.

4. Modules are provided within professional development for judges, court staff and other registry staff on techniques to when depersonalising and anonymising judgments.

5. Courts actively develop third party reuse policies for judgments. Reuse policies would outline the scope of use and possibly deter misuse. Specific provisions should outline the court's position on bulk access and data mining.

6. A standard publication restriction notice should be applied to judgments that have publication restrictions. This notice should be provided even where a decision has been
anonymised. This would allow those who later access the judgment to understand their obligations.

7. Education sessions should be provided for judges and court staff on new media and search aggregates to provide awareness of emerging technology, its applications and impacts.

8. Records be kept by the court of complaints received on this issue to monitor any developing impacts publishing judgments online has on the community.