



Attorney General's
department of nsw

**REVIEW OF THE
POLICY ON ACCESS TO COURT
INFORMATION**

APRIL 2006

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Draft Review of Access to Court Information & Documents

1. Introduction

Documents and material that constitute the record of court proceedings are the property of the Court. The Court is responsible for administering access to court documents and information. Traditionally, the Court determines any request for access to court information or documents on a case by case basis.

A new computer system, CourtLink, is being implemented across the Supreme Court, District Court and Local Courts. The system will create the opportunity for improved access to information. In anticipation of the introduction of CourtLink, the Supreme Court initiated a review in 2004 of its policies concerning access to court information and documents.

The Supreme Court released a consultation paper and draft policy entitled “Non Party Access to Court Records”. The responses to the consultation paper and draft policy raised complex issues of public policy including:

1. The relevance of privacy principles to court proceedings
2. Differing approaches taken by individual NSW Courts, and
3. Whether access to records should extend to accessing physical exhibits

In view of the significant public policy considerations associated with access, the Supreme Court referred the issue to the Attorney General’s Department.

In April 2005 the Criminal Justice Forum was asked to comment on what changes should be considered to the current manner in which access to records is administered.

The following views were expressed:

- That a uniform approach across all Courts was needed,
- That in conjunction with access to court records it was appropriate to review powers relating to non-publication orders, and
- That law agencies currently accessing electronic court management systems should continue to do so subject to appropriate controls.

Based on consultation comments provided to both the Supreme Court and the Criminal and Civil Justice Forum 2005 the policy relating to access to court documents has been reviewed. The review contains proposals to address concerns raised by stakeholders on access to court documents.

2. Purpose of Review

Access to court information and copies of documents involve a balance of a number of principles including open justice, securing the proper administration of justice, the protection of vulnerable persons involved in proceedings and recognition of privacy and the confidentiality that might attach to certain information. The question of access is one that affects a wide range of stakeholders. Law enforcement officers, members of the media, researchers, employers and the general community seek access to court information for a number of reasons. Guidance on how the Court or Registrar should exercise their discretion when determining applications by these groups is limited. While this allows the Court to maintain a greater degree of flexibility when dealing with applications it also results in an approach that creates potential uncertainty and inconsistency.

The purpose of this review is to articulate a proposed policy in respect to access to court documents and information and to make proposals for change that promote greater certainty in relation to rights of access and a more consistent application of that policy.

This review attempts to state in more definitive terms the rights of persons to obtain access to court information and the information to which those rights extend. It also clarifies the circumstances and manner in which rights to access court information should be limited.

The proposals contained in this review represent an in-principle framework on access to court information and documents. The Department seeks the views of the Court and other stakeholders as to whether the proposals are appropriate and to determine whether to proceed with legislative amendments that will give effect to the proposals.

3. Scope of Review

The issue of access to court documents and information arises in all court proceedings. As the nature of court proceedings varies significantly it is necessary to examine the balance of competing policy considerations affecting access to court information in the context of different types of proceedings. This review considers the principles applying to access to court documents and seeks to apply them within the context of the following:

- Criminal proceedings
- Civil proceedings

The terms of this review extend to proceedings before a New South Wales Court to which either the *Criminal Procedure Act 1986* or the *Civil Procedure Act 2005* applies.

The review also applies to proceedings under Part 15A of the *Crimes Act 1900* (apprehended violence proceedings) and Part 6 of the *Local Courts Act 1982* (application notice proceedings). These proceedings are treated in the same manner as civil proceedings in this review.

Section 27 of the *Children's (Criminal Proceedings) Act 1987* applies the provisions of the *Criminal Procedure Act 1986* including those provisions relating to access to court documents. Additional safeguards exist in relation to publication of information identifying juvenile offenders and these additional protections should continue.

The Court regulates the public availability of court documents and information through two methods, firstly, by imposing restrictions on access to court documents, and secondly, by imposing restrictions on the publication and use of court documents or information. By necessity, any review of the right to access court documents involves a consideration of the protections that exist to safeguard against the improper use of court information. If there is a change to the rights of access to court documents and information, then it will also be necessary to review the controls which exist on the use of information to ensure that they remain adequate to afford protection for privacy concerns and the administration of justice.

The issue of rights of access relates not only to court documents but also to court information held in electronic or other formats. The term "court information" makes it clear that principles of access are not limited to traditional paper based court files.

4. Current Legislative Framework on Access

There are a number of legislative provisions affecting rights of parties and non-parties to access court information. These legislative provisions fall within two categories:

- enabling provisions that allow for access to court information
- restrictive provisions that create a prohibition on access or publication of court information.

In some court proceedings there is no legislative provision either enabling or restricting access.

Provisions Allowing Access

Section 314 Criminal Procedure Act 1986

Section 314 of the *Criminal Procedure Act* was introduced on 7 July 2003. This provision adopted a proposal by the Law Reform Commission. It provides the media with a right of access to certain court records at any time from commencement until the expiry of 2 working days after they are finally disposed of, for the purpose of compiling a fair report of the proceedings for publication.

The documents that a media representative is entitled to inspect under this section are:

- a) the indictment, court attendance notice or other document commencing proceedings
- b) witness statements tendered as evidence
- c) brief of evidence
- d) police fact sheet (in the case of a guilty plea)
- e) transcripts of evidence
- f) record of sentence, conviction or order

The Registrar must not allow documents to be inspected if the proceedings are subject to an order prohibiting their publication, a suppression order or are held in closed court or are otherwise prohibited from being published by or under any other Act or law. Media wishing access to criminal court records after the expiry of 2 working days must seek leave of the Court or Registrar.

Supreme Court Practice Note SC Gen 2

On 17 August 2005 the Supreme Court reissued the Practice Note relating to access to court documents by non-parties. The Practice Note applies to proceedings in the Court of Appeal, the Court of Criminal Appeal and to each Division of the Supreme Court. The Practice Note requires a non-party to obtain leave from the Court to access material and identifies certain documents that will normally be granted:

“6. Access to material in any proceedings is restricted to parties, except with the leave of the Court.

7. Access will normally be granted to non-parties in respect of: pleadings and judgments in proceedings that have been concluded, except in so far as an order has been made that they or portions of them be kept confidential;

- documents that record what was said or done in open court;
- material that was admitted into evidence; and
- information that would have been heard or seen by any person present in open court

unless the Judge or Registrar dealing with the application considers that the material or portions of it should be kept confidential.

Access to other material will not be allowed unless a Registrar or Judge is satisfied that exceptional circumstances exist.”

District Court Practice Note (Civil) 11 allows for non-party access to material in terms similar to the Supreme Court Practice Note.

Uniform Civil Procedure Rules 2005

The Uniform Civil Procedure Rules 2005 commenced on 15 August 2005. The Rules apply to the Supreme Court, District Court and Local Courts. Rule 36.12 relates to access to court documents. The Rule allows any person, upon payment of the prescribed fee, to obtain a copy of a judgment or order unless the Court otherwise orders. In respect to pleadings or documents other than judgments or orders the Registrar may furnish a copy to any non-party “appearing to have sufficient interest in the proceedings”.

Local Courts (Criminal and Application Procedure) Rule 2003

In the Local Court the Magistrate or Registrar may grant leave to non-parties to access court documents under clause 62 of the *Local Courts (Criminal Proceedings and Applications) Procedure Rule 2003*. The Rule applies to criminal proceedings before the Local Court and general applications under Part 5 of the *Local Courts Act 1982*. The Magistrate or Registrar may provide a copy of transcripts to a third party only where the Magistrate or Registrar is “of the opinion that the person seeking leave to access or obtain a copy of the record or transcript has a proper interest for doing so”.

Provisions Restricting Access

Access to court information and documents is affected by non-publication orders and provisions restricting the disclosure of “spent convictions” under the *Criminal Records Act 1991*.

Statutory Non Publication Provisions

There are a number of legislative provisions restricting the publication of court information. The legislative provisions restrict publication or broadcasting of certain information. The restrictions are often subject to qualifications that allow the publication of an official record of the proceedings and the disclosure of information to particular persons or agencies. Statutory provisions allowing the Court to order the non-publication of evidence or information includes:

Section 36C Bail Act 1978 – restriction against publication of the name of a person specified in a condition imposed on the grant of bail.

Section 11 Children (Criminal Proceedings) Act 1987 – restriction against the publication of the name or identifying information of a person who was a child at the time when the offence was committed.

Section 578A Crimes Act 1900 – restriction against publication of information identifying victims of sexual offences.

Section 292 Criminal Procedure Act 1986 – publication of evidence may be prohibited in certain sexual assault cases.

Section 562NB Crimes Act 1900 – non-publication of names and identifying details of children under the age of 16 years during AVO proceedings.

Section 72 Civil Procedure Act 2005 – the Court may, by order, prohibit the publication or disclosure of any information tending to reveal the identity of any party to proceedings or any witness in proceedings if it is of the opinion that it is necessary to do so to secure the proper administration of justice in the proceedings.

Section 126E Evidence Act 1995/Section 302 Crimes Act 1900 – non-publication of evidence of a protected confidence disclosure.

Section 26 Witness Protection Act 1995 – identity of witness not to be disclosed in legal proceedings.

Non Publication Powers at Common Law

The making of an order by a Court prohibiting the publication of evidence is only valid if it is necessary to secure the proper administration of justice in proceedings before it. When a Court is an inferior Court, the order must do no more than is necessary to enable it to act effectively within its jurisdiction; *John Fairfax & Sons Pty Ltd v Police Tribunal of New South Wales [1986] 5NSWLR465*.

The scope of the non-publication restriction will depend on the circumstances. Non-publication orders may take various forms including an order that a person be referred to by a pseudonym or that the identity of a person not be published. Unless the order is revoked or otherwise subject to a time limitation the non-publication order continues indefinitely.

Criminal Records Act 1991

The *Criminal Records Act* establishes a spent conviction scheme intended to prevent discrimination against individuals on the basis of old minor convictions. The spent conviction scheme allows individuals with minor convictions to disregard those convictions after a specified period. In addition, the law prohibits individuals or organisations from taking these convictions into account, or disclosing them to anyone without the consent of the individual. Under section 7 of the *Criminal Records Act 1991* the following convictions are not capable of becoming spent:

- a) convictions for which a prison sentence of more than 6 months has been imposed,
- b) convictions for prescribed sexual offences, and
- c) convictions imposed against bodies corporate

A conviction will only become spent after the lapse of the prescribed “crime free” period being 10 years in respect of an adult and 3 years in respect of juveniles.

The prohibition on disclosing spent convictions does not apply to a range of law enforcement agencies, other prescribed agencies and disclosure to the Court.

Rights to Access Exhibits

The use of evidence in electronic mediums in Court proceedings is becoming increasingly widespread. The use of video and audio tapes, DVDs and CD-roms as a means to tender an evidentiary record in Court proceedings is no longer an unusual occurrence.

There is limited authority to allow non-parties to access to physical exhibits. Supreme Court Practice Note SC Gen 2 provides in paragraph 7: “Access will normally be granted to non-parties in respect of material that was admitted into evidence”.

District Practice Note DC (Civil) No. 11 adopts this provision in identical terms, however, the Practice Note applies only to civil proceedings before the Court.

There is no express authority that would allow non-party access to material admitted into evidence in the Local Court or the criminal jurisdiction of the District Court. There is no common law right to access court documents or material; *R Lucas & Son (Nelson Mail) Ltd v O'Brien* [1978] 2 NZLR 289 at 305-307. The consequence of the absence of an express access provision was considered by the Supreme Court of New South Wales in *John Fairfax Publications Pty Ltd & 2 Ors v Ryde Local Court & 3 Ors* [2005]NSWCA 10. Spigelman CJ held that in the absence of an express provision conferred on an inferior Court the power was only available if it was reasonably necessary to infer.

5. How is Access to Court Information Administered?

Judicial officers and Registrars are responsible for determining requests by persons to access court information. In practice, the vast majority of applications are determined by the Registrar. Except in limited circumstances where there is an automatic entitlement, or prohibition, in relation to the access to information the Court or Registrar is required to exercise discretion.

There are a number of issues to be taken into account by the Court or Registrar in the exercise of this discretion:

Principle of Open Justice

Except in limited circumstances, proceedings before Courts in New South Wales are open to the public. The principle of open justice is fundamental in ensuring that Courts remain transparent and accountable for their decisions. Public access to decisions and the processes of the Court promotes public respect for, and confidence in, the court system.

The provisions enabling access to court information do not make reference to the principle of open justice. The absence of any express reference to open justice in the context of access to court records raises the question as to whether the principle of open justice requires anything more than the conduct of proceedings in an open forum.

Historically, the principle of open justice may have been achieved by allowing open public access to the courtroom. Where evidence relied upon by the Court is primarily in the form of oral testimony by witnesses a member of the public present in the courtroom may gain an understanding of the evidence presented to the Court. Recent developments in court procedure that have been designed to improve the efficiency of case management such as the introduction of paper committals and admission of statements and affidavits not read onto the record, have had a consequential impact on the openness of court proceedings by limiting the availability of information within the courtroom. In today's courtroom it is far more likely that a member of the public present in the courtroom will not be privy to the content of affidavits, reports and statements tendered and will be left with only a vague understanding of the proceedings.

In the Matter of an Application by the Chief Commissioner of Police (Vic) [2005] HCA 18 (20 April 2005) the joint judgment of the High Court stated;

“It is not sufficient for the assurance of open justice in this country that the doors of a court should be unlocked. Fair and accurate reports of what occurs in courtrooms is an essential attribute of the administration of justice in Australia.”

In *John Fairfax Publications Pty Ltd & 2 Ors v Ryde Local Court & 3 Ors* [2005]NSWCA 101 the principle of open justice was relied upon by the media in support of an application to obtain a copy of an apprehended violence complaint. Spigelman CJ indicated that the principle of open justice guides the Court in assessing what documents should be made available. The principle of open justice does not act as a right to access court information.

Given the changing nature of court proceedings and the reduced reliance on oral testimony and statements being read in open court, the issue of access to court information is becoming increasingly relevant to adherence to the principles of open justice.

Establishing Sufficient Interest/Proper Interest

A number of legislative provisions enabling access to court information require the applicant to demonstrate that they have a sufficient interest or a proper interest in the proceedings.

Rule 36.12 of the Uniform Civil Procedure Rules 2005 allows the Registrar to provide access to a person having “sufficient interest in the proceedings”. In the criminal jurisdiction of the Local Court a non-party must demonstrate a “proper interest in the proceedings”

It is not clear what category of persons may be able to satisfy the requirement of “sufficient interest” and “proper interest”. These terms, in the context of access to court records, are not defined.

The issue of “sufficient interest” was considered in the context of determining locus standii of a person who was not a party to proceedings in *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493;

“What is a sufficient interest will vary according to the nature of the subject matter of the litigation. There must be a curial assessment of the importance of the concern which a plaintiff has with that subject matter and of the closeness of his relationship to that subject matter. He is not “interested” within the meaning of the rule unless he is likely to gain some advantage, other than the satisfaction of enforcing the observance of a particular law, if his action succeeds, or to suffer some disadvantage, other than a sense of grievance (and an order for costs), if his action fails.”

Perhaps more analogous to the question of what constitutes a sufficient interest is the consideration of an “interest” in the context of section 22(1)(a) of the *Defamation Act 1974* and the defence of qualified privilege. That provision refers to the interests of the person or class of persons to whom the publication is communicated.

In *Austin v Mirror Newspapers Ltd* [1985] 3 NSWLR 354 a broader construction of the term “interest” was accepted:

“But it is clear that the Courts in New South Wales have placed a broader construction upon the words “an interest” and have taken them to include any matter of genuine interest to the readership of the newspaper. In *Wright v Australian Broadcasting Commission* [1977] 1 NSWLR 697 Reynolds JA, with whom Glass JA agreed, said (at 711), when considering s 22(1)(a) in respect of a television broadcast:

‘It cannot be denied that the recipient, in this case the general public, had an interest in having information on the subject of public affairs.’”

In *Barbaro v Amalgamated Television Services Pty Ltd* [1985] 1 NSWLR 30 Hunt J said, at p 40: “The word ‘interest’ is not used in any technical sense; it is used in the broadest popular sense, to connote that the interest in knowing a particular fact is not simply a matter of curiosity, but a matter of substance apart from its mere quality as news”.

The “interest” referred under section 22(1)(a) of the *Defamation Act 1974* is an interest of the “recipient” of the information. In the context of access to court information what happens in the courtroom is a matter of interest to the general public both from the perspective of the public affair of law and order and the open administration of justice.

If this broader construction of “interest” is accepted then it is arguable, at least in respect to court information disclosed in open court, that every member of the general public has a legitimate interest in all court proceedings.

Confidentiality

The Supreme Court and District Court Practice Notes on Access to Court Records create a presumption that access to pleadings and other evidentiary documents will normally be granted unless the Court or Registrar considering the application believes that the material should be considered “confidential”. There is limited guidance in the Practice Note on what documents or material might be considered confidential.

The Practice Note provides the following examples of matters that are to be kept confidential:

- matters within the scope of the *Criminal Records Act 1991*
- documents affected by public interest immunity considerations such as applications for listening devices, affidavits in support of suppression orders.

The examples cited in the Practice Note as to confidentiality are not intended to be exhaustive. The question of what other information may be considered “confidential” remains open for the Court or Registrar assessing a request for access to court information. The extent to which commercially confidential information or personal and private information may constitute confidential information, and therefore be restricted from access, is not clear.

Privacy Considerations

The *Privacy and Personal Information Protection Act 1998* provides safeguards against the misuse by public sector agencies of private information. The Court is considered to be a public sector agency under the Act by virtue of the requirement that financial records of the Court are subject to audit by the Auditor General. As a consequence the Act has application to the Court.

However, section 6(1) of the Act exempts a Court or Tribunal from the provisions of the Act when exercising the Court’s or Tribunal’s judicial functions. The Act states:

“(3) In this section, “judicial functions” of a court or tribunal means such of the functions of the court or tribunal as *relate to* the hearing or determination of proceedings before it.” (Emphasis added.)

The question of whether access to court information and documents falls within the judicial functions exemption of section 6(1) is uncertain. Access to court information or documents will be captured by the exemption if it is a function that relates to the hearing or determination of the proceedings before it.

A number of High Court decisions have considered that the term “relates to” as being a wide term and that it will depend upon the context whether it is necessary that the relationship is direct or substantial or whether an indirect or less substantial connection will suffice; (see, for example, *Re Dingjan*; *Ex parte Wagner* [1995] 128ALR 81).

There has been limited consideration of the phrase in the context of the *Privacy and Personal Information Protection Act*. In *NZ v Director General, Attorney General’s Department (GD)* [2005] NSWADRAP 62, the Administrative Decisions Tribunal gave broad interpretation to the words “relate to” in section 6(3) of the Act and found that the actions of the Registry staff in providing access to Court files falls within the meaning of “judicial functions”.

Records of proceedings remained the property of the Court and the Court maintains control over the release of information and documents, if not directly, then through the Registrar. This control continues during the proceedings and after their conclusion. The release of information and documents will generally

be related to considerations of open justice or otherwise assisting the administration of justice. In this context there is a compelling argument to say that release of information or documents is related to the hearing or determination of proceedings and therefore within the terms of the exemption. If information or documents were released for reasons other than relating to the administration of justice then the argument that the section 6(1) exemption applies may be less compelling.

The relationship between the *Privacy and Personal Information Protection Act* and access to court information and documents should be clarified. One way in which this uncertainty could be resolved is to expressly apply the *Privacy and Personal Information Protection Act* to personal information contained in those court documents that are not considered to be open access.

In practice, Courts and Registrars have generally taken the approach that they are not bound by the *Privacy and Personal Information Protection Act* but rather guided by specific rules relating to access to court information and documents. While these provisions do not expressly refer to the issue privacy it is normally a relevant factor considered when determining requests for access.

Protection of privacy will outweigh the principle of open justice when it is necessary to do justice between the parties by ensuring that their welfare is not affected, or their rights prejudiced, to the extent that they would not be prepared to give evidence freely.

Certain information is protected expressly through statutory provisions and non-publication powers designed to protect children, sexual assault victims and vulnerable persons.

These express protections do not extend to other court information that may be considered highly sensitive including medical reports, psychological reports, family background reports and criminal antecedent records. The Court or Registrar will generally decline to allow access to these documents based on considerations of the sensitivity of private information.

6. Contrast with Overseas Schemes for Access to Records

United Kingdom

Civil Jurisdiction

The Civil Procedure Rules requires the Court to keep a publicly accessible register of claims that have been issued out of the Court. Any person may search the register. The Rules allow claim forms, judgments or orders to be available to non-parties at the stage when an acknowledgment of service or a defence has been filed. The restriction on release of information prior to the acknowledgement of service or defence is intended to ensure that the existence of the claim is not reported or known to third parties before the defendant becomes aware of it.

Criminal Jurisdiction

The Magistrates' Court is required to keep a register of criminal proceedings, however, this register is available for inspection only by magistrates (justice of the peace) or the Lord Chancellor.

A public register is maintained in relation to unpaid fines imposed by the Crown Courts and Magistrates' Courts.

Access to criminal documents in the Magistrates' Court and Crown Court is governed by policy guidelines and legislative provisions. Media are entitled to access a transcript of proceedings and a certificate of conviction. If proceedings are historic then questions of access will be referred to a judicial officer for consideration. If the case is high profile or involves serious charges then a daily transcript will be available to the media. Access to court documents is not required as the indictment and statements will be read onto the court record.

Legislative Provisions:

Rehabilitation Act 1974 - provides that after a period of 10 years then certain offences become "spent" convictions and will not be disclosed.

Public Records Act 1958 - provides that after a period of 30 years then conviction that is not spent becomes a public record.

United States

The policy of access to court information within the United States Federal Court system has undergone a process of review during the past five years. The policy now provides for remote access to all electronic civil bankruptcy and criminal case files with appropriate privacy safeguards. The policy for access to court files has been developed by the Judicial Conference. In summary that policy provides:

Civil Case Files:

The Federal Court policy provides that documents in civil case files should be made available electronically to the same extent that they are available at the courthouse, with the exception being that Social Security cases should be excluded from electronic access and subject to the requirement that certain “personal data identifiers” be modified or partially redacted by the litigants. These identifiers are Social Security numbers, dates of birth, financial account numbers and names of minor children.

Criminal Case Files

The Policy on Privacy and Public Access to Electronic Criminal Case Files treats criminal files in much the same way as civil files. Persons filing documents have the obligation to partially redact specific personal identifying information from documents before they are filed. Some specific criminal case file documents will not be available to the public remotely due to the security and law enforcement issues unique to criminal files. The following documents are not included in the public case file and are not available for access:

- Unexecuted summonses or warrants
- Pretrial bail or pre sentence investigation reports
- Statements of reasons in the judgment of conviction
- Juvenile records
- Documents containing identifying information about jurors or potential jurors
- Financial affidavits
- Ex parte requests for authorisation of investigative expert or other services
- Sealed documents (e.g. motions for downward departure for substantial assistance, plea agreements indicating cooperation).

7. Guiding Principle on Access to Court documents

Statute and common law do not state in principle why court information should be either available and open to dissemination or not available. Clearly, though, the idea of open justice cannot be separated from the concept of a public interest to which the courts are accountable. The public interest requires that court information should be available to the public. Access to court information allows the public to inform itself of how legal rights and duties are interpreted and applied by the courts. It is crucial in order to maintain public confidence in the judicial system.

The principle of open justice exists as an aid to the proper administration of justice. On occasion, the attainment of the proper administration of justice will be better served by the restriction of information. This may be based on the need to protect the welfare of a person involved in court proceedings or to protect the court process. The circumstances in which these considerations should limit the operation of the principle of open justice should be clear.

The extent to which privacy considerations should be recognised when dealing with access to court information is uncertain. Although the community has an expectation that personal and private information should not be misused, the protection of personal and private information sits uneasily with the principle of open justice.

The principles that underpin access to court documents and information are implied rather than legislatively expressed. As a consequence, the public understanding of the reasons for refusal to access court information may be seen to be subjective or unclear.

To introduce certainty and objectivity into the process, the basis for allowing access to court information should be enunciated in a policy statement. A policy statement should provide a reference point upon which legislative rights and decisions on access are sourced. A policy statement should be expressly incorporated in legislative and procedural guides on access to court information. The policy statement describes the relationship between competing public principles and the boundaries of relevant considerations on access to court information:

Access to court documents will only be refused and the making of non-publication orders will only be available where disclosure of information contained in court documents will substantially prejudice the attainment of a just outcome in court proceedings, or unreasonably affect the welfare of a person involved in court proceedings.

Private and personal information will be protected to the extent that it does not significantly infringe upon the principle of open justice.

In the chapter that follows on issues relating to access to court information and documents each proposal is consistent with, and gives effect to, this fundamental policy statement.

8. Proposals to Address Access Issues

What is the appropriate legislative framework to support policies relating to access to court information?

The current legislative framework for access to court information is a composite of statutory provisions, rules of court and practice notes. The legislative framework lacks cohesion, has gaps where there are no provisions dealing with access and fails to articulate the principles relating to access to court information. Guidance on how discretionary powers are to be exercised has been largely left to the judiciary to develop through Practice Notes and precedent. In contrast, the release of information held by government and other agencies has been regulated by comprehensive statutory regimes.

The issue of access to court information involves a complex balance of competing considerations. The issue extends beyond the rights of the parties involved in proceedings and affects the broader community. Issues such as privacy, improper use of information and freedom of information that prompt regulation of information held by government and other agencies are also relevant to the release of court information. While the independence of the judiciary must be preserved it is appropriate that government establish the fundamental public policy on access in legislation and provide a clear statutory framework within which Courts should operate when allowing access to court information.

The fundamental principles applying to access to court information and documents should be expressed in the legislation. The fundamental principles should include a statement similar in terms to that referred to in Chapter 7. In addition, the legislation should create certainty as to the extent to which the *Privacy and Personal Information Protection Act 1998* applies to access to court information and documents.

The legislation should consolidate the powers to suppress or make non-publication orders and ensure that these powers are sufficient to give effect to confidentiality considerations. Where the Court retains discretion the relevant matters to be considered in exercising that discretion should be expressly stated. It should also provide restrictions on the use of court information by defining improper purposes and create sanctions to protect against the improper use of information.

The *Criminal Procedure Act 1986* and the *Civil Procedure Act 2005* consolidate procedures for both criminal and civil jurisdiction across the Supreme Court, District Court and Local Court. New provisions should be inserted in each of these Acts to establish fundamental policies regarding access to court information. Details regarding the manner of making applications and guidance

to the community on rights of access should be incorporated in Rules of Court or Practice Notes.

Proposal 1:

That current legislative provisions relating to access to criminal and civil court documents and information be repealed and consolidated in the Criminal Procedure Act 1986 and the Civil Procedure Act 2005. The legislative provisions should provide for the following:

- a. The Court retains rights of property in the records of the court.**
- b. The fundamental principles applying to the access to court information and documents.**
- c. The extent to which the Privacy and Personal Information Protection Act 1998 applies to access to court information and documents.**
- d. Consolidate provisions allowing the Court to make non-publication orders and the basis upon which such orders may be made.**
- e. Allow rules of court or practice notes to supplement legislative provisions providing procedural details relating to access to court information and documents.**

Is the requirement of showing an interest in proceedings prior to obtaining access relevant? Do media have a “special right”?

The requirement to demonstrate a sufficient or proper interest in proceedings acts as a barrier to obtaining access to court information. However, at least in respect of information available in open court it appears that this barrier is artificial in that every person has an interest in knowing what takes place in open court. The continued existence of the barrier in respect to access to all court information is misleading in that it suggests that a particular interest in the outcome of the proceedings is required.

Section 314 of the *Criminal Procedure Act 1986* confers a special right to members of the media above other members of the public. This right recognises that there is a public interest in members of the media being able to access court information for the purposes of compiling a fair and accurate report of open court proceedings. The “interest” relied upon is not a personal interest of the media. It is one derived from the general public’s right to know what is taking place in court. In practical terms members of the media have a special responsibility to act as a conduit to the community to facilitate the community’s interest.

If the right created for the media is not a personal right, but rather a right exercised on behalf of the public then there is no basis upon which to prevent a member of the public exercising that same right directly. If information may be in the public domain through media reports then there is no value in attaching restrictions on this same information for other members of the public.

The requirement for a person to demonstrate an “interest” in proceedings may only be a relevant consideration where a person is seeking to access information that is not information that would have been heard in open court or admitted into evidence.

Proposal 2:

The access to documents that is available to the media should be extended to apply equally to members of the public. The requirement to show a sufficient cause is to apply only in respect of documents that are classified as restricted public access.

Consistency in the Exercise of Discretion

The operation of an access to court information regime that relies upon a large and vaguely defined discretion encourages uncertainty in respect of rights of access. The existence of a broad discretion will often lead to inconsistent decisions being made depending upon the weight accorded by the decision maker to relevant considerations. Decisions that appear to be arbitrary or inconsistent may erode the public confidence in the Court's commitment to the principle of open justice. The Principal Registrar of the Western Australian Supreme Court recently declined to release a transcript amid allegations of errors in the summing up by the trial judge. The public criticism that followed this decision demonstrates that court officers exercising discretions by reference to confidentiality and the interests of justice are subject to increasing scrutiny by the community.

The discretion to refuse access to court information can be seen as a passive form of suppression. By declining access to court information the Court or Registrar may effectively prevent public knowledge of the evidence relied upon by the Court in making a decision. Whereas express powers to make non-publication orders have a clear scope of operation there is no similar guide on the discretion to allow access to court information. There is a need to refine the exercise of discretion in terms of its scope.

The media and the public should have access to court records unless there is a countervailing interest sufficient to overcome that presumption. If there are to be restrictions upon the access to court information available in open court then such restrictions should apply uniformly in respect of that class of information. Alternatively, if there is no compelling policy reason to restrict open access to certain court information then there is no value in continuing the exercise of the discretion in respect of that information.

The current regime based on the exercise of discretion is difficult to apply in an age where electronic access is becoming increasingly expected. The exercise of discretion in allowing access to court information is dependent on court officers assessing the merits of each application. This system is not conducive to an automated electronic access system that allows access protocols to be set by reference to the class of user and the category of information to be accessed.

Proposal 3:

The exercise of discretion on all applications for access is to be replaced by a system whereby court information is classified as either open to public access or restricted public access. Where information is classified as open access it is unnecessary for the Court or Registrar to determine the application.

What information in criminal proceedings can be classified as open access information?

The term “open access” in this review is intended to refer to those documents or a category of information in which it is not necessary for the Court or Registrar to grant permission to allow access. However, the classification of a document or a class of information as “open access” does not derogate from the power of the Court to make non-publication or suppression orders or the overriding power of statute to restrict access to court documents or information. In the absence of these restrictions, court documents or information that fall within the classification of “open access” should be available to any member of the public upon request and payment of any prescribed fee.

Supreme Court Practice Note No SC Gen 2 provides guidance on access to criminal and civil court documents by non-parties. The Practice Note states that there is a presumption in favour of the release of a certain documents. The circumstances in which access to these documents should be refused will be exceptional. Reasons for refusal will often be based on the confidentiality, privacy or potential prejudicial nature of the information. If it is possible to identify what constitutes sensitive material contained in these documents then legislative safeguards may be introduced to protect that material. In addition, the Court should have powers to protect against the release of any other sensitive material that might otherwise fall outside legislative safeguards. If these safeguards were established documents that have a presumption in favour of release could then be classified as “open access” subject to any specified restriction.

Open Access Documents

Section 314 of the *Criminal Procedure Act* lists certain documents that the media have a right to access within two days after the conclusion of the case. The media have an automatic entitlement to these documents, subject to any suppression or non-publication order made by the court.

During the period from the commencement of proceedings until two days after the conclusion of proceedings these documents are effectively “open access” to the media. In view of matters considered in Proposal 2 above there is no genuine basis upon which to distinguish between the rights of the media and the public in general to access court documents or information.

The following documents referred to in section 314 of the *Criminal Procedure Act* should be considered to be publicly Open Access documents unless the Court orders otherwise:

- Transcript of open court proceedings
- Documents admitted into evidence
- Record of Adjudication or Order
- Indictment or Court Attendance Notice

Section 314 also includes a reference to the availability of the Fact Sheet, however, this is subject to the condition that the Fact Sheet will only be available where the defendant has entered a plea of guilty. The issue of open access to the Fact Sheet is considered separately below.

Fact Sheet

The Fact Sheet is an unsworn statement prepared by the police officer in charge of the case that provides a brief narrative of the circumstances surrounding the alleged offence. The Fact Sheet is provided to the Court in bail applications and on sentencing hearings where an accused person enters a plea of guilty.

The Fact Sheet contains information that is likely to be prejudicial to any future trial of an accused person. It will contain assertions that are unproven and information that would not be allowed under normal evidentiary rules.

It is the practice of the Court not to retain the Fact Sheet when it is tendered in bail hearings. The document will read by the Court and then returned to the prosecutor. The contents of the Fact Sheet are not normally read onto the Court record. The practice of returning the Fact Sheet to the prosecutor has developed in recognition of the prejudicial nature of the document and to avoid any perception that the Court might be influenced by its contents in any subsequent defended hearing.

Section 314(2) of the *Criminal Procedure Act* provides media with a qualified right to obtain a copy of the Fact Sheet. The media do not have an entitlement to obtain a copy of the Fact Sheet where the defendant has pleaded not guilty. In practical terms, the media are only able to obtain Fact Sheets from the Court where it is tendered at a sentencing hearing.

The unavailability of Fact Sheets in bail hearings has been criticised by the media as unreasonably impacting upon their capacity to provide a fair and accurate report of bail proceedings. There is little doubt that decisions by the Court on bail hearings are matters of significant public interest. Bail decisions require the Court to consider issues including the protection of victims of crime and the general community. Increasingly, decisions relating to bail are matters subject to public scrutiny. When making decisions in relation to bail the Court will take into account matters contained on the Fact Sheet that demonstrate the strength of the prosecution case and the seriousness of the alleged offences. The reporting of bail decisions without knowledge of matters contained in the Fact Sheet that were relied upon by the Court is likely to compromise the fair and accurate reporting of bail proceedings.

The practice of the Court not to retain the Fact Sheet at the conclusion of a bail hearing should be reviewed. The fact that a judicial officer has been called upon to make an earlier bail decision against a person in earlier proceedings is not a sufficient basis for inferring that the judicial officer will not approach a subsequent

hearing otherwise than with an impartial and unprejudiced mind. There are other circumstances in which judicial officers are required to disregard potentially prejudicial information retained on file. In civil proceedings, on the rehearing of an Arbitrator's decision, the Court retains the original Arbitrator's decision on file in a sealed envelope. In relation to procedures under the *Children Protection (Offenders Registration) Act 2000* a notice by the prosecutor that an accused person may be a registrable offender remains sealed on the Court file until the conclusion of the case.

The Court should retain a complete record of the information relied upon in making its orders, including bail orders. To safeguard against perceptions of bias arising through the retention of the Fact Sheet, procedures could be introduced to seal the document in the case of a plea of not guilty.

Section 314(2) of the *Criminal Procedure Act* restricts the availability of the Fact Sheet in recognition of the potential prejudice that may be caused to the accused person in a subsequent trial. The extent of that prejudice will vary according to the circumstances of the case. In many instances, the prejudice may be minimal where the trial of the matter takes place before a magistrate or judge without a jury or where there is a lengthy period between the bail application and any subsequent trial. In contrast, the prejudice to the accused caused by the release of the Fact Sheet is likely to be significantly increased where there is an impending trial before a jury. The degree of potential prejudice will also vary according to the information contained in the Fact Sheet.

The restriction against access to Fact Sheets in bail applications where there is either no or limited potential for prejudice to an accused person appears unnecessary. Instead of a general restriction in these circumstances, it is appropriate for the Court to retain an overriding discretion to prohibit access in appropriate circumstances.

Court Lists and Case History Information

Administrative documents created by the court do not generally form part of the record of proceedings and there is no entitlement to seek access to these documents.

With the exception of Children's Court proceedings each Court publishes details of the cases that are listed before the Court. The majority of Courts publish their Court list in daily newspapers, on the internet and on noticeboards within the Court foyer.

Each Court also maintains a record of proceedings that contains summary data on court proceedings including the case number, the parties and any legal representative, a short description of the nature of the proceedings and a record of court listings.

The availability of court lists and case history information can be of considerable value to both as a summary of the history of proceedings and a means to search and locate particular proceedings. The case history information is generally searchable by a number of case identifiers.

It is anticipated that with the future development of CourtLink improved search options will be available. Searches return summary information from which a particular case may be identified. It is proposed that public searches will be available based on the following criteria:

- Name of Litigant (except in Children's Court or other proceedings where suppression applies)
- Case number
- Listing date and venue
- Year of commencement

Proposal 4:

Unless the Court orders otherwise, the following documents & information be classified as open access:

Criminal Jurisdiction:

- 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 (subject to any order of the court where there is a not guilty plea)**
- 6. Court listing and case history information**

What information in civil proceedings can be classified as open access information?

Judgments and orders of the Court in civil proceedings to which the Civil Procedure Act 2005 applies are publicly available documents. Rule 36.12(1) of the Uniform Civil Procedure Rules 2005 provides that unless the Court otherwise orders, if a person pays the prescribed fee “the registrar must furnish a sealed copy of any judgment or order that has been entered in the proceedings to any person who applies for such a copy”. It is no longer necessary for a non-party to demonstrate a sufficient reason to a Registrar as to why a judgment or order should be provided.

Rule 36.12(2) qualifies the right of non-parties to access other documents only where they demonstrate a sufficient interest in the proceedings. Supreme Court Practice Note SC Gen 2 provides that access will normally be granted to non-parties in respect of:

- pleadings and judgments in proceedings that have been concluded, except in so far as an order has been made that they or portions of them be kept confidential;
- documents that record what was said or done in open court;
- material that was admitted into evidence;
- information that would have been heard or seen by any person present in open court.

The presumption in favour of the release of these documents is rebutted where the Judge or Registrar dealing with the application considers that the material or portions of it should be kept confidential.

In a similar manner as proposed in the criminal jurisdiction, the documents referred to in the Supreme Court Practice Note that attract a presumption in favour of release may be treated as open access provided that appropriate safeguards exist to protect confidential or sensitive material.

Although Supreme Court Practice Note creates a presumption in favour of release of material admitted into evidence there are a number of practical and legal implications that arise from allowing access to exhibits. The issue of how to approach the issue of access to exhibits is dealt with separately.

The Supreme Court presumption in favour of allowing access to pleadings and judgments applies only where the proceedings has concluded. The term “judgment” in the *Civil Procedure Act 2005* is used in the context of a conclusive determination of the proceedings and the purported restriction on judgments until the conclusion of proceedings in the Practice Note seems to have no real practical effect. The Practice Note suggests, however, that pleadings should not be as readily accessible prior to the conclusion of the case.

The absence of a presumption in favour of the release of pleadings prior to the conclusion of the proceedings recognises the fact that pleadings contain untested allegations. Pleadings commonly contain allegations of fraud, breach of duty or negligence on the part of another person.

The limited use of the jury in civil cases diminishes the potential risk that the release of pleadings will cause prejudice to the conduct of a trial.

There remains the possibility that pleadings may contain allegations that are scandalous, frivolous, vexatious, irrelevant or oppressive. The Court retains the power to strike out and remove the document from the Court file. If pleadings were generally available prior to the trial of proceedings then there is the potential that access may be obtained prior to a party having the opportunity to seek the pleadings to be struck out. While it is arguable that pleadings should be available prior to judgment it is appropriate to allow the parties reasonable opportunity to avoid scandalous, frivolous, vexatious, irrelevant or oppressive material to be removed from the pleadings. As a consequence it is proposed that pleadings should not be classified as open access prior to the conclusion of the case.

Access to Court listing information and case history information should be available in the same manner as proposed in the criminal jurisdiction.

Proposal 5:

Unless the Court orders otherwise, the following documents & information in the civil jurisdiction of the Court shall be classified as open access:

- 1. Judgments and Orders**
- 2. Originating Process and pleadings on concluded cases**
- 3. Transcript of evidence of open court proceedings**
- 4. Statements and affidavits admitted into evidence**
- 5. Court listing and case history information**

How to deal with personal or sensitive information contained in open access documents

The task of distinguishing open access documents from other restricted access documents is complicated by the fact that documents that are otherwise considered open access documents may contain personal or sensitive information.

Personal information includes the name, address, date of birth, financial and health records of an individual. The disclosure of personal data may increase the possibility of information being used for identity fraud or for compiling a profile of personal information to be used for other purposes. In the context of court proceedings the disclosure of sufficient personal information to identify participants in proceedings is consistent with open justice. Notwithstanding this, the Court has a responsibility to protect private information and take steps to prevent the unnecessary release and misuse of private information.

The United States Judicial Conference addressed this issue by encouraging parties to refrain from including personal identifiers in documents such as social security numbers, financial account numbers, names of minors, full details of dates of birth and home addresses. In certain circumstances, the parties may be required to file an additional copy of the document with full particulars provided that will remain non accessible by the public.

It is suggested that a similar approach be taken within New South Wales to protect personal information contained in open access documents. Information that is sensitive should, as far as possible be expressly defined. It should include information regarding an individual's financial and health records. Certain personal information could be generalised, for example, recording of dates of birth only to the year and personal addresses only to the suburb, city and state. In relation to corporations it would include commercially confidential information. It is proposed that this personal and sensitive information may be redacted and separately annexed to an affidavit or other document. This annexure would then be treated as a restricted access document.

The issue of access is made more difficult where personal or sensitive information has not been redacted from the open access document. For example, historic court documents will not have information redacted. This concern may be addressed, in part, by allowing the Registrar of the Court to delete sensitive information from copies of open access documents that are released unless the recipient is expressly authorised to receive that information. However, the option of deleting information from copies of documents may be administratively impractical in respect to lengthy statements or transcripts. If it is not practicable for the Registrar to delete personal and sensitive information from an open access document then the Court should retain the power to refuse

access to the open access document. The Court should be able to refuse access to an open access document in exceptional circumstances where the document contains substantial parts of sensitive information that cannot be redacted.

The precautions of redacting personal information and providing the Court with authority to either delete or refuse access to an open access document will not provide complete protection against personal and sensitive information being released. Media representatives may be attending in open court when oral evidence of personal and sensitive information is given. An additional measure to protect personal and sensitive information is to create a legislation prohibition against the publication by the media of personal and sensitive information.

Proposal 6:

Parties should be entitled to file a copy of open access documents that omits confidential data referred to in Proposal 7 and to file a separate restricted access document that contains this personal or sensitive information. Where personal or sensitive information has not been redacted the Court may delete information from copies of open access documents or, where that is not practicable, the Court may refuse access to the open access document.

Proposal 7:

The following information contained in court documents is restricted access information and subject to a legislative prohibition against media publication:

- 1. social security and tax file numbers**
- 2. driver's license and motor vehicle registration numbers**
- 3. medicare numbers**
- 4. financial account numbers**
- 5. dates of birth to be reported only to the year, and**
- 6. home addresses to be reported only to the suburb, city and state**
- 7. the name and other identifying information of juveniles offenders and juvenile witnesses/victims connected with criminal proceedings.**
- 8. the identity of an informer or information capable of revealing the identity of an informer**
- 9. the identity of an alleged victim of a sexual assault offence or information capable of revealing the identity of an alleged victim of a sexual assault offence**
- 10. information disclosing commercially confidential matters**
- 11. health information.**

What documents should be considered Restricted Access Documents?

If court documents do not fall within the description of open access then they are to be treated as restricted access documents.

There are certain court documents that fall within the description of an open access document that include highly sensitive information. The inherent privacy, confidentiality or welfare concerns that attach to these documents will normally either outweigh the principle of open justice or not significantly detract from the adherence of open justice.

Due to the highly sensitive nature of these documents, they should not be treated as an open access documents.

A defendant's criminal history record may be tendered as evidence in open court during sentencing. The public release of this document may potentially lead to community victimisation and unreasonably impact on the defendant's employment and commercial dealings. Release of medical information tendered to the Court may also create the potential for embarrassment and discrimination.

Prior to imposing a sentence the Court may refer an offender for assessment by Probation and Parole as to the offender's suitability for a particular sentencing option. The report provided by Probation and Parole will contain personal information regarding the family, social and health background of the offender.

Certain documents tendered or filed during the proceedings, but either not relied upon in the trial or otherwise prejudicial to trial evidence should be classified as restricted access documents.

In practice, the Court restricts the release of these documents currently through the exercise of its discretion not to release confidential information.

Proposal 8:

Unless the Court otherwise orders, the following documents are to be classified as restricted access:

- 1. Criminal and Traffic Antecedents**
- 2. Medical and Health records**
- 3. Psychiatric, Psychological Reports**
- 4. Pre-sentence Reports**
- 5. Pleadings, Affidavits or Statements that are rejected or struck out**
- 6. Evidence taken at trial in the absence of the jury**
- 7. Documents in support of suppression/non-publication orders**
- 8. Documents subject to a non-publication or restricted access order**
- 9. Victim impact reports**

Should any person or agency be entitled to access Restricted Information or Documents?

The classification of court information or documents as restricted access denotes that a higher degree of control will apply to their release. Parties to proceedings, including their legal representatives, would be entitled to obtain access to any court documents or information relating to their proceedings.

The Court should retain the discretion to allow a non-party to be permitted to access a particular restricted information or document in proceedings if the Court considers it appropriate to do so. The discretion should be exercised only in exceptional circumstances where the applicant provides a sufficient reason for requiring access and that access to the information or document is consistent with the interests of justice. The Court should be entitled to impose conditions on the release of restricted information or documents.

There are a number of agencies that may require access to particular categories of restricted information or documents. If personal information is redacted from open access documents then a number of public sector agencies may require access to specific personal information in order properly to effectively carry out their duties. Redacted personal information such as complete details of date of birth and residential address of persons involved in proceedings is critical to enable law agencies to properly identify accused persons or other persons involved in court proceedings. The disclosure by the Court of specific categories of personal identifying information such as address and date of birth currently takes place for a number of purposes:

Law Enforcement

- NSW Police Warrant Section record particulars of all arrest warrants issued by the Court on a warrant system accessible to police to facilitate execution of warrants.
- NSW Police receives bail orders to supervising bail reporting conditions.
- NSW Criminal Records Section compiles outcomes on criminal proceedings to produce criminal records on individuals.
- Corrective Services receives information from the Court relating to custodial sentencing outcomes and persons remanded in custody.
- Probation and Parole Service receive information from the Court relating to sentencing outcomes requiring supervisions such as good behaviour bonds, community service orders as well as information on criminal cases requiring pre sentence assessment.
- Roads and Traffic Authority receive information from the Court on driver licence disqualification or convictions imposed for traffic related offences.
- Department of Juvenile Justice receives information from the Court on sentencing outcomes involving juveniles.
- State Debt Recovery Office receives information from the Court on sentencing outcomes involving a monetary order and bail forfeiture orders.

Research

- Bureau of Crime Statistics and Research receive information on criminal sentencing outcomes in order to research trends in criminal activity and sentencing outcomes.

Legal Assistance

- Legal Aid Commission obtains information on court proceedings when assessing applications for legal aid.

Civil Judgments

- Credit rating organisations maintain credit profile to facilitate credit worthiness checks by financial institutions. Credit rating organisations can obtain the full address of the parties involved in proceedings where a default judgment is entered.

Employment Checks

- Commissioner for Children and Young Person seek access to criminal records for the purpose of assessing the suitability of persons for child related employment.
- Department of Education receives information on convictions against teaching staff.
- NSW Medical Board receives information on convictions against medical practitioners.
- Nurses Registration Board receives information on convictions against registered nurses.
- Optometrists Board of Registration receives information on convictions against optometrists.
- Physiotherapists Registration Board receives information on convictions against physiotherapists.
- Bar Association & Law Society of NSW receives information on convictions against barristers and solicitors respectively.

The examples cited are not intended to be exhaustive.

The restricted information or documents that should be made available to a specific agency varies and should be assessed on a case by case basis. Information currently provided in relation to employment checks will normally include the accused persons date of birth, and full residential address. The Bureau of Crime Statistic and Research receive all personal identifying information including whether the accused person is indigenous (ATSI status). The Roads and Traffic Authority and State Debt Recovery Office will receive information regarding the accused persons driver license or motor vehicle registration details. Law enforcement agencies currently receive personal identifying information on the accused person held by the Court. The

Department of Juvenile Justice receives details of names, addresses and dates of births of juvenile offenders.

The current practice of the Court to release information, including personal information, to public sector agencies has developed through an assessment by the Court of whether particular agencies had a legitimate interest or lawful purpose to obtain information on court proceedings. Greater clarity should be provided on what categories of restricted information or documents should be made available to each relevant agency. The provision of particular restricted information or documents should be negotiated with each agency and incorporated in a protocol that also addresses issues of retention, use and security of personal information.

Safeguards against the misuse of this access by agencies may include potential disciplinary action, codes of conduct and the requirement of agencies to adhere to privacy codes and protocols and impose conditions on the release of information. Court documents that are not considered to be open access documents should be subject to the provisions of the *Privacy and Personal Information Protection Act 1998*.

Proposal 9:

The Court may grant leave to a non-party to access a restricted document if the Court is satisfied that sufficient reason is shown and the release of information is consistent with the interests of justice. The Court may impose conditions on any grant to that document.

Proposal 10:

Subject to any order of the Court allowing access, restricted access should be subject to the provisions of the Privacy and Personal Information Protection Act 1998. A prescribed agency may be authorised to obtain prescribed categories of restricted document provided that the agency is bound by protocols addressing the retention, use and security of the document.

Should there be limitations on the use of open information?

The classification of judgments of the Court as open access information raises a number of concerns regarding the use of information, particularly in the context of the information age with internet and electronic access to court records.

Traditionally, the paper based nature of court records have presented barriers from the perspective of ease of access and the ability to use that information. Modern electronic technologies remove these barriers and the question arises as to how the court should respond to technical developments.

The possibility of electronic access may enable information to be compiled for a number of commercial purposes such as traffic, criminal and credit checks, research and marketing. Electronic search facilities allow greater capacity to identify cases that might have been otherwise unknown, and potentially enable persons to access and use information that is embarrassing and simply not the proper concern of others.

A fundamental issue is how should the policy address these concerns. One option is to apply differing access regimes to electronic access and physical access to information. However, if the policy distinguishing what should be accessible and what should not be accessible is appropriate then, as a matter of principle, that policy should not differ according to the mode of access. The concerns of electronic access are better addressed by controlling the use of accessible information to safeguard against its improper use.

The capacity for outside agencies to compile records about court proceedings on external databases may cause problems as to the accuracy of the records. Errors in individual records accumulate in compiled records and, even if corrected in the original record, may not be corrected in external databases. The compilation of records of court proceedings could be used for improper purposes. If electronic compilation of open access records was unregulated, commercial entities could create criminal history profiles on individuals. Given the privacy restrictions that apply to criminal history checks the capacity for open access information to be electronically transferred to an external database should be restricted to approved agencies.

The open access to civil judgments under Rule 36.12 of *the Uniform Civil Procedure Rule 2005* has created the opportunity for credit check organisations to negotiate with the Department to obtain default judgments in the Local Court for the purpose of allowing financial institutions to conduct credit worthiness checks on potential clients. The compilation of copies of court judgments for this purpose has been agreed to on grounds that it is consistent with public policy that financial institutions should be entitled to make prudent decisions in relation to the provision of credit. The compilation of records is controlled through an agreement outlining the terms of use of the information. Mechanisms exist to

allow the correction of errors on the original court record to be also reflected in the records compiled by the credit rating organisation.

Electronic access to open access information may enable a person using the system to use an index search facility. Although there are considerable benefits to court users in allowing a search facility, the availability of this option will potentially increase the opportunities for misuse of information.

Safeguards can be made to reduce the capacity to electronically search these records. Options include placing time limits on search criteria so that searches may not be done by reference to date of birth or address. Additionally, time limits should be in place regarding the time within which a search may be done. In relation to civil judgments credit rating organisations retain information for a period of 5 years. In criminal proceedings the *Criminal Records Act 1991* provide time frames after which certain convictions are spent.

To discourage bulk data mining a search of records should be available on an individual case basis and subject to payment of a search fee. Persons undertaking searches should be identifiable and restrictions should be in place to limit the number of searches that may be undertaken during any particular session. It may be appropriate to incorporate sanctions against the misuse of information. Additional restrictions on the use of information could include restrictions to prohibit the on selling of information, or the use of information for the dominant purpose of harassing, intimidating or causing embarrassment to an individual.

There is also a need to restrict the use of open access information if release of that information may prejudice the conduct of a trial. This issue is more fully considered below under the heading “Ensuring Open Access does not affect Administration of Justice”.

Proposal 11:

That the electronic compilation by a non-party of open access information is prohibited unless approved. Accessing multiple sets of information for data mining purposes by non-parties should be restricted unless approved by the Attorney General and Heads of Jurisdiction.

Proposal 12:

Electronic search index facility of open access information is to be limited by such criteria such as name of litigant, case number, listing date and venue. Additional search criteria such as date of birth may be available to approved agencies.

Is there a need to restrict open access in criminal proceedings to two days after the conclusion of the case?

Section 314 of the *Criminal Procedure Act 1986* allows the media open access to certain court documents within two days after the conclusion of the case. This section was introduced on 7 July 2003 based on a Proposal contained in the New South Wales Law Reform Commission Report on Contempt by Publication (2003). The rationale for limiting open access to the media for a period of two days is to reduce the possibility of the media committing contempt by publication by accessing and then publishing old cases in respect to persons currently on trial before the Court. Some support for the restriction may also exist if the media's public interest is considered to be limited to reporting only current court proceedings.

This approach, however, does not take into account the role of investigative journalism on law and order issues and the continuing public interest in court cases beyond the "headline of the day". It also seeks to indirectly control the publication of information prejudicial to a trial by controlling access to that information. The restriction of access in this manner is a blunt and ineffective tool to prevent contempt by publication. The nature of modern communication means that the life cycle of information is significantly longer. A news report of court proceedings will continue to be available online well after the conclusion of the case and may inadvertently have the potential to prejudice subsequent proceedings.

The media may also seek leave to access court information beyond the period of two days. The capacity of the Court or Registrar to decline access to court information based on considerations of the potential prejudice of a current or future trial is limited. It would require the Court or Registrar to have knowledge of an upcoming trial that may commence in the near future at another Court and assess the impact of any publication of earlier proceedings on that trial. There is no indication in the terms of section 314 that the limitation is intended to address potential prejudice of a future trial. In the absence of any guidance Registrars may wrongly assume that the public interest in media reporting matters more than two days old is diminished.

Proposal 13:

That the restriction on entitlement to access to court records within 2 days after the conclusion of the case be removed to allow continuing open access subject to the *Criminal Records Act 1991*.

What is the effect of “spent convictions” on access to court information?

Some open access information will become restricted in the future by operation of the *Criminal Records Act 1991* and the “spent conviction” scheme. The *Criminal Records Act 1991* restricts the release of information relating to certain offences after a crime free period. In order to determine whether a conviction becomes spent it is necessary to have regard to the nature of the offence, the outcome of the proceedings and whether the person has re-offended during the required crime free period prior to a conviction becoming spent.

Unless the Court institutes a system whereby it compiles a criminal history record on each offender, it will not be possible for the Court to assess whether a particular conviction has become spent.

A person who has access to records of convictions kept by or on behalf of a public authority and who, without lawful authority, discloses to any other person any information concerning a spent conviction is guilty of an offence. By releasing information relating to a spent conviction the Court or Registrar could be unwittingly in breach of section 13 of the *Criminal Records Act 1991*. The only way in which the Court can avoid this potential is to restrict access to information capable of being spent after the prescribed period. The release of information after this period may only be done to an exempted agency.

The spent conviction scheme is a matter that is under review by the Standing Committee of Attorneys General. A working party was established to research the possibility of enacting uniform legislation.

Proposal 14:

Open access information relating to convictions capable of being spent is to be treated as restricted access information after ten years in relation to adult offenders and three years in relation to juvenile offenders.

Should non-parties have access to exhibits?

Practice Notes issued in both the Supreme Court and District Court provide a presumption in favour of allowing access to material that was admitted into evidence. The term “material” encompasses both physical exhibits and exhibits in documentary form.

Material admitted into evidence will inevitably include physical items such as photographs, videos, weapons and prohibited drugs tendered as an exhibit. It will also include documentary exhibits such as commercial records, banking records or medical records.

In *R v O’Grady [2000] NSWSC 1256 (6 December 2000)* Hulme J, in releasing a video of a record of interview to the media, stated:

“The practice of the Courts is that they conduct their affairs, with limited exceptions, in public. The confidence which the Courts enjoy, in no small measure, is due to that fact. Our processes are open and available to scrutiny to all who care to attend. The practice is an important one. It is my view that it is but a logical incident of that practice that documents which become exhibits should also be available for scrutiny by the public, recognising, of course, that the extent of that scrutiny cannot be allowed to impose any significant disruption on the efficient operation of the Court system”.

The use of video or audio taped evidence does raise competing considerations to the principle of open justice. Both the Director of Public Prosecutions and the Law Society of New South Wales have previously made representations urging caution against the release of material such as ERISP tapes, videotapes and re-enactments of offences.

In *R v O’Grady* strong objections against the release of information were made. The prosecution raised concern that the exhibiting of video evidence on television could impact future investigations. Suspects may be disinclined to participate in video records of interview if these interviews were likely to be released to the media.

In jury trials caution is exercised when making available video evidence to a jury. Access during the trial by the jury is done under the supervision of the Court. A warning is generally given by the judge to the jury not to place undue weight on video evidence. In *Regina v NZ [2005] NSWCCA 278* the Court of Criminal Appeal referred to numerous authorities that recognised the danger of a jury placing undue emphasis on video evidence:

“It is, however, noticeable that a central theme emerges from the judgments as to the significant possibility of the jury decision-making process being distorted by

the jury being able to replay as often as it wishes only part of the evidence in the trial.”

The Court identified the nature of the dangers inherent in the unsupervised use by a jury of video evidence:

“The authorities give particular emphasis to the possibility that the playing of the evidence in chief in videotape form carries with it the risk that the evidence will be given disproportionate weight. Two matters are emphasised. First, repetition, in a context where other balancing evidence is not or may not be repeated at all or as often. Secondly, the force attending evidence in an audio-visual form when compared with the force of evidence that may only be available in documentary or transcript form.”

The caution exercised in the use of video evidence before a jury is based on the need to ensure a fair trial. The release of court information to the media is to enable the fair and accurate reporting of proceedings. The dangers inherent in the unregulated use of video evidence to the conduct of a fair trial also exist in the context of fair reporting. The absence of any safeguard to protect against disproportionate or repeated use of segments of video exhibited in television news reports out of context with the rest of the evidence may raise doubts as to whether the release of video evidence will assist the fair and accurate reporting of court proceedings.

The question of whether material admitted into evidence should be released to a non-party raises complex issues. The almost unlimited scope of material that might be admitted into evidence creates difficulties in developing a policy approach that could be broadly applied. The issue of access to material admitted into evidence is a matter that the Court should consider on a case by case basis. The Court will need to consider issues of the practicality of allowing access to material that could be dangerous or prohibited or forensic material that could be compromised. In relation to media requests for access the Court will also need to have regard to whether material such as video, audio or photographic evidence will enhance the reporting of proceedings or may have adverse impacts upon the trial or any other individual. The Court will also have to consider the costs associated with allowing access to material or providing copies of video, audio or documentary material.

In view of the complexity of this issue it is proposed that material admitted into evidence should not be included in the protocol for access to court information and documents except where specifically provided (eg, witnesses’ statements tendered as an exhibit in Court). The issue of allowing access to exhibits, including documents exhibits should remain in the discretion of the Court.

Proposal 15:

The protocols relating to access to court information and documents should not extend to exhibits, including documentary exhibits, other than witnesses' statements tendered as evidence. The Court should retain the discretion to allow access to exhibits. The guidelines creating a presumption in favour of release of exhibits should be removed.

Ensuring Open Access does not affect the Administration of Justice

Protecting against Prejudicial Information

The proper administration of justice and the right of an accused to a fair trial may be affected by unfettered publication of information available in open court. Publication of information arising in earlier court proceedings, or preliminary hearings relating to bail, may be prejudicial to an accused person. In addition, the publication of information relating to a co-accused or information not available to a jury, may be prejudicial. Close proximity of the publication to the trial will increase the likelihood of prejudice.

There are a number of safeguards available to limit the potential for prejudice to be caused by publication of earlier court proceedings. The Court may regulate the conduct of trials by either adjourning proceedings to a later date, or granting a stay of proceedings where recent media reports, may impact on a trial. The Court may manage proceedings involving a co-accused to ensure that there is a reasonable lapse of time between trials to avoid the report of the earlier trial impacting on the subsequent trial of the co-accused. Recent amendments to the *Jury Act 1977* allow the examination of a juror to assess whether they have been influenced by prejudicial material published during a trial and prohibit jurors from making inquiries to obtain information relevant to the accused person or the trial.

The effectiveness of the current safeguards need to be examined in the context of proposed greater access to court information and the increasing lifecycle of media reports in online communications.

The increased rights of access to court information should be accompanied by clearer guidance to the media to limit potential publication of information that might be prejudicial to a trial. Evidence taken at trial in the absence of the jury and affidavits in support of suppression orders identified in Proposal 8, act as a protection against publication of information potentially prejudicial to a trial. A general legislative non-publication order in respect to information identified in Proposal 8 would promote the conduct of a fair trial.

In addition to the matters identified in Proposal 8 there are other circumstances in which the Court may seek to prevent the publication of prejudicial information. While the contemporaneous reporting of interlocutory proceedings is appropriate, the publication of this information either immediately prior or during the trial could potentially be prejudicial. Similarly, reports of an earlier trial or previous unrelated criminal proceedings involving the accused immediately prior to a trial may be prejudicial.

The removal of the two day restriction in section 314 would enable members of the media to access court information at any time in the future. The protection intended by this restriction is better achieved by preventing the prospective publication of prejudicial information in close proximity to the conduct of a trial.

The court, during preliminary case management of proceedings committed for trial, should be entitled to consider whether non-publication orders are necessary to protect against the publication of prejudicial information conduct of an imminent trial. Generally, the making of non-publication orders for this purpose should extend only to the conclusion of the trial.

Proposal 16:

The Court may, by order, prohibit the publication or disclosure of any information prejudicial to the conduct of a trial if it is of the opinion that it is necessary to do so to secure the proper administration of justice in the proceedings.

Protection of Witnesses

In *Witness v Marsden & Anor [2000] NSWCA 52* the Court of Appeal recognised that the interests of justice include the interests in securing relevant testimony. In appropriate circumstances a Court will make a non-publication order to protect the identity of a witness having a specific and legitimate fear for their safety. The protection is not afforded on privacy considerations but rather the need to ensure that the Court is able to gain the full testimony of witnesses.

The Court has a narrow jurisdiction to make non-publication orders. The power is limited in relation to inferior Courts to circumstances in which the existence of the power must be necessarily inferred to effect the administration of jurisdiction. The power may be inferred to protect the identity of a witness and thereby secure testimony that may not otherwise be given, or in order to protect against possible prejudicial information being published.

The *Civil Procedure Act 2005* provides express powers in relation to non-publication orders in relation to civil jurisdiction. It is appropriate to provide an express statutory power for the making of such orders in the criminal jurisdiction to ensure greater clarity as to the scope of the Courts' powers to make non-publication orders.

Proposal 17:

The Court may, by order, prohibit the publication or disclosure of any information tending to reveal the identity of:

- a) any party to proceedings, or
- b) any other person involved in proceedings,

if it is of the opinion that it is necessary to do so to secure the proper administration of justice in the proceedings.

Powers to Remove Prejudicial Publications

The reporting of court cases on the internet means that information that could be prejudicial to an accused person's trial continues to be easily accessible in the public domain long after the initial report. The effectiveness of adjourning proceedings as a means to reduce possible prejudice may be diluted by the

continuing availability of information on the internet. In *John Fairfax Publications Pty Ltd v District Court of New South Wales [2004] NSWCCA324* at 65 Spigelman CJ proposed that steps should be available to remove information from the internet to avoid prejudice during a trial:

“In *Burrell* at [39] I indicated that it may be desirable for the Crown to conduct searches in advance of a trial and, where necessary, request Australian-based websites to remove references to an accused for the period of a trial. In New South Wales the standard directions to a jury warn the jury not to access internet databases. In some cases it may be necessary to return to the past practice of sequestering the jury. In some cases a judge-alone trial may be appropriate.”

The option of providing the Court with an express power to direct the withdrawal of an electronic report is one that may directly address the concerns created by the continuing availability of reports well after their initial publication. The Court may be able to direct the withdrawal of news reports of earlier proceedings or other unrelated proceedings.

It may also be appropriate to direct online public legal reports of earlier trials to be removed from publication on a permanent or temporary basis. In lieu of the removal of a publication from a website an online publisher may be able to control access by search engines through the Robots Exclusion File. The Robot Exclusion Protocol is a voluntary code whereby a search engine accesses a Robots.txt file that guides the search engine on whether certain files should be excluded from a search index.

There may be some difficulties in providing the Court with the power to order the removal of online publications where the publisher is located outside the State of New South Wales, however, the power may provide some measure of protection against the publication of prejudicial information.

Proposal 18:

That the Court be given the power, either of its own motion, or on application by a party to the proceedings, to direct a publisher to withdraw a web based article from publication, either on a temporary or permanent basis if the court is of the view that the publication may contain information that may be prejudicial to the conduct of a trial.

Proposal 19:

That the Court be given the power to direct an online based law publisher to temporarily remove or exclude from internet search engines a case that is ordered to a retrial until the conclusion of the further trial.

Proceedings under Acts involving Confidential Issues

The classification of certain criminal and civil court documents as open access may lead to adverse consequences in proceedings that are of an inherently personal nature. By making proceedings publicly available, litigants may experience shame or embarrassment through publication of private family proceedings. Treating these matters as open access may result in litigants being reluctant to participate in the legal system and enforce their legal rights.

The increased availability of court documents may require a review of proceedings brought under particular Acts to consider whether appropriate safeguards exist.

Applications brought under the *Property Relationships Act 1984* deal with property disputes between persons involved in the break up of a domestic relationship. The nature of the proceedings is similar to property settlement applications under the *Family Law Act 1975*, however, there is no similar protection regarding the reporting of these proceedings. Similarly, complaints for apprehended domestic violence orders may be considered to be uniquely sensitive and requiring a greater level of protection to the parties.

In proceedings under the Adoption Act 2000 non-parties do not have knowledge of the existence of the adoption case.

There is likely to be a limited class of proceedings brought under specific Acts that will require additional protection against open access. This may be done through the creation of a legislative non-publication order or by excluding the proceedings from the operation of the protocol.

Proposal 20:

That the identity of parties in proceedings under the Property Relationships Act 1984 and Division 1A of Part 15A of the Crimes Act 1900 be subject to a legislative non-publication order. Information or documents relating to adoption proceedings is to be suppressed.

Impact of suppression orders on access to court information classified as State Records.

The State Records Office NSW is responsible for preserving the official archives of the State of New South Wales. State Records have classified a range of historic court records as State Archives. Supreme Court records become open State Records after the lapse of time approved by the Court, being a time when the Court records are no longer administratively required and when considerations of personal privacy and confidentiality become diminished by the historic nature of the records. The current time frame set by the Supreme Court is 75 years. The State Records office has determined that Local Court records after December 1982 shall no longer be required as State Archives. In respect of the District Court, no determination has been made regarding the retention of those records as State Archives.

Powers relating to suppression orders and non-publication orders rarely have any limitation on their duration. Unless a Court directs that the suppression order or non-publication order is lifted that order will continue indefinitely. As a consequence, even after records are declared to be State Archives, the release of information will be contrary to Court orders. Given the likelihood that persons protected by the making of suppression and non-publication orders are likely to have since deceased, the need for the continued operation of these orders is inappropriate.

Proposal 21:

That a provision of any law or order of the Court restricting access to, or publication of, court records ceases to have effect in relation to court records classified as a State Archives after the lapse of 75 years.

Will changes be needed to the current fees for access to Court information and documents?

The proposed structure for providing access to court information and documents would result in a significant change to the way in which the Court provides service to clients. The introduction of CourtLink will provide benefits through public electronic search options and the capacity to obtain certain information online. It has the potential to lessen the current geographic barriers associated with attending a court registry in person to obtain information. The removal of the individual decision making process in relation to the release of certain documents will assist the timeliness associated with providing access to information and documents.

In light of the changing method of delivery of services it will be necessary to review the fee structure in line with those services. The introduction of public electronic search options and the capacity to obtain certain data online will not fit within the traditional per page copying fee structure contained in the *Criminal Procedure Regulation 2005* and the *Civil Procedure Regulation 2005*.

The cost to the Attorney General's Department of providing access to documents will require further consideration once the services become more clearly defined. The substantial capital cost of developing a new case management system that allows public electronic searches may need to be offset to some extent by the introduction of a search fee. There may also be some potential for savings to clients who may be able to obtain certain information online in lieu of more expensive hard copies of documents.

Proposal 22:

The current fee structure should be reviewed when changes to services relating to access to court information and documents takes place.

9. Conclusion

The issue of access to court information involves the balance of open justice and privacy considerations in a way that best secures the proper administration of justice.

It has traditionally been the province of judicial officers and Registrars to determine where the balance should be struck. Although this method allows flexibility to deal with the particular circumstances of each case, it fails to provide clarity of reasoning and consistency in the minds of the community as to how information is to be used and released. It also fails to deliver a response that meets the demands of an electronic communications environment.

The proposals contained in this paper are intended to remove unnecessary discretion and artificial barriers to access to court information. While the proposals address individual issues, they are also intended to operate together to provide a set of business rules on access that can be adapted to an electronic court management system.

This review establishes an access system that classifies court documents according to open access and restricted access. Where possible, safeguards against the concerns of more open access are addressed by controlling the use of information. If the approach is adopted then a consolidated legislative scheme will be necessary.

The issue of access to court records is a shared responsibility between the judiciary and government. This review provides an in-principle policy option. The development of a comprehensive regime will require continued collaboration between the judiciary, the Attorney General's Department and stakeholders.

10. Summary of Proposals

Proposal 1:

That current legislative provisions relating to access to criminal and civil court documents and information be repealed and consolidated in the Criminal Procedure Act 1986 and the Civil Procedure Act 2005. The legislative provisions should provide for the following:

- a. The Court retains rights of property in the records of the court.**
- b. The fundamental principles applying to the access to court information and documents.**
- c. The extent to which the Privacy and Personal Information Protection Act 1998 applies to access to court information and documents.**
- d. Consolidate provisions allowing the Court to make non-publication orders and the basis upon which such orders may be made.**
- e. Allow rules of court or practice notes to supplement legislative provisions providing procedural details relating to access to court information and documents.**

Proposal 2:

The access to documents that is available to the media should be extended to apply equally to members of the public. The requirement to show a sufficient cause is to apply only in respect of documents that are classified as restricted public access.

Proposal 3:

The exercise of discretion on all applications for access is to be replaced by a system whereby court information is classified as either open to public access or restricted public access. Where information is classified as open access it is unnecessary for the Court or Registrar to determine the application.

Proposal 4:

Unless the Court orders otherwise, the following documents & information be classified as open access:

Criminal Jurisdiction:

- 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 (subject to any order of the court where there is a not guilty plea)**
- 6. Court listing and history information**

Proposal 5:

Unless the Court orders otherwise, the following documents & information in the civil jurisdiction of the Court shall be classified as open access:

1. Judgments and Orders
2. Originating process and pleadings on concluded cases
3. Transcript of evidence of open court proceedings
4. Statements and affidavits admitted into evidence
5. Court listing and history information

Proposal 6:

Parties should be entitled to file a copy of open access documents that omits confidential data referred to in Proposal 7 and to file a separate restricted access document that contains this personal or sensitive information. Where personal or sensitive information has not been redacted the Court may delete information from copies of open access documents or, where that is not practicable, the Court may refuse access to the open access document.

Proposal 7:

The following information contained in court documents is restricted access information and subject to a legislative prohibition against media publication:

1. social security and tax file numbers
2. driver's license and motor vehicle registration numbers
3. medicare numbers
4. financial account numbers
5. dates of birth to be reported only to the year, and
6. home addresses to be reported only to the suburb, city and state
7. the name and other identifying information of juveniles offenders and juvenile witnesses/victims connected with criminal proceedings.
8. the identity of an informer or information capable of revealing the identity of an informer
9. the identity of an alleged victim of a sexual assault offence or information capable of revealing the identity of an alleged victim of a sexual assault offence
10. information disclosing commercially confidential matters
11. health information.

Proposal 8:

Unless the Court otherwise orders, the following documents are to be classified as restricted access and be subject to a legislative non-publication order:

1. Criminal and Traffic Antecedents
2. Medical and Health records
3. Psychiatric, Psychological Reports
4. Pre-sentence Reports

5. Pleadings, Affidavits or Statements that are rejected or struck out
6. Evidence taken at trial in the absence of the jury
7. Documents in support of suppression/non-publication orders
8. Victim impact reports

Proposal 9:

The Court may grant leave to a non-party to access a restricted document if the Court is satisfied that sufficient reason is shown and the release of information is consistent with the interests of justice. The Court may impose conditions on any grant to that document.

Proposal 10:

Subject to any order of the Court allowing access, restricted access should be subject to the provisions of the Privacy and Personal Information Protection Act 1998. A prescribed agency may be authorised to obtain prescribed categories of restricted document provided that the agency is bound by protocols addressing the retention, use and security of the document.

Proposal 11:

That the electronic compilation by a non-party of open access information is prohibited unless approved. Accessing multiple sets of information for data mining purposes by non-parties should be restricted unless approved by the Attorney General and Heads of Jurisdiction.

Proposal 12:

Electronic search index facility of open access information is to be limited by such criteria such as name of litigant, case number, listing date and venue. Additional search criteria such as date of birth may be available to approved agencies.

Proposal 13:

That the restriction on entitlement access to court records within 2 days after the conclusion of the case be removed to allow continuing open access subject to the *Criminal Records Act 1991*.

Proposal 14:

Open access information relating to convictions capable of being spent is to be treated as restricted access information after ten years in relation to adult offenders and three years in relation to juvenile offenders.

Proposal 15:

The protocols relating to access to court information and documents should not extend to exhibits, including documentary exhibits, other than witnesses' statements tendered as evidence. The Court should retain the

discretion to allow access to exhibits. The guidelines creating a presumption in favour of release of exhibits should be removed.

Proposal 16:

The Court may, by order, prohibit the publication or disclosure of any information prejudicial to the conduct of a trial if it is of the opinion that it is necessary to do so to secure the proper administration of justice in the proceedings.

Proposal 17:

The Court may, by order, prohibit the publication or disclosure of any information tending to reveal the identity of:

- a) any party to proceedings, or**
- b) any other person involved in proceedings,**

if it is of the opinion that it is necessary to do so to secure the proper administration of justice in the proceedings.

Proposal 18:

That the Court be given the power, either of its own motion, or on application by a party to the proceedings, to direct a publisher to withdraw a web based article from publication, either on a temporary or permanent basis if the court is of the view that the publication may contain information that may be prejudicial to the conduct of a trial.

Proposal 19:

That the Court be given the power to direct an online based law publisher to temporarily remove or exclude from internet search engines a case that is ordered to a retrial until the conclusion of the further trial.

Proposal 20:

That the identity of parties in proceedings under the Property Relationships Act 1984 and Division 1A of Part 15A of the Crimes Act 1900 be subject to a legislative non-publication order. Information or documents relating to adoption proceedings is to be suppressed.

Proposal 21:

That a provision of any law or order of the Court restricting access to, or publication of, court records ceases to have effect in relation to court records classified as a State Archives after the lapse of 75 years.

Proposal 22:

The current fee structure should be reviewed when changes to services relating to access to court information and documents takes place.