

27 April 2021

The Right Honourable Dame Helen Winkelmann
Chief Justice of New Zealand | Te Tumu Whakawā o Aotearoa
Supreme Court of New Zealand | Te Kōti Mana Nui
Wellington

By email: officeofthechiefjustice@courts.govt.nz

Tēnā koe, Chief Justice

Re: Proposed changes to the way Supreme Court proceedings are published

The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the changes proposed to the public availability of the record of hearings in the Supreme Court | Te Tumu Whakawā.

The Law Society supports the objective of improving the timeliness and quality of case-related materials available to the public. The final courts of the United Kingdom, Australia and Canada have all begun publishing or broadcasting their hearings in the last decade, explicitly in the interests of transparency and maintaining confidence in the administration of justice. The Law Society considers that it is appropriate for the Supreme Court of New Zealand to move in the same direction.

Guiding principles

Transparency and the education of the public about court processes are particularly important for the work of the Supreme Court | Te Tumu Whakawā. Appeals only reach this Court if it is necessary in the interests of justice for the Court to hear and determine the appeal: that is, if the appeal involves a matter of general or public importance, a substantial miscarriage of justice may have occurred, or the appeal involves a matter of general commercial significance.¹ Such appeals are, by definition, of general or public interest.

Notwithstanding the significant public interest in the work of the Supreme Court, it is important not to overlook other concerns to which the publication and digital archiving of hearings and written submissions can give rise.

The Rules Committee's 2015 consultation document on proposed reforms to the rules relating to access to court documents in the senior courts explicitly referenced the loss of "practical obscurity" in the digital age:²

The digital age has changed the nature of publicity. One particular change has been the end of the practical obscurity that would descend on court documents with the passage of time. Documents

¹ Senior Courts Act 2016, s 74.

² The Rules Committee, *Consultation on Accessing Court Documents in Civil and Criminal Proceedings*, issued 11 May 2015 (Rules Committee Consultation), para 6.

once released have an indefinite digital life and, without particular expense or effort, can be re-publicised long after a trial. It must be asked what the public good is in allowing access to court documents when the court process is long over.

The Rules Committee's consultation document went on to note the reduced public interest in some of the information about a case after it has been determined:

63. The Rules Committee recognises that it is [...] an important principle of justice to keep the courts open to all persons seeking to resolve disputes so that such disputes are resolved fairly, according to the law. While at the time of the dispute, the disclosure of such facts or information may be necessary, prior to the proceeding there is no need to allow people to access such information as the proceedings may be settled prior to the hearing. **After the hearing, there is little need to allow the general public to trawl through court documents and discover private facts that are not directly related to the proceedings or commercially sensitive information disclosed in the course of the proceeding but not directly at issue.**

64. **The Rules Committee considers that private facts about individuals or commercially sensitive information that are not directly relevant to a proceeding should not unnecessarily be disclosed before or after a proceeding.** This is not an absolute principle and must be balanced against the other factors, including open justice and freedom of expression. However, the Rules Committee considers it appropriate to include this additional factor to make it clear that the effects of the disclosure of the type of information on the general court system should be borne in mind.
[Emphasis added]

In response, the Senior Courts (Access to Court Documents) Rules 2017 (**the 2017 Rules**) introduced a requirement for a judge considering an application to access documents other than the "formal court record" to consider:³

the right to bring and defend civil proceedings without the disclosure of any more information about the private lives of individuals or matters that are commercially sensitive than is necessary to satisfy the principle of open justice.

This factor was described as a "key provision" of the 2017 Rules.⁴ The other matters that rule 12 of the 2017 Rules directs a judge to consider—including the orderly and efficient administration of justice, the right of a defendant in a criminal proceeding to a fair trial, and the protection of confidentiality and privacy interests—are also relevant to the proposals on which the Court is seeking feedback. These considerations also have the potential to outweigh any countervailing public interest in disclosure. As the 2017 Rules recognise, these factors extend beyond traditional grounds for suppression (such as prevail in family and criminal matters).

While these concerns do not justify retaining the status quo, the Law Society considers that they should be accommodated as part of any reform of the Supreme Court's procedures. Access to justice and the development of the law would be impeded if reforms intended to enhance transparency end up driving more parties into private and confidential dispute resolution forums.

³ Senior Courts (Access to Court Documents) Rules 2017, r 12(c).

⁴ See the explanatory note to the draft rules appended to the Rules Committee Consultation at page 7 of the draft rules.

The Law Society suggests that the Supreme Court's proposed reforms could be articulated either by amendment to the 2017 Rules or by a practice note that references the principles in those Rules. The reforms should allow for the redaction of written materials, and the editing of audio and film records, prior to publication, in the cases where there is a proper reason for doing so.

Publication of transcripts

The Law Society agrees that the current delay in the uploading of official transcripts is undesirable. The proposal to upload an unchecked transcript within a few days of the hearing is welcome, so long as appropriate safeguards are in place for matters where there are non-publication or suppression orders or the prospect of a subsequent trial. At the same time, improved processes for achieving shorter timeframes for checked, official transcripts could also be considered.

Audio recording and livestreaming

The Law Society supports the uploading of an audio recording of at least some of the Court's hearings as a step on the way to filming hearings and publishing them online. Practices overseas are not identical. The Supreme Court of the United Kingdom livestreams its hearings; the High Court of Australia seems to post the filmed hearing to its website a few days after the hearing.

Any publication of an audio recording or a film of the hearing should be subject to restrictions both on what is published and on the use that can be made of what is published.

The Supreme Court of the United Kingdom has been livestreaming its proceedings since 2011. Provision for the filming and broadcasting of the Court's hearings is made in Practice Directions 6 and 8. Broadcasting is to be conducted in accordance with a protocol agreed with representatives of the relevant broadcasting authorities (PD 8.17.1). A footnote to Practice Direction 8.17.1 states:

The protocol ensures that certain types of proceedings and some aspects of proceedings such as private discussions between parties and their advisers are not recorded, televised or filmed. It also regulates the use of extracts of proceedings and prevents their use in certain types of programmes (such as party political broadcasts) and in any form of advertising or publicity.

It does not appear that the protocol itself is available to the public.

The Law Society considers that any provision for the broadcasting of hearings of the Supreme Court of New Zealand should be regulated so as to address the risk of the broadcast being abused or otherwise used in a manner contrary to the administration of justice.

Rules on this subject should deal with the following:

- On what basis might publication be restricted on grounds that publication would interfere with the proper administration of justice, threaten the interests of any person involved in the proceedings, or in the event of disruption or demonstration within the hearing?
- Should the use of any audio recording or footage be restricted to news, current affairs and educational purposes?
- Should the broadcasting of court proceedings be prohibited in, for example, entertainment, satirical programmes, advertising or promotion? (In the United Kingdom, for example, recordings of hearings must be fair and accurate in the context in which they occur and cannot

be used for the purposes of political broadcast, an advertisement, satire or light entertainment.)

- Should the publication of audio recordings or video images apply equally to parties represented by counsel as to self-represented litigants?

Experience in the United Kingdom and Australia will provide useful guidance and experience.

Submissions

The Law Society sees the case for routine publication of written submissions as more evenly balanced.

The Supreme Court of the United Kingdom does not publish the parties' written submissions. The High Court of Australia, on the other hand, has done so since 2011.

There is no readily available commentary on the practice in Australia. All published submissions commence with a paragraph certifying that the submissions are suitable for publication on the internet. There is seemingly no guidance available as to when or how often publication of submissions is considered unsuitable or what role the Court plays when a party considers that part of its own submission, or part of another party's submission, ought not be published.

The publication of written submissions would certainly enhance understanding of the hearing. It would be of assistance not only to the public at large but to the profession. However, this practice would inevitably expose more of the case to permanent public scrutiny.

Counsel and the Court have always been able to modulate what is said in open court. It is fair to say that this is often a matter of taste, tact and discretion, with practices among counsel and judges varying. On occasions, more sensitive material can be traversed in a less confronting way at a hearing when the material is contained in written submissions. The judicious sparing of unnecessary details at a hearing can reduce the impact of hearings on parties, witnesses and victims. This can extend to personal information, commercially sensitive information, but also to criticism of parties and witnesses. It is not uncommon for counsel to feel that such matters are properly drawn to the attention of the Court in written submissions whilst discretion is warranted in the extent to which, and the manner in which, such matters are addressed orally. The routine publication of written submissions will leave less room for this: either because the material will be published and permanently accessible to anyone; or because counsel will omit such material, or counsel will seek to redact the material where they otherwise might not do so if submissions were not to be published.

The interest in making submissions accessible to the public therefore needs to be weighed against the potential for parties to refrain from putting before the Court all that they wish to say.

It does not seem that there is any meaningful evaluation of the routine publication of written submissions over the last decade by the High Court of Australia. On the face of it, that reform does not appear to have generated adverse comment (at least, not publicly). Many of the published written submissions on the High Court of Australia website appear to be somewhat more skeletal than current practices in New Zealand, at least in civil cases. It is not clear if this reflects long-standing practices of the Australian bar or is an accommodation to publication. The Law Society

suggests that the Supreme Court may wish to consider consulting with their judicial colleagues on the High Court of Australia to obtain feedback on the Australian experience.

If the Supreme Court proceeds with the proposal to upload written submissions to the courtsfnz website, the Law Society proposes that:

- All written submissions include a certification that the submissions are suitable for publication on the internet (as occurs in Australia) or identifying whether the party considers that the whole or any part of the submissions should not be published.
- Any uploading of written submissions should occur close to the hearing or, in any event, sufficiently after the filing and service of the submissions to provide a brief window for any objection to the publication of material in a party's submission to be brought to the Court's attention and addressed by the panel prior to the hearing.

The Court will understandably want to ensure that any exceptions to a general presumption in favour of publication are rare. This should be achievable by promulgating guidelines and, in time, by the manner in which the Court responds to any requests for non-publication.

Finally, any publication of written submissions will have to avoid infringing any copyright that may exist in them under the Copyright Act 1994. There is a potential issue about whether the provision in section 59 of the Act, that the use of copyright material in judicial proceedings is not an infringement, is sufficiently broad to capture routine publication (and permanent accessibility) of submissions.

Judgment delivery

Thank you for your advice concerning the new process for delivery of judgments having high media interest. The Law Society has no concerns about the new process.

Next steps

We hope these comments are helpful. If you have any questions or would like to discuss the comments, the Law Society's Law Reform Committee would be pleased to assist (contact can be made through the Law Society's Law Reform and Advocacy Manager, Vicky Stanbridge vicky.stanbridge@lawsociety.org.nz).

Nāku noa nā,



Tiana Epati
NZLS President