

A photograph of a paper mill with large rollers and machinery. A blue rectangular box is overlaid on the top left corner.

**BELL GULLY**

# Media Law Update

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SPRING 2007

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**Welcome to Media Law Update, a regular review of issues and developments in this area of New Zealand law from Bell Gully.**

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For more information on any of the cases, articles or features in *Media Law Update*, please contact: Alan Ringwood on 64 9 916 8925 or Garry Williams on 64 9 916 8661

***Disclaimer:** This publication is necessarily brief and general in nature. You should take professional advice before taking any action in relation to the matters dealt with in this publication.*

## **The serious business of the House of Representatives – whither humour and freedom of expression?**

### **The report of the Standing Orders Committee and sessional order, and the prohibition of satire, ridicule and denigration**

*The aim and purpose of televising Parliament was to make Parliamentary debate more accessible to the public and to improve public understanding of the democratic process. Parliament however now has new rules and conditions for television coverage of its proceedings which outline uses of the coverage of proceedings which are not permitted, and provide that breaches will be contempt.*

The Report of the Standing Orders Committee of Parliament in June 2007 concerning television coverage of the House of Representatives recommended amendments to Standing Orders and the adoption of a new appendix to the Standing Orders. to be embodied in a sessional order until a full review of the Standing Orders has been completed.

The changes recommended by the Standing Orders Committee include in Part 2 new conditions of use of coverage and in particular that coverage of proceedings must not be used in any medium for satire, ridicule or denigration.

Breach of the conditions may result in loss of access to coverage, and may be treated as contempt “and proceeded against accordingly”. Contempt of Parliament is a serious matter.

Broadcasters have objected to the new rules, maintaining that the they are “anti-democratic” and that the public has a right to see how MPs behave in Parliament. Some broadcasters have indicated that they will defy the new rules.

The Attorney-General (who was the Deputy Chairperson of the relevant Standing Orders Committee) is obliged by s7 of the New Zealand Bill of Rights Act to inform Parliament if any provision in a Bill before Parliament is incompatible with the Bill of Rights, and must therefore be fully familiar with the right of freedom of expression, inherent in a democracy, that has been enshrined in s14 of the New Zealand Bill of Rights Act. Section 14 provides that:

“Everyone has the right to freedom of expression, including the freedom to seek, receive and impart information and opinions of any kind in any form.”

Justice Anderson in his powerful dissenting judgment in the *Hosking* privacy case, noted that

“Freedom of expression is the first and last trench in the protection of liberty. All of the rights affirmed by the New Zealand Bill of Rights Act are protected by that particular right. Just as truth is the first casualty of war, so suppression of truth is the first objective of the despot.”

The use of satire as political commentary has a long and distinguished history and is as old as democracy itself. From the plays of the ancient Greek comic dramatist Aristophanes to those of Shakespeare, and more modern examples such as George Orwell’s *Animal Farm*, political cartoons, and “Spitting Image” television broadcasts. Tolerance of political satire is a sign of a healthy democratic society. When faced with misbehaving, pompous, humourless, overbearing, self-important or simply sleeping politicians, it is natural and healthy for the public - and the media as surrogates of the public - to resort to humour.

All the more so when politicians so often seem oblivious to any form of reasoned critique so that humour may be the only effective commentary on their performance.

The resistance of the media to Parliament's attempt to constrain the use of satire and ridicule in televised reporting of Parliament has led to attempts to come to a compromise. One of the most important roles of the media in a liberal democracy is to fight for press freedom and for the right of freedom of expression.

It will be interesting to see where the line in this case is eventually drawn and what weight Parliament really attaches to the right of freedom of expression supposedly enshrined in our Bill of Rights Act.

For more information on broadcasting issues, please email [alan.ringwood@bellgully.com](mailto:alan.ringwood@bellgully.com) or call on 64 9 916 8925

## Refusal to publish advertisement

### *House of David Healing Centre Trust & Coxhead v Fairfax NZ Limited*

*A newspaper which declined to publish a religious advertisement was sued for \$5 million in damages for breach of contract. The Court of Appeal had to consider the merits of the claims.*

The appellants, House of David Healing Centre Trust and Mr Coxhead, sought to have the *Sunday Star Times*, a Fairfax publication, publish as a full-page advertisement a lengthy piece of religious writing setting out, in seven parts, a new "Covenant for Mankind".

Fairfax decided not to publish this particular advertisement, reasoning that it was lengthy, unsuitable, poorly written and likely to be considered offensive by some readers of the newspaper. Unfortunately, the text of the proposed advertisement is not reproduced in the Court of Appeal's judgment so we are not able to judge its literary merits for ourselves.

Fairfax's usual terms and conditions for advertising provided that they could refuse to publish advertisements without the need explain their refusal. After the decision not to publish had been made all copies of the advertisement were returned to Mr Coxhead. He issued proceedings for breach of contract, claiming to have suffered extreme mental stress as a result of the breach and seeking \$5 million in damages.

In the High Court Fairfax applied for summary judgment on the basis of their standard terms, or alternatively for an order striking out the claim. In response, the appellants raised various statutory provisions under the Contractual Remedies Act, the Copyright Act, the Human Rights Act, the Privacy Act, the Consumer Guarantees Act, the New Zealand Bill of Rights Act, and the Crimes Act. Notwithstanding the many and varied statutes relied upon by the appellants in support of their claim, the High Court struck out the proceeding as disclosing no reasonable cause of action.

The appellants took their case to the Court of Appeal. The Court of Appeal concluded that the newspaper's standard terms and conditions precluded any claim in contract; that on the facts there was no copyright claim based on alleged conversion of copies of the proposed advertisement; that no offence of dishonesty was committed under the Crimes Act; that there was no misrepresentation to trigger the Contractual Remedies Act and no "service" to trigger the Consumer Guarantees Act; that the Privacy Act did not apply to the circumstances of this claim; that the New Zealand Bill of Rights Act does not apply to an entirely private regime which had no public function, power or duty conferred on it; and that there was no evidence to support any discrimination under the Human Rights Act.

The Court of Appeal concluded that the High Court had been correct to strike out the proceeding; describing it as "misconceived".

While the nature and conduct of this particular case was clearly unusual, the result is nevertheless comforting for publishers, who need to consider, from time to time, their ability to refuse to publish various unusual kinds of material.

For more information on advertising issues, please email [alan.ringwood@bellgully.com](mailto:alan.ringwood@bellgully.com) or call on 64 9 916 8925

## **Discovery of documents in defamation proceedings against media organisations: transcripts of reporter's notes and draft programme scripts**

### ***Simunovich Fisheries Limited & ors v TVNZ & ors***

*In the fifth interlocutory judgment in this ongoing defamation proceeding the High Court had to consider whether a broadcaster was required to give discovery of draft programme scripts held by its lawyers, and whether a newspaper was required to produce and discover transcripts of its reporter's notes.*

This defamation proceeding arises out of a television broadcast and newspaper publications in 2002 relating to questions over the allocation of fishing quota by the Ministry of Fisheries. The plaintiffs, Simunovich Fisheries Limited and two of its executives, allege that the broadcast and publications were defamatory towards them.

In this judgment the High Court considered applications by the plaintiffs for additional discovery from the two media defendants. Discovery was sought from the broadcaster of draft scripts prepared in advance of the relevant television broadcast and provided to its lawyers for vetting. Discovery was sought from the newspaper publisher of transcripts of handwritten documents (its reporter's notes), the originals of which had been discovered, but which the plaintiffs contended they were unable to decipher.

### **Draft programme scripts**

The originals were overwritten in the course of preparing fresh drafts as the television programme was prepared, and old drafts were not retained by the broadcaster, to ensure that old drafts were not inadvertently used during the programme.

The broadcaster had however routinely referred draft scripts to its lawyers for advice on various matters relating to the content of the scripts, and the lawyers had retained those drafts as part of the files maintained on behalf of their client. The discovery application related to those copies, approximately 15, held by the lawyers.

The plaintiffs claimed that the drafts were relevant to their allegations of ill will and malice against the broadcaster, and were therefore relevant to the quantum of damages sought. The plaintiffs believed that sections of the programme had been deliberately cut before it was broadcast which aggravated the sting of the allegedly defamatory material. The broadcaster, on the other hand, argued that the draft scripts were not relevant; and that they were, in any event, covered by legal professional privilege.

The court decided that the scripts were relevant, in that they could lead to inferences relevant to the case against the broadcaster; and that discovery of them was reasonably necessary (satisfying the test in the relevant rule). The court then had to consider whether the relevant copies were privileged.

The court held that while copies of the scripts prepared for the preparation of the programme would need to be discovered in the usual way, copies of the script which had been provided to lawyers for the purpose of legal advice were privileged. The plaintiffs are appealing this decision.

## **Reporter's notes**

The plaintiffs complained that they were unable to decipher the handwritten notes, and sought an order requiring typewritten versions. The court concluded that there was no jurisdiction to make the order sought; holding that the rules cited by the plaintiffs in support of the application were designed to deal with the situation where poor or only partial copies of documents had been provided on discovery, and that the absence of any obligation on a party to provide translations of documents in foreign languages supported the conclusion that the plaintiffs could not obtain the order sought.

(\* Bell Gully declares an interest in this proceeding, as Alan Ringwood is acting for the newspaper publisher in this litigation.)

For more information on this issue, please email [alan.ringwood@bellgully.com](mailto:alan.ringwood@bellgully.com) or call on 64 9 916 8925

## **The South Park “Bloody Mary” episode – religious sensibilities versus the right to freedom of expression in a free and democratic society**

### ***Browne v Canwest TV Works Limited***

*An outcry over the proposed screening of the “Bloody Mary” episode of South Park last year led to the screening being brought forward and increased ratings. Many viewers will have been impressed by the strong positive messages of individual responsibility and self-reliance conveyed by the programme. Aspects of the programme’s disrespect for the iconic figure of the virgin Mary however led to a number of complaints to the Broadcasting Standards Authority. The Authority declined to uphold those complaints, and that decision was appealed by a representative of the Catholic Church. The High Court gave its decision in an important recent judgment.*

The “Bloody Mary” episode of South Park screened in February 2006, amid significant public controversy and debate which caused the screening to be brought forward from its originally scheduled date of May 2006. The Catholic Bishops Conference took offence at the content and broadcast of the programme, and wrote to CanWest after its screening alleging “great offence”, to the Catholic community in particular, and also to other Christians and the New Zealand Muslim community. CanWest’s Standards Committee declined to uphold the complaint, but CanWest nevertheless apologised, and advised the Bishops Conference of its decision not to replay the episode.

### **The position of the Broadcasting Standards Authority**

The Bishops Conference formally complained to the Broadcasting Standards Authority. The basis of the complaint was that the programme breached the standards of good taste and decency, and fairness, in Standards 1 and 6 of the Free to Air TV Code of Practice. The essence of the appeal was that the programme was so crassly tasteless, offensive and denigratory that it could not on any balanced and sensible view be said to observe the requisite standards of good taste and decency, and of fairness.

The programme certainly caused offence to some viewers. For those readers who missed it, and are not to have the benefit of any repeat screening, the following description is contained in the Authority’s decision:

“In this episode, one of the characters, Randy, is arrested for driving while drunk, and is made to attend Alcoholics Anonymous meetings. There Randy is told that alcoholism is a disease, that he is powerless to control his drinking, and that only submitting to a higher power (God) can help him stop.

Following the meeting, Randy succumbs to his disease and drinks more heavily than ever, until he sees a news story on television about a statue of the Virgin Mary which is apparently bleeding, as the reporter puts it, “out her ass”. A cardinal visits the statue, is showered in blood (accompanied by a “farting” sound), and declares the bleeding to be a miracle. Randy rushes to see the statue, hoping that he will be cured. When Randy approaches the statue, he too is showered in blood, and he declares himself “cured”.

Later, when Randy is attending an AA meeting, having been sober for five days, another news report is broadcast, showing footage of the Pope visiting the statue. The Pope is shown peering at the statue from close range, whereupon he too is showered in blood, again with the same sound effects. The news item then reports that the Pope had declared the statue not to be a miracle. The reporter said:

Having investigated closely, the Pope determined that the blood was not coming from the Virgin Mary's ass, but rather, from her vagina. And the Pope said, quote, "A chick bleeding out her vagina is no miracle. Chicks bleed out their vaginas all the time.

At this point, Randy realises he could not have been miraculously cured. He reverts to drinking heavily, along with the other AA members, before his son points out that if there was no miraculous intervention, it must have been his own willpower that had kept him sober for five days."

The Authority declined to uphold the complaint.

### **Appeal to the High Court**

The Authority's decision was appealed to the High Court by Bishop Denis Browne, in his capacity as President of the Catholic Bishops Conference.

The appeal was opposed by CanWest, which explained the satirical adult nature of the South Park cartoon series (as evident from the above description of the programme), and the fact that over the nine years it has screened in New Zealand it has poked fun at most major religions, nationalities and authority figures.

In order to succeed in such an appeal from a discretionary decision, it is necessary for the appellant to show that the decision maker (i.e. in this case the Authority) acted on a wrong principle, failed to take into account some relevant matter, took into account some irrelevant matter, or was plainly wrong. The thrust of the appeal in this case was that the Authority's decision was plainly wrong.

The appellant contended that the Authority had been wrong to take into account the impact of the right to free expression set out in section 14 of the Bill of Rights Act when considering the good taste and decency standard. In rejecting that contention the judge re-affirmed his earlier decision in *TVNZ v Viewers for Television Excellence* (a decision known as "VOTE") where he held that it is proper to take into account the right to freedom of expression set out in the Bill of Rights Act, and whether any limit on the right of freedom of expression is reasonable and demonstrably justifiable in a free and democratic society. The judge held that the Authority had not erred in principle in its application of the Bill of Rights Act.

The appellant further contended that the Authority was required to impose the requirement of good taste and decency without regard to context and that the Authority had erred in taking the context of this broadcast into account (e.g. the show's adult target audience, timeslot, AO classification, pre-broadcast warning, and the well-known nature of the South Park series). The appellant also contended for a universal, objective standard of good taste and decency. The judge noted that good taste and decency cannot be assessed in a vacuum, and rejected the submission that there are universal standards of good taste and decency that can and must be upheld irrespective of the context of the matter in issue.

The Authority had recognised that the broadcast was offensive to the Catholic community, but found, on balance, that it did not cross the threshold so as to be contrary to good taste or decency. The judge was not prepared to disturb that finding; and in particular was not satisfied that the Authority had erred in principle in finding (implicitly) that the right to free expression was a weightier consideration than religious rights under the Bill of Rights Act. The judge referred to the decision of the European Court of Human Rights in *Otto-Preminger-Institut v Austria* which emphasised that the right of freedom of expression:

"...is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that shock, offend

or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society"."

The judge noted that the task of determining what are generally accepted standards of good taste and decency is one for which the Authority is specially qualified. The authority's view was that the material was of such a farcical, absurd and unrealistic nature that it did not breach standards of good taste and decency in the context in which it was offered.

The judge also noted that while the appellant was uniquely and acutely offended by Bloody Mary, the Conference's sense of outrage is not shared by the wider community.

Having secured an apology from CanWest, and its decision not to re-broadcast the episode, the Conference presumably considered it to be a matter of principle to pursue its complaint to the Authority and thereafter to the High Court. The consequent decisions of the Authority and the court are important affirmations of the right of freedom of expression in a free and democratic society.

\*(We declare an interest in this matter, in that Andrew Scott-Howman, a partner of our firm, acted for the Broadcasting Standards Authority in relation to the appeal.)

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## **Access to court records - another chance to have your say on the Law Commission Report**

*The Law Commission (the Commission) issued for consultation and submissions a Draft Report on Access to court records, the final report (the Report) being published in June of last year. The Report recommends that court records should be more accessible and that a Court Information Act should be enacted to establish a regime for dealing with access.*

In May of this year the Government asked Parliament's justice and electoral committee to enquire into the Report and consider what the Government's draft response should be. Meanwhile the Government has agreed with the Commission that the current access rules need improvement, acknowledging they are "not easy to find, unclear and inconsistent".

The Report recommends a significant shift from current rules. As a result, the Government has decided there should be public debate on the matter and that interested stakeholders, such as the media, the legal profession and the general public should have a further opportunity to contribute to the debate

### **Terms of reference of the Report**

The terms of reference of the Commission's Report included that:

- the Official Information Act should be the legislative framework for access to court records – because that Act, with its presumption of availability of information in the absence of good reason for withholding it, has been tried and tested over time; and
- while acknowledging litigants need adequate protection of personal information and individual privacy, the underlining principles for access are those of open justice, the public interest, accountability of the judicial process, and the administration of justice.

### **The Commission's considerations**

The Commission's view is that access to information held by the courts should be generally more accessible than at present, but notes there will be good reason in some cases for withholding access. It considered:

- (a) what constitutes a "court record"; and
- (b) the rules and principles for granting or withholding access to information, including:
  - the relationship between the rules and the Official Information Act 1982 and the Privacy Act 1993;
  - whether the format of the court record (in hard copy, electronic or other form) might affect those principles;
  - if special laws should be enacted for access requests by accredited news media; or for research and statistical purposes, and
  - if there should be one single access code for all court and Tribunal jurisdictions, or specific codes.

## **Current access rules**

### **(a) Access to civil records**

Currently the civil search rules are not comprehensive across all jurisdictions. While the District and High Courts have similar rules governing access in civil proceedings, other courts, such as the Family Court and Maori Land Court have their own rules. Specialist courts sometimes apply the District and High Court rules by analogy, or operate without access rules.

There are various statutory exceptions to the general right of access to court records, including in the Family Proceedings Act 1980, Matrimonial Property Act 1963, Adoption Act 1955, Civil Union Act 2004 and others, and a ban against access to defamation proceedings.

While open justice has become increasingly important, temporal considerations operate when judicial discretions are being exercised in civil records searches. For example, the rules limit public access to case records where proceedings have not been determined, in the interest of ensuring that trials proceed without prejudice and that unbalanced reporting does not occur.

### **(b) Access to criminal records – Criminal Proceedings (Search of court records) Rules 1974**

The criminal search rules are more than 30 years old – (preceding the Official Information Act and the Privacy Act) - and are out of step with the move towards greater access to information.

There are no comprehensive criminal search rules, which in many cases are applied by analogy, and there is uncertainty as to the proceedings to which they actually apply. Most requests for access are subject to judicial discretions, for which the rules provide no guidance.

The Commission cited the case of *R v Mahanga* [2001] 1 NZLR 641 where the Court of Appeal applied a balancing approach to the criminal search rules which has been followed in subsequent decisions. The court considered the purpose of the rules was not to protect the privacy of defendants in the absence of strong reasons for allowing access, but rather to enhance the court's supervisory powers over court files, and rationalise the way requests for access were dealt with. In that case the court held that relevant considerations to the balance of interests included:

- any legitimate privacy concern raised by an accused;
- the purpose, if known, for which access is sought;
- the principle of open justice, especially where applications are made by the media;
- the administration of justice where there is a risk this will be harmed by disclosure; and
- in some cases, fair trial rights which may be affected and should be weighed.

Other cases have also demonstrated other matters which may be relevant to the exercise of judicial discretion to grant access to criminal records, including:

- the risk of prejudice to a trial (for example when the trial is imminent and likely to attract public notoriety and the risk of prejudice is therefore high);

- where access to materials is sought for research or commentary, and there is a need to ensure access to an accurate record of what was said in court rather than rely on recollection; and
- matters given publicly at trial which have received extensive media coverage.

In such cases access is more likely to be granted. So while there is case law guidance for the exercise of judicial discretion, the results for applicants are uncertain and inconsistent.

### **The proposed new framework**

The Commission envisages that future access rules will be sensitive to the stage the case has reached, the type of case it is, and the nature of the party requesting access (i.e. whether a party to the proceedings, a journalist, a researcher, or simply a member of the public).

The purpose of its proposed new Court Information Act (the proposed Act) is to make court records more accessible by commanding a good reason for withholding access. The suggested good reasons include: if access is likely to prejudice the proper administration of the law (for instance, the prevention, investigation or detection of offences), the right to a fair hearing, or if access might endanger anyone's safety. The Commission notes, however, that such reasons still need to be weighed against the public interest in open justice.

### **The proposed Act**

The Commission proposes under the Act that information held by the court will be divided into two categories – to be dealt with separately under different rules and processes, namely:

- i. information held by the court relating to judicial administration (as distinct from that which relates to particular judicial proceedings); and
- ii. information which forms part of the “court record” relating to particular judicial proceedings.

Part 1 of the Act would cover the first category of information – with the Ombudsman being responsible for dealing with any disputes about access. The new ground for withholding such information would be “judicial independence” – an important constitutional principle to be weighed against the open access principal. This may not be a factor in many requests.

Part 2 of the Act would cover the second category, the court record; which is of more interest to most people. The Commission considered what would constitute the “court record”, for there is presently no clear definition. In its view the “court record” should be defined as including the entire case file used by the court (administrative documents, electronic recordings of hearings, transcripts of evidence, affidavits, depositions, bail documents, briefs of evidence, pleadings, submissions, judgments, orders, exhibits and interlocutory documents about case conferences and so on) - but not judges’ notes or drafts.

### **Conclusive reasons for withholding information**

The Commission considers case record information should be accessible unless there are conclusive or good reasons for withholding it. Conclusive reasons would include prejudice to the security or defence of New Zealand, or the interests of information provided to it by

other countries, prejudice to the maintenance of law, the right to a fair hearing, endangering the safety of any person, or prejudice to the proper administration of justice.

The Commission considered good reasons may exist for withholding information - unless in the particular circumstances of a case, withholding is outweighed by public interest considerations making disclosure desirable. This exception would operate only if withholding information is necessary:

- i. because disclosure would (a) disclose a trade secret or (b) unreasonably prejudice the commercial position of the person who supplied or who is the subject of the information;
- ii. to protect information subject to confidentiality obligations, or which any person has been or could be compelled to provide, and providing access would likely prejudice the supply of similar information or information from the same source, contrary to public interest;
- iii. because the case record relates to proceedings for defamation or under specific statutes, including in the family court or in relation to mental health matters;
- iv. to protect an individual's privacy rights, both under the Privacy Act and other legislation (such as the Criminal Records (Clean Slate) Act 2004); or
- v. because allowing access to the case record is contrary to a court order.

It is intended the proposed Act will provide a right of appeal from any decision refusing access to information, and further appeals only with leave. The rules would outline the situations where the parties to the cases need to be consulted or heard on the application for access.

### **Media access to information**

The Commission does not consider there needs to be specific statutory provisions or special rules applying to access to information by media representatives. It has, however, made some recommendations which if implemented should assist media access, in light of the public's special interest and reliance on media reporting of court cases. For further details of these recommendations, see the related article in this edition.

For more information on access to court records, please email [wendy.duggan@bellgully.com](mailto:wendy.duggan@bellgully.com) or call on 64 9 916 8989

## **Access to court records by the media: concerns and remedies**

**“The media has a critical role to play in translating the principle of open justice into reality.”**

*The Law Commission in its Report on Access to court records (the Report) did not consider it necessary to recommend specific statutory provision or rules for media access to the court record. It did, however, make recommendations which should assist the media.*

The Government has decided before it responds to the Report to allow time for debate on the findings of the Report by interested stakeholders, including the media.

In the meantime, the Minister for Courts has announced the launch of the long overdue “real time” recording and transcribing of evidence in courts – which will help reduce the length of trials. This is part of other proposed technological investments by the Ministry, some of which will assist media members - such as the provision of judicial decisions on-line.\*

### **The current position**

The Commission outlines in its Report the current situation for media access to court information.

Laws and conventions exist which recognise the special role of the media in reporting information about court proceedings. For example, accredited media can in some cases attend the Youth or Family Courts without special permission. By convention, media can also attend chambers hearings in the High Court and bail hearings (even though facts may be aired at such hearings which are adverse to an accused and may be inadmissible at trial). Media members can also sit in the press benches and take notes in court - which members of the public are not permitted to do. They also often provided with copies of informations of criminal charges at the start of the first hearing of the charges.

Ministry of Justice Guidelines provide that court staff must give the media “all reasonable assistance” to ensure accurate reporting. This is, however, qualified by the statement that media members are expected to attend a hearing of interest but are not otherwise entitled to information about it as of right, but may have their enquiries considered under the criminal records search rules (and presumably, under applicable civil search rules).

### **In-court media coverage of proceedings**

Other guidelines, the In-court Media Coverage Guidelines 2003, apply to television, photographic and radio coverage of court proceedings. While all matters relating to in-court media coverage are at the discretion of the court, the intention of these guidelines is to ensure applications for in-court media coverage are dealt with expeditiously and fairly, and as far as possible, that similar cases are treated alike. In considering an application for media coverage, the court may take into account:

- the need for a fair trial;
- the desirability of open justice;
- the principle that the media have an important role in the reporting of trials as the eyes and ears of the public;
- the importance of fair and balanced reporting of trials;
- court obligations to the victims of offences; and

- the interests and reasonable concerns and perceptions of victims and witnesses.

### **Media concerns and proposed remedies**

Prior to publication of the Report, media representatives consulted with the Commission and raised concerns about existing media access to court records, including:

- (i) problems arising from the requirement for media to be in court before they can get information;
- (ii) delays receiving responses to applications for material from the court records;
- (iii) inconsistency of treatment of requests by court staff, both within and between regions;
- (iv) diminished access resulting from the increasing trend towards the court receiving written material which is not read out; and
- (v) the costs of accessing the record – both the photocopying and legal fees incurred in making access requests.

#### **(i) Requirement to be present in court**

Media members perceived that access to information had become more difficult in the past 10 years. Irrespective of whether a reporter had been in court, it used to be relatively easy to obtain information from court staff about who was appearing in court, the nature of the charges, the correct spelling of names, the dates of adjournments, and outcomes. Currently some media representatives are finding that court staff generally refuse to provide such information unless the reporter concerned has been in court during the hearing. It is of course a logistical impossibility for a court reporter to be in every courtroom in a region on any particular day.

The Commission recommends that a reporter should not have to have been physically present in a courtroom to obtain copies of court records produced or relied upon in open hearing.

#### **(ii) Delay in court response**

Media representatives expressed strong concerns about delays, often of several weeks or many months duration, in obtaining a response to access requests, by which time the information is no longer newsworthy. The Commission's view is that delays some times cannot be avoided, as the court must find time to respond to requests, but the real issue is what is an acceptable delay. It considers new rules are required which provide clarity and certainty as to what is required in all situations, as would according greater priority to media requests.

#### *On-line developments*

Media members reported frustration at the time and effort currently required to confirm details such as names of parties and the exact nature of the charges or claims, and what stage the case is at. Online court calendars and any advance listings were said to be of real value to the media in planning deployment of resources.

The Commission noted that providing information online has the potential to radically improve media access to court information (and reduce time spent by Ministry staff handling requests). Journalists expressed strong support for the initiatives taken by the Supreme Court in putting court calendars, case summaries, transcripts and judgments

online. Access to online court calendars for all courts would enable media to plan in advance which cases to report, and permit better coverage of the courts.

The Commission has been advised that it would not be technically difficult to follow the example of overseas courts, many of which have calendars online, subject to rules being agreed as to what information should be displayed, and how names should be displayed where suppression orders operate. The Commission notes however that there would be practical difficulties in keeping the daily lists current, particularly in the summary criminal jurisdiction of the District Court, where the information may be subject to change at short notice.

It is not envisaged that criminal matters would be posted on the online calendar at first call, as matters such as suppression order applications would need to be dealt with before case information is posted on the internet. It is suggested calendar information could be posted for the duration of the hearing of the matter (from the time of schedule for a hearing other than the first call, until 14 days after disposition), and that the listing then be removed. The Commission recommends that providing online access to court calendars should be a resource priority for development of the electronic medium for New Zealand courts and tribunals.

The High Court has begun to include judgments of public interest on its website\* and has on occasion included important District Court decisions. This is seen as an excellent development, and it is recommended all courts have a system for identifying decisions with high public importance or interest and publishing them online, subject to any suppression orders.

### **(iii) Inconsistency of treatment of requests**

It is not surprising that media members are finding inconsistency in treatment of requests to access for information when it was found by the Commission that:

".. The present rules are not always consistent, clear or easy to locate. Nor are they comprehensive. There are obvious gaps and there is also a lack of consistency across jurisdictions. A new approach is overdue".

It is also noted in the Report that the New Zealand Chairman of the Commonwealth Press Union (the CPU) wrote to the Chief Executive of the Ministry of Justice in December 2005 expressing concern that judges impose too many suppression orders, that the orders are often made orally, particularly in the District Courts, and the efficiency with which these orders are transcribed and circulated varies widely from one registry to another. The CPU suggested suppression orders should be typed up as a matter of urgency, and posted on the Ministry's website, or the details sent out by email. The Commission endorses this suggestion.

### **(iv) Diminished access because material is handed up**

There is an increasing trend in civil and criminal cases for material to be put before the court in written form, rather than being read out in court, and such material is taken into account by the court in its decision. Examples of this include expert witness statements, depositions and submissions. At a trial, documentary evidence will not normally be read out in full, although there may be references to it during argument or in cross-examination. This trend creates serious practical problems for the media - material previously read aloud in open court is not now available to them, and trying to gain access to material during the hearing through the court record rules can result in delays. An application for access may ultimately be unsuccessful.

The Report considers written material which features in proceedings in open court. such as pleadings, affidavits, confirmed witness statements which stand as evidence in chief, and written submissions, should be regarded as documents which have been read in open court, and subject to any statutory restrictions or confidentiality orders, the media should be granted access to them once the documents have been produced in the court hearing.

#### *Hand-Up Depositions*

A particular area of frustration for reporters was the practice relating to the handing up of depositions, written statements of evidence not read out in open court but handed up to the judge or Justice of the Peace (JP). In most cases hand-up depositions are used for reasons of convenience rather than because the evidence is in any way confidential. The depositions are part of the court record. As such, media have to apply for access to them under the criminal search rules, which may present problems for a reporter trying to produce a timely report of a criminal depositions proceeding.

The Commission considers this situation unsatisfactory, because in most cases the media would have been able to hear the deposition had it been read out in open court. It notes that in some cases, there may be suppression orders or other good reasons, such as the risk of prejudice to a fair trial, why the media should not have access and that those cases can be dealt with accordingly by an order of the court. Otherwise, the Commission considers there is no principled reason why the media should not have access to hand-up depositions, without which they may be hard-pressed to make sense of the proceedings.

The Commission recommends that JPs should be empowered to release hand-up depositions to the media, where there is no objection from the parties. Where there is objection, or the JPs are concerned that release might prejudice a fair trial, the matter should be referred to a jury-warranted judge for decision.

#### *Access to Electronic Documents in court*

A further concern for the media is access to electronic documents in court. In fraud trials and trials involving extensive and complex financial information computers are often used to store documents, and counsel and the judge will have a computer screen on the bench before them to follow the evidence. The resources for such cases are usually provided by the Serious Fraud Office, not the Ministry of Justice. In such cases, reporters typically do not have access to screens and this makes it very difficult for them to follow and report on the evidence.

The Commission considers that accredited news media should have access to computer screens during such hearings so they can make a fair and accurate report of the proceedings. Interested media should be able to make application to the court prior to the hearing, and the question of how access will be facilitated addressed at a case conference prior to commencement of the hearing or trial.

#### **(v) Costs of accessing information**

The Commission acknowledged the wide reported variance in fees being charged by court officials and that media are sometimes required to pay legal fees to argue access to court records.

In response, the Report notes that the Ministry of Justice has made significant changes to its communications strategy to ensure consistency of responses to media requests generally. Communications advisers have also been appointed to District and High Courts, and a media policy circulated within the Ministry which tries to ensure frontline court staff deal only with routine enquires (requests for judgments, public documents and basic information), and that all other queries are referred to communications staff.

Access requests will still however need to be made to the registrar or judge where leave is required under the rules. The Ministry is also preparing a media handbook to assist in fostering a positive working relationship between the media and courts, with a promise that it will be discussed with key media stakeholders before it is finalised and published on the Ministry's website.

The above is a summary only of the Commission's recommendations – which, if implemented, should go some way to addressing the media's concerns regarding access.

\*Judicial decisions from the Supreme Court, Court of Appeal and High Courts are now available free of charge on the internet. *Judicial Decisions Online* is available on the Ministry of Justice website, [www.justice.govt.nz](http://www.justice.govt.nz), and this may prove a very useful resource for journalists.

For more information on access to court records, please email [wendy.duggan@bellgully.com](mailto:wendy.duggan@bellgully.com) or call on 64 9 916 8989

## **Name suppression: New Zealand Press Council ruling**

An article in the last edition of Media Law Review entitled *The challenge of name suppression orders* included discussion of a New Zealand Press Council adjudication. The Council subsequently wrote to us. An extract from its letter is reproduced:

"There is however one small matter arising out of your article on name suppression in the December issue. It concerns NZCP Case 984, June 2004. You stated (second to last paragraph, page 2) "the Council stated in its judgment, 'legal advice is that in such circumstances the reporting of Mr Peters' comments amount to a prima facie case of contempt". What the article did not make clear was that at this point the Council was simply reporting the argument put to it by the Immigration Service. This was not the Council's view, nor that of the Council's counsel, Bill Wilson, QC. When the Service was asked to make this opinion available to the Council they declined to do so. While noting that the law was uncertain, the adjudication went on to say... " [For this citation from the adjudication, see highlighted script in the full text of the adjudication set out below]."

For clarification, reference and interest the full text of the Council's decision is set out below. It is also available on their website [www.presscouncil.org.nz](http://www.presscouncil.org.nz).

### **Case number 984: New Zealand Immigration Service against New Zealand Herald: Council Meeting JUNE 2004**

The New Zealand Immigration Service lodged complaints against the Press and The New Zealand Herald, respectively, arising out of both newspapers publishing the name of a man claiming refugee status who had been identified by Mr Winston Peters in the House of Representatives in the course of a Parliamentary debate.

The Press Council's job is not to set legal precedents.

It is primarily to decide ethical issues on complaints received.

It therefore accepts the complaints from the Immigration Service to that extent. It does not uphold the complaints for the reasons now set out. The central point of the complaints against both newspapers was that publication of the man's name was prohibited by s129T (5) of the Immigration Act 1987 and is a breach of a claimant's right to confidentiality.

The Service also complained about the tone of the response of the editor of The Press to their first letter of complaint.

The response was robust but no more, and this complaint is not upheld.

Section 129T of the Immigration Act states:

**"Section 129T. Confidentiality to be maintained** – (1) Subject to this section, confidentiality as to the identity of the claimant or other person whose status is being considered under this Part, and as to the particulars of their case, must at all times, both during and subsequent to the determination of the claim or other matter, be maintained by refugee status officers, the Authority, other persons involved in the administration of this Act, and persons to whom particulars are disclosed under subsection (3) (a) or (b)...

(5) A person who without reasonable excuse contravenes subsection (1) and any person who without reasonable excuse publishes information released in contravention of subsection (1), commits an offence."

There was a further and separate complaint against The New Zealand Herald in that it had published the name after there had been a court order prohibiting publication of the identity of the person.

Both complaints against both newspapers can conveniently be dealt with in one adjudication. The facts are these.

There was a debate in the House on immigration issues on 12 November 2003 and in the course of that debate Mr Peters disclosed the name of one individual who had on arrival in New Zealand claimed refugee status at the border.

Next day on 13 November 2003 both The Press and The New Zealand Herald published reports of the debate and both included the name of the claimant.

There is no complaint about either the accuracy or fairness of the respective reports, only that the name was published.

After a traveller claims refugee status there is a procedure that follows to deal with the claim, but that does not concern us here, except that on 19 November 2003 when the named person appeared in the Manukau District Court the judge made an express order suppressing publication of the identity of the person.

By this time both newspapers had published reports of the 12 November parliamentary debate that included the name, and application by claimant's counsel in seeking the order had clearly been influenced by the prior publication.

Also on 19 November 2003 there was another debate in the House when Mr Peters again repeated the name of the claimant for refugee status.

Only The New Zealand Herald published the name in the course of reporting the further debate of 19 November.

The complainant alleges this publication on 20 November 2003 amounted to contempt of court.

In a separate part of the same edition The Herald on 20 November 2003 reported the court proceedings and the fact of the suppression order having been made.

The Press in its report of the further debate on 19 November and the court proceedings did not repeat the name of the claimant. The Press in its response to the complaint stated it was not prevented from publishing the report of the proceedings in Parliament by s129T (1) and (5).

The Press said it "had more than a reasonable excuse for publishing the statements by Mr Peters.

Accurate reports of parliamentary debates have never been objected to in New Zealand." The New Zealand Herald takes the position that the Press Council has no jurisdiction to entertain the complaint made by the Service and says that no breach of the Council's Statement of Principles has been named.

That is true, but the objection is covered by the Preamble to the Statement, which is part of the Principles: "A complainant may use other words, or expressions, in a complaint, and nominate grounds not expressly stated in these Principles." Close analysis of section 129T was made in the Council when it received the response of the editor of The Press.

The preliminary conclusion was that the defence would succeed, but as it was a question of statutory interpretation the Council sought the opinion of Mr W.M.Wilson QC which on this point was as follows; "Sub-section (1) does not impose a blanket prohibition on any disclosure by any person of the name of the applicant.

To the contrary, the sub-section specifically provides that it is only those within a series of specified categories (Refugee Status Officers, the Refugee Status Appeal Authority, others involved in the administration of the Act and those supplied with information under sub-section (3a) and (b) who are subject to the obligation of confidentiality. The newspapers which published the name of the applicant in question do not come within any of these categories and, accordingly section 129T has no application to them." That is not the end of the matter for then the Council must go to sub-section (5) to decide whether the newspapers had a reasonable excuse for publishing the name.

Whilst acknowledging this was a matter for the Council, Mr Wilson was of the opinion that as a matter of law an accurate report of the Parliamentary proceedings could constitute a reasonable excuse for the purposes of s129T (5).

In the circumstances of publishing an accurate report of the debate in the House the Council finds that was a reasonable excuse within the terms of the statute and therefore no breach was committed in publishing the name.

The position in regard to the contempt of court issue of publishing the name following a specific court order is more complex.

This part of the complaint relates only to The New Zealand Herald and its report of 20 November.

The Press never published the name after the court order of 19 November 2003, but the Herald did so on 20 November 2003. Before laying the complaints with the Press Council the NZIS had apparently asked the Solicitor General to prosecute The New Zealand Herald for contempt.

In the complaint against The Herald the Service said: "Legal advice is that in such circumstances the reporting of Mr Peter's comments amount to a prima facie case of contempt." The supplier of this opinion was not expressly named.

However a few sentences on from that remark the Service said: "The Crown Law Office have advised that contempt prosecutions are rare and reserved for the most serious of breaches.

In the circumstances they have advised they do not intend to proceed with prosecution in this case." There is an ambiguity in the way this has been made part of the Service's complaint to the Press Council against The Herald.

It is unclear which legal adviser said the "comments amount to a prima facie case of contempt". Clarification was sought from the Service about these statements but it refused to supply verification claiming legal privilege.

It seemed to the Press Council that the Service had already waived privilege when it made the opinion of the Solicitor General part of its case to the Press Council.

In the circumstances it is unclear what the exact position of the Crown Law Office was and therefore it must be put to one side for our purposes. Mr Wilson's opinion was that the law is uncertain as to how any conflict between the legislature and the courts is to be resolved

in a situation where there is an accurate publication of what was said in Parliament that could otherwise amount to a contempt of court.

The uncertainty is reflected in this country's leading text on media law, Burrows and Cheer's Media Law in New Zealand (4<sup>th</sup> ed.) at page 242. "A matter yet to determined is the effect of parliamentary privilege on name suppression orders.

On several occasions Members of Parliament have openly stated in the House the names of persons whose names have been suppressed by a court. Moral considerations aside, there is no doubt that those MPs are protected from legal action by the absolute privilege of Parliament.

But there is much greater doubt whether the media are safe in publishing such statements made in Parliament.

The media's qualified privilege to report Parliament may have no application outside the law of defamation.

While direct broadcasts of such statements are probably protected, delayed reports in the media may be more at risk." The starting point for the consideration of the relationship between Parliament and the Courts requires examination of art 9 of the Bill of Rights 1688, which is in force in New Zealand and states: Freedom of speech – That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament. Relevant authority is the reasoning of Lord Denning M.R. in *Attorney-General v Times Newspapers Ltd* [1973] 1 All ER 815 at 823 which mentions the Bill of Rights and quotes art 9, and on the same page goes on to say: "Whatever comments are made in Parliament, they can be repeated in the newspapers without any fear of an action for libel or proceedings for contempt of court." This statement of the law was agreed to by Lord Justice Scarman and not referred to when the case went on appeal to the House of Lords. Another matter for the Press Council to decide is whether the publishing of the name by the Herald on 20 November carried any inference that the motive for publishing the name was to circumvent the court order.

The Council finds that no such inference can be made in the circumstances of the publication. In the absence of direct New Zealand authority the Council considers it prudent to follow the English case. To do otherwise might suggest primacy of the courts over Parliament.

The Council will not take that step and leaves it to be decided elsewhere. The final matter to be disposed of is the point of the newspapers that the complaints of the Immigration Service were lodged a few days after the expiration of the three months from publication specified in the Council's procedure.

The Council decided in a complaint of this importance, and because there was a reasonable excuse on the part of the Service for the delay, it would go ahead and accept the complaints for disposal. For the foregoing reasons the complaints against both newspapers are not upheld. Ms Ruth Buddicom and Mr Jim Eagles took no part in the consideration of this complaint.

For more information on name suppression issues, please email [wendy.duggan@bellgully.com](mailto:wendy.duggan@bellgully.com) or call on 64 9 916 8989