

29 July 2016

The Hon Justice Stephen Kós
President, Court of Appeal
PO Box 1606
Wellington 6140

By email: courtofappeal@justice.govt.nz

Dear Judge

Criminal electronic document filing: updated Protocol, 2016

1. The New Zealand Law Society appreciates the opportunity to comment on the proposed revisions to the Court of Appeal's Criminal Electronic Document Protocol (version dated 17 April 2016) (the revised Protocol). The revised Protocol updates the current Electronic Casebooks document dated 14 February 2014 (the 2014 Protocol).¹ The revised Protocol says at paragraph 1.1 that:

This protocol is a guideline to be used by counsel and the Courts. It is intended to encourage and facilitate the use of electronic documents for criminal cases in the Court of Appeal. It updates the version dated [14 February 2014] and allows counsel to file electronic submissions and authorities that are hyperlinked to the case on appeal prepared by the Registry.

2. The Law Society considers there are likely to be long-term benefits from electronic filing, including a reduction in time and costs related to copying, distributing and storing documents post-trial.
3. The Law Society's Criminal Law Committee has considered the revised Protocol and suggests below a small number of changes to enhance and facilitate its uptake.

Compliance costs

4. As the Court will be aware, uptake of electronic filing will necessarily involve compliance costs for parties and counsel in the short-term. Parties and counsel will need to acquire the technology to create electronic casebooks. These include a PC or Mac computer with a USB port, word processing programme, internet access and a web browser, and PDF writer software with the required functionality. They will also need to acquire the skills to compile and file the casebooks.

¹ <http://www.courtsofnz.govt.nz/business/guidelines/court-of-appeal-electronic-casebooks-protocol/Court%20of%20Appeal%20Electronic%20Casebooks%20Protocol.pdf>

5. Although many larger firms will have already outlaid this time and expenditure, this is less likely to be undertaken in smaller practices or by established appellate lawyers familiar with the paper-based systems, or by self-represented litigants or prisoners.² The electronic filing process may be challenging for those who are less technically skilled.
6. With respect to the hardware required, the Law Society understands that the United Kingdom and Australia have made computers publicly available for people who do not have electronic access and this may be worth considering.

Additional measures to encourage uptake

7. The Law Society understands that NZLS CLE Ltd will be hosting a free webinar on building electronic casebooks on 4 August 2016. The webinar will continue to be available on the CLE website, with a link from the revised Protocol on the Courts of New Zealand website. This will assist parties and counsel, and encourage the uptake of electronic filing.
8. It may not be appropriate to file electronic documents in all cases. There may be merit in providing guidance in the revised Protocol to parties and counsel, to help determine whether electronic documents are appropriate in the case at hand.

Filing and serving

9. The revised Protocol (paragraph 5.2) provides that if electronic versions of documents are to be filed, one hard copy of documents must still be filed with the Court. An encrypted USB flash drive may also need to be filed, for example if the Multiple PDF Format is used for the bundle of authorities (paragraph 7.5). These requirements detract from the aim of quick, remote and inexpensive filing. Other jurisdictions (such as the UK and Australia) use internet-based uploading portals to file and serve documents. Consideration could be given to adopting these technologies for filing with the Court.
10. The revised Protocol (paragraph 5.2(b)) allows parties to serve electronic documents on each other in any manner they agree, and allows for modification as technology evolves and experience is gained (paragraph 1.5). This may allow the implementation of cloud/internet-based programmes to share documents remotely in future.

Format

11. Paragraphs 6.1 and 9.2 require that the “electronic version of any document must be the direct equivalent of the hard copy version. An exception to this is large Excel spreadsheets [as] converting these to PDFs can make them unwieldy and incomprehensible”. The revised Protocol could usefully provide guidance on how large Excel spreadsheets should be formatted.
12. These formatting provisions are also included in paragraph 3.1 of the Higher Courts Civil Electronic Document Protocol (Civil Protocol). The Civil Protocol provides that where the electronic version is not the direct equivalent of the hard copy version, this must be noted in

² Paragraph 1.4 of the revised Protocol notes that parties are entitled to use paper copies and that counsel should bear in mind that some parties, notably self-represented parties who are in custody, may not have ready access to computers.

any relevant bundle index or table of contents. This requirement could be included in the revised Protocol.

Hyperlinking

13. The revised Protocol requires hyperlinks from submissions to relevant passages in the casebook or authorities, whereas the 2014 version prohibited hyperlinking as it was not feasible at that time to preserve hyperlinks when downloading from the Court server. This is a significant change and the work involved in creating hyperlinks may dissuade the uptake of electronic filing.
14. Consideration could be given to an intermediate step which encourages but does not require hyperlinking. The Law Society notes that the Civil Protocol provides that documents “should” contain hyperlinks to relevant documents (paragraph 7). Alternatively, the revised Protocol could require hyperlinking to relevant authorities but encourage, rather than require, hyperlinking to the relevant parts of the casebook.
15. Whilst hyperlinks are in common use, the phrase may not be familiar. A definition of “hyperlink” could be included in the introductory paragraph, e.g.:

A hyperlink is a word, phrase, or image that you can click on to jump to a new document or a new section within the current document.
16. Paragraph 7.4 requires that hyperlinks must be relative rather than absolute. The paragraph could include the footnote in paragraph 7.3 of the Civil Protocol that “hyperlinks created in PDFs using Adobe Pro should normally be relative. Those created in Word may be relative or absolute, depending on the user’s selected settings.” In addition, the revised Protocol should emphasise that the same naming process needs to be followed to make the case book cohesive and function properly.

Conclusion

17. The Law Society hopes these comments are helpful. If further discussion would assist, please do not hesitate to contact the convenor of the Law Society’s Criminal Law Committee, Steve Bonnar QC, via Karen Yates, committee secretary (karen.yates@lawsociety.org.nz / 04 463 2962).

Yours sincerely

A handwritten signature in black ink, consisting of a large, stylized loop followed by a long horizontal stroke extending to the right.

Andrew Logan
Vice President