ACCESS TO COURT INFORMATION

DISCUSSION PAPER

Supreme Court of Western Australia

10 JUNE 2014

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1. Executive Summary

1.1 The Supreme Court is reviewing the regime governing access by parties and non-parties, including members of the public, to information held on Court files. While this Discussion Paper canvasses each of the Court's significant jurisdictions, the general civil area has been identified as the jurisdiction most in need of reform.

1.2 The key provision governing access to material in general civil cases is *Rules of the Supreme Court 1971* (WA) (RSC) Order 67 r 11. Pursuant to this rule, the parties are allowed to inspect and copy all documents that are filed in Central Office. Non-parties are allowed to inspect and copy a small number of documents as of right (essentially initiating processes and orders). Other documents filed in Central Office may be obtained 'with the leave of the Court or a registrar'.

1.3 The Court's overall objective in developing a policy on the release of information is to enhance public confidence in the administration of justice by the Court. This involves balancing three competing principles: open justice, privacy and practicality.

1.4 The Court proposes to amend RSC O 67 r 11 and other provisions relating to the release of information in civil cases (and civil appeals) to give effect to the objective in [1.3]. The major changes proposed are that:

- The records able to be released as of right to a non-party will include the transcript of a hearing.
- Records used or referred to in open Court will be released to a non-party unless there is a good reason not to do so.
- Records not used or referred to in open Court will not be released to a non-party unless there is a good reason to do so.
- There will be an express power to restrict access to Court records.

1.5 No change is proposed to the regime for the release of information in first instance criminal cases pursuant to *Criminal Procedure Rules 2004* (WA) (CPR) rr 43 and 51. In particular, this means that except for the release of transcript to the accused and the DPP, no documents will be released by the Court as of right. This regime will be expressly extended to apply to criminal appeals in the Supreme Court.

1.6 A minor change is proposed for the release of information in non-contentious probate, so that the test will be the same as that proposed for records not used or referred to in open Court for general civil cases.

2. Overview

2.1 The Supreme Court is reviewing the regime governing access by parties and non-parties, including members of the public, to information held on Court files. This information is excluded from the auspices of the *Freedom of Information Act 2004* (WA) (FOIA).[1]

2.2 The key provision governing non-party access to material in general civil cases is RSC O 67 r 11. Pursuant to this rule, the parties are allowed to inspect and copy all documents that are filed in Central Office. Non-parties are allowed to inspect and copy a small number of documents filed in Central Office as of right (essentially initiating processes and orders). Other documents may be obtained 'with the leave of the Court or a registrar'. Other than when a trial is in progress or the case is being managed by a Judge, the vast majority of applications are dealt with administratively by Registrars.

2.3 RSC O 67 r 11 has been in its current form since the RSC came into force in 1971.[2] In recent years, different courts have adopted different access regimes in their endeavours to reflect modern community expectations in the spheres in which they operate. For example, the access regime in the Magistrates Court in effect creates a presumption that non-parties can access all documents on the Court file.[3]

2.4 The Court is aware anecdotally of media organisations baulking at applying for leave pursuant to RSC O 67 r 11 and in the inherent jurisdiction of the Court because of the perceived complexity and cost of the application process. The number and complexity of applications seems to be increasing, exacerbating the impact on the scarce judicial resources of the Court. In cases where there is a party actively opposing the release, the determination of the issue can take a considerable amount of judicial time, potentially at the expense of a more timely determination of the substantive issue.[4]

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1 This is because only the administrative records of the Court are subject to the FOIA: Glossary cl 5.

2 The issues considered in this Discussion Paper seem to be as old as the Court itself as evidenced by the application against the Master of the Supreme Court reported in *The West Australian*, Saturday 24 December 1898, p 7.

3 See *Magistrates Court Act 2004* (WA) s 33.

4 Examples of applications which were opposed include *Buswell v Carles [No 2]* [2013] WASC 54, *Paul Douglas Nicholson v Morgan* [2012] WASC 65 and *Tap (Harriet) Pty Ltd v Burrup Fertilisers Pty Ltd [No 2]* [2012] WASC 179.

3. General Principles

3.1 The Court's overall objective in developing a policy on the release of information is to enhance public confidence in the administration of justice by the Court. This involves balancing three competing principles: open justice, privacy and practicality:

i. Open justice refers to the concept that the 'method by which decisions are made must be, and be seen to be, just'.[5] The principle of open justice is not, however, an end in itself; it is rather a means to an end, 'namely to inform the public about the workings of the third arm of government and to ensure that courts and judges administer the justice system in a way that will maintain and foster its integrity, fairness and efficiency'.[6] Although the 'ordinary rule' is that court proceedings are to be conducted 'publicly and in open view', it is silent on the issue of the provision of court documents and exhibits to persons not involved in the proceedings.[7]

ii. As to privacy, there is a clear risk of a court's access to information regime being abused, exposing untested private information to public scrutiny and undermining confidence in the justice system. Courts need to respond to an abuse of their process.[8] Another area of concern is identity theft based on personal information from court files.

iii. As to practicality, whatever access regime is put in place, the court must be able to implement it using the scarce judicial, administrative and technological resources that it has available.

4. Issue 1 - What records should RSC O 67 r 11 apply to?

4.1 RSC O 67 r 11 currently provides as follows:

> **11. Inspection of documents in Central Office**
>
> (1) Any person shall, on payment of the prescribed fee, be entitled during office hours to search for, inspect and take a copy of any of the following documents filed in the Central Office, namely —
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> (a) the copy of any writ, and the statement of claim (if any) indorsed thereon under Order 6 rule 3; and
>
> (b) any originating application made under the *Corporations Act 2001*

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6 *Re, Hogan; Ex Parte West Australian Newspapers Ltd* [2009] WASCA 221 [50] (Owen JA). See also McLure JA [33].

7 *Re, Hogan; Ex Parte West Australian Newspapers Ltd* [2009] WASCA 221 [31] (McLure JA, with whom Owen JA [48] and Miller JA [53] agreed).

8 See, for example, *eisa Ltd v Brady* [2000] NSWSC 929.

of the Commonwealth; and

(ba) any appeal notice filed under the *Supreme Court (Court of Appeal) Rules 2005* ; and

(c) any judgment or order given or made in court or the copy of any such judgment or order; and

(d) with the leave of the Court or a registrar, any other document.

(2) An application under subrule (1)(d) may be made *ex parte* .

(3) Nothing contained in this rule shall be construed as preventing any party to a cause or matter searching for, inspecting, and taking or bespeaking a copy of any affidavit or other document filed in the Central Office in that cause or matter or filed therein before the commencement of that cause or matter, but made with a view to its commencement.

(4) This rule does not entitle a person to search, inspect or take a copy of any part of a document that contains information that the person is prevented by an Act from possessing.

4.2 To access documents other than those allowed as of right, a non-party must make a written request to the Principal Registrar.

4.3 The limitation on access to only 'documents filed in the Central Office' does not accord with the current practices of the Court. For example, on the current definition of RSC O 67 r 11, an order prepared by Court staff is not within its scope, as it was not filed at the Central Office (and therefore even a party would not have a right of access to it). Submissions are not formally filed in the Central Office, but handed directly to the Judge in Court, emailed to his or her Associate or emailed to Listings. Nor does the rule extend to transcripts of hearings.

Proposal 1:	**The replacement RSC O 67 r 11 should not restrict either party or non-party access to only those documents filed in the Central Office.**

5. Issue 2 - What records should be released as of right?

Access by parties

5.1 Currently RSC O 67 r 11(3) enables a party to a case to inspect any part of the documents filed in Central Office in respect of the case. However it does not state that this is to be at no charge.[9] It is proposed that the new Order will provide parties with access to:

- all of the records in their proceedings that are provided for under the RSC;
- submissions;
- transcripts; and

[9] Cf DCR r 71(4). Note, however, *Supreme Court (Fees) Regulations 2005* (WA) (SCFR) reg 4(3) provides that a fee must not be charged in respect of a search by a party.

- tendered exhibits (while these remain in the possession of the Court);

and that the right to inspect these is without charge.

5.2 One practical, and intended, effect of the new Order is that it will not apply to other documents held on the Court file, for example:

- General correspondence (eg to provide unavailable dates);
- Fee waiver applications;
- Notes made by Registry staff or judicial officers;
- Statistical records.

The inherent power of the Court to control its own processes will apply in the rare instances when a party seeks access to such a document, as is currently the case.[10]

5.3 Access by parties to documents produced on subpoena will continue to be governed by RSC O 36B.

5.4 Access by parties would be subject to the powers and exclusions set out in Part 6.

5.5 Fees for copying and transcripts will continue to be charged under the *Supreme Court (Fees) Regulations 2005* (WA) (SCFR).

Proposal 2:	**Parties should be entitled to search and inspect, without charge:** • **all of the records in their proceedings that are provided for under the RSC;** • **submissions;** • **transcripts; and** • **tendered exhibits (while these remain in the possession of the Court).** **On payment of the prescribed fee, parties should be entitled to take copies of the above records.**

Access by non-parties

5.6 The structure of RSC O 67 r 11 which specifies types of documents to which persons other than parties have a right of access, accompanied by a residual discretion to grant access to other types of documents, works well in practice. However, the list of documents needs to be adjusted.

5.7 Under RSC O 67 r 11, essentially initiating processes and orders are released as of right, being:

[10] *Broad Construction Services (WA) Pty Ltd v The Construction, Forestry, Mining and Energy Union of Workers* [2007] WASC 133 [16] (Le Miere J).

- The copy of any writ, and the statement of claim (if any) indorsed thereon under O 6 r 3;
- Any originating application made under the *Corporations Act 2001* (C'th);
- Any appeal notice filed under the *Supreme Court (Court of Appeal) Rules 2005* (WA)*;* and
- Any judgment or order given or made in court or the copy of any such judgment or order.

5.8 By way of comparison, the following list of documents are released as of right under the *Federal Court Rules 2011* (WA) (FCR) r 2.32:[11]

(a) an originating application or cross-claim;
(b) a notice of address for service;
(c) a pleading or particulars of a pleading or similar document;
(d) a statement of agreed facts or an agreed statement of facts;
(e) an interlocutory application;
(f) a judgment or an order of the Court;
(g) a notice of appeal or cross-appeal;
(h) a notice of discontinuance;
(i) a notice of change of lawyer;
(j) a notice of ceasing to act;
(k) in a proceeding to which Division 34.7 applies:
  (i) an affidavit accompanying an application, or an amended application, under section 61 of the *Native Title Act 1993*; or
  (ii) an extract from the Register of Native Title Claims received by the Court from the Native Title Registrar;
(l) reasons for judgment;
(m) a transcript of a hearing heard in open Court.

5.9 The Court proposes to add the following categories of documents to the current list of documents accessible by non-parties as of right:

- Any amended writ;
- Other documents initiating proceedings (for example, an originating summons);
- Memorandum of appearance;
- Notice of change of solicitor;
- Notice of ceasing to act;
- Notice of intent to act in person;
- Reasons for judgment;[12]
- Notice of discontinuance;

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11 Extracted in full at *Federal Court Rules 2011* (WA) (FCR) r 2.32.

12 The inclusion of reasons for judgment reflects the fact that all judgments in the class of cases to which the new Order will apply will be available online. The Court is likely to direct all inquiries for copies of reasons for judgment to online sources. The suppression rules considered in Part 6 would create an express power to address any particular confidentiality or publicity issues that may arise with a judgment.

- Transcript of a hearing (except where any portion of the information in the transcript is subject to an order prohibiting release);
- List of exhibits.

5.10 The resulting list is based on the Federal Court position, except that it does not include pleadings. Pleadings are excluded as they tend to change over the course of the litigation, and so may not necessarily relate to any hearing ultimately held. They also may include confidential information or scandalous allegations and it would not be appropriate to release these before being considered or tested in court. Once a pleading has been referred to in an open hearing, the default position will be that it will be accessible by non-parties (see Part 7). Reference to the pleading in an open hearing will also provide any party who wishes to restrict access to seek an order to that effect.

5.11 One significant change is to add transcript of hearings to the list of documents accessible by non-parties as of right. The rationale for this addition is that if a member of the public can sit in court and listen to a hearing, then there seems no reason not to let them have access to a transcript of this hearing. The exception of transcripts where any portion of the information in the transcript is subject to an order prohibiting release is to safeguard against the inadvertent release of suppressed information. It also reflects the significant resource implications of reviewing and redacting transcripts in proceedings in which information is suppressed.

5.12 The proposed approach will mean that practitioners will need to give greater attention than currently required to the issue of whether there should be an order suppressing information or limiting access to Court records, including transcripts. There is to be an express power to make orders of the latter kind – see proposal 5. For example the Court may be asked to make an order restricting access to transcripts to mirror an order for witnesses to be out of Court whilst evidence is being taken.

5.13 In relation to memoranda of appearances and like documents, it should be noted that the address of the defendant is already able to be obtained from the writ. However, the Court proposes to include a rule along the lines of *District Court Rules 2005* (WA) (DCR) r 22C by which a party can be relieved of the requirement under RSC O 71A to provide their geographical address in a court document.[13] DCR r 22C provides:

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[13] For example, it may be that there is a restraining order between parties to an application under the *Family Provision Act 1972* (WA) and the beneficiary of the order does not want the restrained party knowing his or her residential address. The exemption may need to extend to practitioners, so they can use their business address in an affidavit and not their home address, and to deponents generally of affidavits in particular circumstances where there is some risk to the witness.

22C. Party may not be required to state geographical address

(1) The Court may, on the application of the party or on its own initiative, order that a party is not required to state his or her geographical address in a document required to be filed or served under the RSC or these rules.

(2) The Court must not make an order under subrule (1) in relation to a party unless the party —

(a) is an individual; and

(b) has provided his or her geographical address to the Court on a confidential basis; and

(c) is represented by a practitioner.

(3) The Court may, on the application of any party or on its own initiative —

(a) amend or cancel an order made under subrule (1); or

(b) order that the party's geographical address be given to another party.

However, it is not proposed that entitlement to such an order should be conditional upon being represented by a legal practitioner.

Proposal 3: There should be a rule that on payment of the prescribed fee any person is entitled to search for and inspect, and receive a copy of, any of the following Court records:

- **Writ and any endorsed statement of claim;**
- **Any amended writ;**
- **Originating application made under the *Corporations Act 2001* (C'th);**
- **Other document initiating proceedings;**
- **Memorandum of appearance;**
- **Notice of change of solicitor;**
- **Notice of intent to act in person;**
- **Notice of ceasing to act;**
- **Order;**
- **Judgment;**
- **Reasons for judgment;**
- **Notice of discontinuance;**
- **Transcript of a hearing (except where any portion of the information in the transcript is subject to an order prohibiting release);**
- **List of exhibits.**

Proposal 4: There should be a rule along the lines of DCR r 22C by which a party can be relieved of the requirement under RSC O 71A to provide their geographical address in a Court document.

6. Issue 3 - What records should be excluded from release?

6.1 RSC O 67 r 11(4) currently provides that the rule 'does not entitle a person to search, inspect or take a copy of any part of a document that contains information that the person is prevented by an Act from possessing'. This is undesirably narrow, and for example does not expressly allow for cases in which there is a prohibition on disclosure by Court order.

6.2 Two changes are proposed. There is to be an express power to the effect that a person may apply to the Court for an order that prohibits or restricts access to, or the publication or possession of, all or any part of the Court record and any other record held by the Court in respect of the case by a person or class of persons. The Court will also be able to make an order of this type on its own motion.

6.3 Second, there is to be a specific provision relating to privileged documents, along the lines of FCR Reg 2.32(1):

> (1) A party may inspect any document in the proceeding except:
>
> (a) a document for which a claim of privilege has been made:
>
> (i) but not decided by the Court; or
> (ii) that the Court has decided is privileged; or
>
> (b) a document that the Court has ordered be confidential.

Proposal 5: The replacement for RSC O 67 r 11 should empower the Court to prohibit or restrict access to all or any records otherwise accessible under the Rules. The rule should also exclude access to documents for which a claim of privilege has been made but not decided by the Court or that the Court has decided is privileged.

7. Issue 4 - How should the residual discretion to permit access by non-parties be framed?

7.1 The residual discretion to permit access to documents not accessible as of right by non-parties in RSC O 67 r 11(1)(d) is expressed in extremely general terms, namely: 'with the leave of the Court or a registrar'. The general discretion model is also used in FCR reg 2.32(4).[14]

[14] Extracted in full at *Federal Court Rules 2011* (WA) (FCR) r 2.32 .

Records used in the course of a hearing

7.2 Consistently with the open justice principle, it is proposed that there is to be a presumption in favour of non-parties having access to material that has been admitted into evidence or considered by, a judicial officer in the course of a hearing.

7.3 The drafting model proposed is the 'unless it has good reason not to' test in *Magistrates Court Act 2004* (WA) (MCA) s33(8). In its full context, this test provides:[15]

> (8) On an application by a person the Court, unless it has good reason not to do so, shall give the person leave, either unconditionally or on any conditions the Court imposes, to inspect, obtain a copy of, view or listen to, any information held by the Court in relation to any case that has been or is being dealt with by it.

7.4 The amended RSC O 67 r 11 or its replacement will provide that on an application by a non-party the Court shall, unless it has good reason not to do so, give the person leave to inspect and obtain a copy of any material that has been admitted into evidence or considered by the Court in the course of a hearing.

Records not used in the course of a hearing

7.5 The amended RSC O 67 r 11 will also provide that the Court shall refuse an application by a non-party for leave to inspect and copy any other material on the court file unless it has good reason to grant the application. That is, there will be a presumption against release of the information. For example, the presumption against release would apply when a non-party seeks access to an affidavit that has not been admitted into evidence or considered by the Court in the course of a hearing.

7.6 Non-party access to material which is not on a court file, such as the documents produced on subpoena but not adduced as evidence would be dealt with under the inherent power of the Court to control its own processes.

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15 Extracted in full at *Magistrates Court Act 2004* (WA) s 33.

Proposal 6: The replacement for RSC O 67 r 11 will provide:

(a) for a discretion allowing the Court or a registrar to grant leave to inspect and copy any Court record other than those accessible as of right;

(b) that on an application by a non-party the Court shall, unless it has good reason not to do so, give the applicant leave to inspect and obtain a copy of any records that has been admitted into evidence or considered by, the Court in the course of a hearing;

(c) the Court shall refuse an application by a non-party for leave to inspect and copy any other records on the court file not falling within (b) unless it has good reason to grant the application.

Other aspects of the discretion

7.7 There are three other aspects of the discretion which merit attention.

7.8 The first is that the rule should expressly provide that the grant of leave to inspect, obtain or use a copy of court record can be subject to conditions. There is a provision to this effect in both DCR r 71(8)(b) and CPR r 51(6A). The latter is considered to be an appropriate drafting model, and provides: 'A judge or a registrar may grant an application subject to conditions'. For example, a document could be released on condition that it not be published. A breach of a condition could be referred to a Judge for consideration as a contempt of court. It may be desirable to state clearly in the proposed rule that failure to comply can be dealt with as a contempt of court.

7.9 The second is that, from time to time in cases of significant public interest, the Court has published the transcript of a trial on its website. The two transcripts currently on the website are *Marsh v Baxter* (CIV 1561 of 2012) from February 2014 and *Brightwater Care Group Inc v Rossiter* (CIV 2406 of 2009) from August 2009.[16] In other cases documents used in open court have been made accessible to media representatives to assist them to produce a fair and accurate report of the proceedings. To formalise this arrangement, there should be a rule to the effect that the proposed Order does not prevent the court from publishing, on its own initiative, any record of the court or all or any part of the proceedings in a case to any person, and in any manner, it thinks fit.[17] There is a provision to this

[16] Transcripts and other material are available at this link: http://www.supremecourt.wa.gov.au/T/transcripts.aspx?uid=9348-5501-0341-3842

[17] There is a current power more or less to this effect in RSC O 69 r 3, though it is limited to transcripts. It may that it should be moved to the access to information order and redrafted based on CPR r 51(7).

effect in CPR r 51(7), which provides:

> (7) This rule does not prevent the court from publishing, on its own initiative, all or any part of the proceedings in a case to any person, and in any manner, it thinks fit.

7.10 In practice, the exercise of this power will usually be controlled by the judicial officer presiding over the relevant hearing, who will be best placed to manage the interaction between the trial process (eg an order for witnesses to be out of Court) and publication.

7.11 The third aspect concerns the regime which currently applies to the release of information to non-parties in criminal cases. CPR r 51 contains provisions allowing the Court's media manager to release information to media organisations once a decision has been made to release information to one media organisation. A similar provision should be included in the regime for general civil cases.

Proposal 7: The replacement for RSC O 67 r 11 should include a power to impose conditions on the release based on CPR r 51(6A).

Proposal 8: The replacement for RSC O 67 r 11 should include a general power for the Court to publish records including transcripts based on CPR r 51(7).

Proposal 9: The replacement for RSC O 67 r 11 should include relevant provisions based on CPR 51 allowing the Court's media manager to release information to media organisations once a decision has been made to release information to one media organisation.

8. Issue 5: What rules should govern the release of audio recordings?

8.1 The current practice of the Court is not to provide a copy of an audio recording of a hearing unless there are exceptional reasons for doing so.[18]

8.2 There are three reasons for this restrictive approach.

8.3 The first is that the audio systems in the courtrooms in which the Court sits record all audible sound in the courtroom, not just the speech that is being transcribed. As a consequence, from time to time a transcript will contain a transcription of a

[18] *Mansell v The State of Western Australia* [2012] WASCA 223 [72]-[76] (Mazza JA).

confidential conversation between accused client and his or her solicitor, or between the Judge and Associate, which ought not be included in the transcript. The transcript is made by trained staff who can discern which conversations are to be excluded from the transcript.

8.4 The second is that any person has the right to request the Court to audit a transcript.[19] There is thus no need for a party to have a transcript in order to check its accuracy. There should be an appropriate fee payable for this review.[20]

8.5 The third is that the provision of an audio recording presents a higher risk of mischief than the provision of a document. This includes posting the audio recording, or an edited excerpt of it, on the internet.

8.6 The Court proposes to put in place a rule that embodies the current practice of the Court that an audio recording of a proceeding in a case will not be released unless there are exceptional reasons to do so.

8.7 Where an audio recording is released, there may well be a need to review and edit the recording to identify and omit material that is not part of the official record of the proceedings. The Court should have the capacity to charge for this service. CPR r 51(6) is proposed as a drafting model, which provides that 'a registrar may determine the cost of supplying the copy' of the record to be released.

Proposal 10:	**There should be a rule governing the release of the audio recording from which a transcript is made to the effect that the audio recording will not be released unless there are exceptional reasons to do so. There should be a general power for a Registrar to determine the cost of supplying the recording based on CPR r 51(6).**

8.8 There have been instances from time to time where the Court has released the audio recording of a hearing to the media. This practice can continue as there is to be a rule that the Court have a general power to publish information – see proposal 8.

9. Issue 6 - Should there be a procedural code?

9.1 The Court proposes to continue with its current approach of dealing with the vast majority of applications for access to records not available as of right administratively on the papers, with the decision being recorded in a letter. This

[19] *Supreme Court (General) Rules 2005* (WA) r 9.

[20] There is a specific charge for this audit in the Court's transcription contract.

will minimise the resource impact on the Court as well as the cost and complexity to applicants.

9.2 CPR r51and MCA s33 read with *Magistrates Court (General) Rules 2004* (WA) r 37 to 39, each contain what might be described as a procedural code for applications for the release of information. The DCR provide that an application to the District Court must be in writing and set out the grounds of the application.[21] The District Court may, in writing, direct the applicant to provide additional information in the form of an affidavit.[22] The FCR does not contain any procedural provisions relating to applications for access.[23]

9.3 Subject to the exception allowed pursuant to proposal 9, the Court proposes the following procedure:

(a) an application must be in writing and set out the grounds of the application;

(b) after receiving an application the Court may, in writing, direct the applicant to provide additional information in the form of an affidavit;

(c) the Court is not required to deal with an application if the applicant fails to comply with a direction to provide additional information;

(d) a Judge may refer an application to a Registrar;

(e) a Registrar may refer an application to a Judge;

(f) the Court, when dealing with an application, may deal with the application even though no, or no other, party to the case has been served with it;

(g) the Court, when dealing with an application, may direct the applicant to serve on a party to the case, specified in the direction, the application and a notice providing an opportunity for that party to provide submissions on the application, and deal with the application accordingly;

(h) the Court may also request submissions from an interested party of its own motion; and

(i) the application may be decided by the Court on the papers without a hearing.

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21 DCR r 71(2).

22 DCR r 71(2a).

23 See *Federal Court Rules 2011* (WA) (FCR) r 2.32.

Proposal 11: **The replacement for RSC O 67 r 11 should include a procedural code for the making of applications for access to records held on Court files.**

9.4 A decision of a Registrar under RSC O 67 r 11 is a decision which may be the subject of an appeal pursuant to RSC O 60A. The Court proposes to adopt a summary approach to an appeal from a decision of a Registrar, and to use a model akin to the right of review on a fee decision.[24] This would ensure Registrars have the ability to make expeditious, pragmatic and efficient determinations, on the basis that if someone is aggrieved by a decision, a Judge may review the decision by way of a re-consideration of the matter that was before the Registrar.

Proposal 12: **The replacement for RSC O 67 r 11 should provide that a decision of a Registrar may be reviewed by a Judge in a summary way, akin to a review of a decision involving fees pursuant to *Supreme Court Act 1935* (WA) s171(4).**

10. Issue 7 – Is there a justification for a different regime for non-contentious probate matters?

10.1 The RSC do not apply to non-contentious probate matters.[25] The release of information in these matters is governed by NCPR r 43A:

> **43A. Searches**
>
> Any person shall, on payment of the prescribed fee, be entitled during office hours to search for and obtain a copy of any of the following documents filed or of record in the Registry, namely —
>
> (a) a will or codicil that has been proved;
> (b) a grant of probate or administration;
> (c) an order to administer; and
> (d) with the leave of the Registrar, any other document.

10.2 Non-contentious probate files will ordinarily contain a significant amount of personal information of limited public interest, for example the value of an estate or the personal financial details of a claimant. Axiomatically, being a non-contentious matter, there will be no issue of access to documents relied on in open court.

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[24] See *Supreme Court Act 1935* (WA) s171(4).

[25] See RSC O 1, r 3(2).

10.3 The decision in *De Haas v Murcia and Associates*[26] is to the effect that no documents will be released under the discretion of the Court in NCPR r 43A unless very cogent reasons are shown.

10.4 The Court is of the view that the same regime as applies to general civil cases should apply to non-contentious probate cases, save that the list of documents to be provided as of right should remain as set out in NCPR r 43A. As there will be no material used in open Court, the Court will refuse an application by a member of the public for leave to inspect and copy any material other than that available as of right unless it has good reason to grant the application. The regime proposed gives effect to the underlying concerns that are reflected in the 'very cogent reasons' test.

Proposal 13: The same regime as applies to general civil cases should apply to non-contentious probate cases, and the NCPR should be amended accordingly. The list of documents in NCPR r 43A should remain.

11. Issue 8 - Is there a justification for a different regime for criminal cases?

11.1 The release of information by the Court in first instance criminal cases is dealt with pursuant to CPR r 43 (for accused and the prosecution) and CPR r51 (for third parties). As indicated, CPR r 51 also contains provisions allowing the Court's media manager to release information to media organisations once a decision has been made to release information to one media organisation. The Supreme Court has also published guidelines setting out the processes to be followed for the release of exhibits.[27]

11.2 Under CPR r 51 no documents are released as of right. The discretion to release is based on there being a 'sufficient cause'. Specifically, CPR r 51(5) provides:

> (5) Subject to -
>
> (a) any order made under the CPA section 171; and
>
> (b) the *Sentencing Act 1995* section 22; and
>
> (c) any other order or written law that prohibits or restricts the publication or possession of the record to which the application relates,

[26] Unreported Templeman J, 14 September 1998 (Lib 980633).

[27] http://www.supremecourt.wa.gov.au/_files/Access_to_Exhibits_SC_20111208.pdf.

a judge or a registrar dealing with a written application, if satisfied the applicant has sufficient cause to be granted leave, may grant the application.

11.3 The regime in CPR r 51 and r 43 works well in practice, and has not given rise to practical difficulties. In practice, one of the more common types of request for a release of information is from the WA Police or another State or Commonwealth Government Department (eg Immigration) to assist in the performance of the relevant statutory functions.

11.4 The Court does not propose to substantively amend CPR r 51.

12. Issue 9 – What regime should apply to appeals?

12.1 There are two relevant types of appeals in the Supreme Court, appeals to a single Judge from a decision of a Magistrate in the criminal jurisdiction (SJA appeals) and criminal and civil appeals to the Court of Appeal.

12.2 The Court's position is that the appeal rules should mirror the first instance rules. This means that there will be different regimes for civil appeals and criminal appeals. Further, access to the records of the primary court should be dealt with by the primary court under the applicable release of information rules.

12.3 Single Judge appeals are governed generally pursuant to CPR Part 14. The Court proposes to include a rule in CPR Part 14 to the effect that the provisions of CPR r 51 apply to appeals under that Part.

Proposal 14: There should be a rule in CPR Part 14 to the effect that CPR r 51 applies to appeals under that Part.

12.4 The Court proposes that access to Court records for Court of Appeal appeals will be governed by a new rule in the *Supreme Court (Court of Appeal) Rules 2005* (WA) (COAR).

12.5 In relation to the civil jurisdiction, the rule will reflect proposals 1 to 12. The documents that may be released as of right will be:

- Notice of appeal (Form 1 or 2);
- Notice of respondent's intention (Form 4);
- Orders;
- Judgments;
- Transcripts (except where any portion of the information in the transcript is subject to an order prohibiting release); and
- List of exhibits.

Grounds of appeal and written submissions in the appeal will not ordinarily be accessible until referred to during the hearing of the appeal, but will thereafter be accessible unless the Court considers there is reason not to do so.

12.6 In the criminal jurisdiction, there will be a rule in the COAR mirroring the provisions of CPR r 51.

12.7 In each case, the discretion will be exercised by a Court of Appeal Judge, the Court of Appeal Registrar or an Acting Court of Appeal Registrar. The summary review process as set out in proposal 12 will be to a Court of Appeal Judge.

Proposal 15: There should be a new rule in COAR for the civil jurisdiction creating an access regime based on that proposed for general civil records, with the documents able to be released to non-parties as of right being:

- **Notice for appeal (Form 1 or 2);**
- **Notice of respondent's intention (Form 4);**
- **Orders;**
- **Judgments;**
- **Transcripts (except where any portion of the information in the transcript is subject to an order prohibiting release)**; **and**
- **List of exhibits.**

Proposal 16: There should be a rule in the COAR for the criminal jurisdiction mirroring the provisions of CPR r 51.