OPEN JUSTICE – WHEN THE DOOR SWINGS SHUT: publication of judgments in New Zealand

In New Zealand, the principle of open justice is firmly entrenched, often being fleshed out by the considerations inherent in Bentham's famous quotation: 'Publicity is the very soul of justice'. As one New Zealand court put it, 29 years ago, 'judges speak and act on behalf of the community' in order to encourage 'public confidence is then given in return'.

The principle finds expression in open court hearings, in public access to court records and in the publication of reasons for and outcomes of a proceeding. It is in the last of these contexts that a Legal Information Institute can find itself struggling to support the reciprocal relationship between decision generator and the public that underpins the principle.

This paper explores the practical face of open justice in the context of free access to law in New Zealand.

Author:
Associate Professor Donna Buckingham, Director, New Zealand Legal Information Institute, Faculty of Law, University of Otago, Dunedin, NEW ZEALAND.

The author thanks Antoinette Brown for her research assistance and Judi Eathorne-Gould, Data Manager for NZLII, who provided the suppression order examples in this paper.

INTRODUCTION – OPEN JUSTICE AS A GENERAL PRINCIPLE

The common law principle of 'open justice' - open court hearings, public access to court records and the publication of legal judgments - has several faces. It is often said to hold constitutional significance,[1] even when there is no written constitution or a written constitution does not expressly include it.[2] It also provides a partial or sole basis for many rules of court and procedural regimes.[3] For example, due process, natural justice and procedural fairness all draw from the premise that justice must not only be done, but must manifestly be seen to be done. Similarly, the principle underpins procedural rules such as the weight to be given to public interest and the prohibition against undue influence of a judge or court official with respect to a trial. Often the principle's existence is paired the right of freedom of expression (or its equivalent in a particular jurisdiction).[4]

The principle applies in common law jurisdictions[5] to the extent it has not been overridden by domestic law and codification in domestic legislation is common.[6] Codification also allows restrictions to be placed upon its application in the search for "a yet more fundamental principle that the chief objects of courts of justice must be to secure that justice is done".[7] In this context, the open justice principle can go head to head with the equally compelling principle of a fair trial.

THE OPEN JUSTICE PRINCIPLE IN NEW ZEALAND

The principle has long been legislatively and judicially recognised in New Zealand, its underlying rationale being expressed in *Broadcasting Corporation of New Zealand v Attorney-General*:[8]

---

[1] *R v Sussex Justices Ex parte McCarthy* [1924] 1 KB 256 at 259.

[2] 'The Principle of Open Justice: A Comparative Perspective' Spigelman AC (2006) 29 UNSW Law Journal 147 at 147. See <http://www.austlii.edu.au/au/journals/UNSWLJ/2006/19.html>.

[3] Above n 2 at 152.

[4] For example, s 14 New Zealand Bill of Rights Act 1990 and the 1st Amendment to the US Constitution.

[5] The open justice principle is also incorporated into international law through instruments such as the International Covenant on Civil and Political Rights (Art 14) and the European Convention for the Protection of Human Rights (Art 6), both expressing entitlement to "a fair and public hearing" by an "independent and impartial tribunal established by law".

[6] For example, statutes in New Zealand, Australia, USA, United Kingdom and ordinances in Hong Kong derogate from the principle to a greater or lesser degree.

[7] *Scott v Scott* [1913] AC 417 (HL) at 477, cited as the modern leading authority by the New Zealand Law Commission in *Access to Court Records* NZLC R 93 (2006) at p 40 (para 2.5).

[8] [1982] 1 NZLR 120 at pp 122-3.

> It is simply that the principle of public access to the Courts is an essential element in our system. Nor are the reasons in the slightest degree difficult to find. The Judges speak and act on behalf of the community. They necessarily exercise great powers in order to discharge heavy responsibilities. The fact that they do it under the eyes of their fellow citizens means that they must provide daily and public assurance that so far as they can manage it what they do is done efficiently if possible, with human understanding it may be hoped, but certainly by a fair and balanced application of the law to facts as they really appear to be. Nor is it simply a matter of providing just answers for individual cases, important though that always will be. It is a matter as well of maintaining a system of justice which requires that the judiciary will be seen day by day attempting to grapple in the same even fashion with the whole generality of cases. To the extent that public confidence is then given in return so may the process be regarded as fulfilling its purposes.

The Court of Appeal has accepted that any departure from the principle 'must depend not on judicial discretion, but on the demands of justice itself'.[9] The New Zealand Law Commission reached the same conclusion in its 2006 Report on *Access to Court Records*[10] - characterising such a departure as necessary where the proceeding is such that applying the principle in its entirety would frustrate or render impracticable the administration of justice, or damage some other public interest for whose protection Parliament has made a statutory derogation from the rule.

New Zealand legislation distinguishes the principle's operation in criminal and civil proceedings and provides separate regimes for closing the court, access to court files and publication orders. In Appendix One of this paper, the civil and criminal regimes are described as they stand at the time of writing (late April 2011).

Whilst access to court records may remain the same for the foreseeable future (since it has relatively recently been the subject of reform), court closure and suppression regimes in criminal proceedings are slated for change. The Criminal Procedure (Reform and Modernisation) Bill was introduced into Parliament in late 2010 and is due to emerge from the Select Committee process in July 2011.[11] Among a myriad of

---

[9] *Broadcasting Corporation of New Zealand v Attorney-General* [1982] 1 NZLR 120 as discussed in the Law Commission's Report on *Access to Court Records* NZLC R 93 (2006) at 41 (para 2.12).

[10] Ibid at 39-42 (para 2.1 – 2.17).

[11] The process for enacting New Zealand legislation involves a Bill's introduction to the House of Representatives, followed by a first reading, select committee process, second reading debate, Committee of the Whole House stage and a final third reading. The bill is then signed by the Governor-General and becomes enacted law on the date of signature (s 16 Constitution Act 1986), although its provisions may become operative at a later date.

intensely debated reforms (including reduction of the right to a jury trial and inroads into the freedom of the defence from disclosure of its case), there will be changes to the grounds for court closure[12] as well as the grounds on which suppression orders can be made[13] and a sharp increase in the penalties for their breach.[14]

At the same time the logistics of judgment distribution, coupled with the lack of a suppression register, has sent a chill through the developing climate of public access to judgments. This paper therefore narrows its focus to the nesting of the open justice principle within the process of judgment publication.

E-PUBLICATION AND THE OPEN JUSTICE PRINCIPLE

Almost 29 years ago, in *Broadcasting Corporation of New Zealand v Attorney General,* the New Zealand Court of Appeal characterised open justice as supporting a reciprocal relationship of trust - judges 'speak and act on behalf of the community' in order to encourage the giving in return of 'public confidence'.[15] Of course, the Court of Appeal could not have contemplated how such a relationship could be assiduously fostered by the electronic publication of decisions, nor that the concept of 'public' might be forever altered by the creation of virtual communities. Nonetheless, even then the open justice principle would have been seen as being able to migrate to the digital world, although the sheer shock of the scale of 'openness' of such publication might have given some judicial pause.

---

[12] See clauses 201 – 203 of the Criminal Procedure (Reform and Modernisation) Bill: <http://www.legislation.govt.nz/bill/government/2010/0243/latest/DLM3359903.html?search=ts_bill_criminal_resel&p=1&sr=1>.

[13] See clauses 204 – 209 of the Criminal Procedure (Reform and Modernisation) Bill: <http://www.legislation.govt.nz/bill/government/2010/0243/latest/DLM3359903.html?search=ts_bill_criminal_resel&p=1&sr=1>.

[14] The Explanatory Note to the Criminal Procedure (Reform and Modernisation) Bill <http://www.legislation.govt.nz/bill/government/2010/0243/latest/DLM3359903.html?search=ts_bill_Criminal+Procedure+%28Reform+and+Modernisation%29_resel&p=1> states:
"Clause 215 makes it an offence to publish any name, identifying information, or other information, in breach of a suppression order, or in breach of any of the automatic suppression provisions. The offence is punishable by—
• in the case of an individual, a term of imprisonment not exceeding 6 months; or
• in the case of a body corporate, a fine not exceeding $100,000.
These penalties are significantly higher than those currently applying under the Criminal Justice Act 1985: - a breach of section 139A (which relates to the protection of child witnesses). The penalty for breaching that section is a term of imprisonment not exceeding 3 months or a fine not exceeding $1,000 in the case of an individual, and a fine not exceeding $5,000 in the case of a body corporate. The penalty for breaching a suppression order under either section 138 or 140, or for breaching section 139 (Prohibition against publication of names in specified sexual cases) is a maximum fine not exceeding $1,000."

[15] *Broadcasting Corporation of New Zealand v Attorney General* [1982] 1 NZLR 120 at p 123.

Since 2004, over 50 collections of decisions from courts and tribunals have been made publicly available through websites unique to the decision generator or via other public distribution services, such as Judicial Decisions Online[16] and the New Zealand Legal Information Institute (NZLII).[17]

This represents enormous progress in public access to the work product of courts and tribunals: for example, when NZLII began life in 2004 it enjoyed only four sources of supply and now provides the largest free access publicly available collection of over 50 data sets.[18] Increase in that public access has not been the result of some legislative change or concerted governmental policy. Rather it has been organic - in each case, it has been an particular expression of a growing collective will by decision generators to make law accessible for a variety of reasons.

NZLII hosts the largest collection of tribunal decisions and court judgments. It does not receive funding from central government but relies on the support of the Australasian Legal Information Institute (AustLII) for its technical platform, discrete and contestable project funding from the New Zealand Law Foundation[19] and voluntary labour. Given its informal genesis, NZLII has been remarkably successful at promoting the face of open justice. There has been migration to e-dissemination of legal decisions on such a scale that it might reasonably be assumed that open justice has been considerably fortified in practical terms. But the continued strengthening of that principle now faces a real challenge.

---

[16] Judicial Decisions Online <http://jdo.justice.govt.nz/jdo/Introduction.jsp> is operated by the Ministry of Justice and hosts decisions of the Supreme Court (all cases), Court of Appeal and High Court (all cases from 2005). The site states: "Decisions subject to a statutory prohibition or suppression order are published if available in a form that complies with the prohibition or restriction. The Judicial Officer has the discretion to allow the decision to be published; however, they are guided by the principle: Decisions should be made available unless there is a legal restraint: non-publication to be limited to the scope of such restraint. Changes in circumstances after a decision is published on the internet may affect the accuracy of information. No assurance is given as to the accuracy or completeness of any representation, statement, information or advice contained after the publication on the internet. The authenticated decision on the court file takes precedence. It is the responsibility of users of the information contained in the decisions to ensure compliance with conditions or other legal obligations governing access, release, storage and re-publication. If in doubt you should consult the Court that issued the decision."

[17] See <http://www.nzlii.org>. NZLII began in 2004 as a virtual 'front door' as a device by which to build an indigenous identity for New Zealand legal information. See Buckingham, D.M. What's in a name? New Zealand and the growth of on-line legal information. In proceedings of *Computerisation of Law via the Internet*, Pacific Islands Legal Information Institute, Vanuatu (2005), 1 – 12.

[18] For a history of the development of NZLII, see Buckingham, D.M. A binding separation – the New Zealand-Australia partnership in free access to law (2011) 38:3 *International Journal of Legal Information* (publication pending).

[19] See <http://www.lawfoundation.org.nz/>.

THE CURRENT PROBLEM (derogation in effect)

The process of managing compliance with suppression orders has the potential to derogate, in effect, from the ability to provide public access to legal decisions.

Tribunals - and the principle of open justice

For some tribunals, anonymisation in the wider interests of justice is not required: for example, the Motor Vehicle Disputes Tribunal, which determines claims by purchasers of vehicles against motor vehicle traders. For others, it will depend on how the empowering legislation addresses open justice issues. For example, the Customs Appeal Authority suppresses identifying information, presumably in the interests of commercial sensitivity. Other tribunals, by the very nature of the issues they determine, may anonymise or suppress details that would lead to disclosure of identity. For example, the default publication position for the Accident Compensation Appeal Authority,[20] Legal Complaints Review Office,[21] Mental Health Review Tribunal[22], Social Security Appeal Authority[23] and Taxation Review Authority[24] is to suppress identifying details.

However few decision generators provide a publicly available policy in relation to how such suppression is managed. This becomes critical when decisions are distributed for publication on a publicly available website. One exception is the Immigration and Protection Tribunal.[25] It is required to hold hearings in public and to issue a public decision. However it is subject to legislative exceptions to publication and therefore manages the process of providing electronic 'research copies' through a publication protocol. Appendix 2 contains a copy of the protocol as an example of what might be considered best practice in this area. Certainly from the point of view of a free-to-air publisher, the Tribunal has provided the mechanism by which the principle of open justice can be best maintained whilst ensuring simultaneous compliance with the public interest in the applicant's privacy.

---

[20] See < http://www.justice.govt.nz/tribunals/accident-compensation-appeal-authority>.

[21] See < http://www.justice.govt.nz/tribunals/legal-complaints-review-officer>.

[22] Established under the Mental Health (Compulsory Assessment and Treatment) Act 1992. Proceedings are closed to the public and publication is only with leave.

[23] See < http://www.justice.govt.nz/tribunals/social-security-appeal-authority>.

[24] See < http://www.justice.govt.nz/tribunals/taxation-review-authority>.

[25] See <http://www.justice.govt.nz/tribunals/immigration-protection-tribunal>. The Tribunal hears appeals and applications regarding residence class visas, deportation (including appeals on the facts and humanitarian grounds) and claims to be recognised as a refugee or as a protected person.

Courts – and the principle of open justice

Some jurisdictions, such as the Family Court[26] and the Youth Court,[27] provide for general suppression of identifying information). In other courts, it may depend on the nature of the proceedings. In 2009, the (then) Chief High Court Judge stated that compliance with suppression or non-publication orders is the responsibility of the publisher[28] - an obligation perhaps even more pressing for an e-publisher (given the scale and speed of dissemination). This entirely traditional position is quite understandable, and eminently reasonable if the discussion is confined to commercial dissemination of judgments or information about a proceeding. Those who publish for profit can be assumed to have the resources to bear and then recover from the burden of compliance. However the stance also has the potential to damage the ability to make legal decisions electronically available to the public at no cost, whether via an integrated site such as NZLII or via a court or tribunal's own web presence.

This paper does not suggest that there be any lifting of the burden of responsibility from the publisher – to do so would not be principled, given that the balance of the respective public interests in freedom of access to information and privacy have been legislatively set. But inconsistent practices in expressing the terms of suppression or non-publication orders, compounded by the absence of a suppression register, mean that compliance may become a hit and miss affair - despite best intentions.

Here are examples of the difficulties of compliance where an order simply refers to the fact of the order in the court below and does not recite its content:

- An order that states:

> **ORDER PROHIBITING PUBLICATION OF THE REASONS FOR JUDGMENT IN NEWS MEDIA OR ON THE INTERNET OR OTHER PUBLICLY AVAILABLE DATABASE UNTIL FINAL DISPOSITION OF TRIAL. PUBLICATION IN LAW REPORT OR LAW DIGEST PERMITTED.**
> **NOTE: EXTANT DISTRICT COURT ORDER PROHIBITING PUBLICATION OF NAME, IDENTIFYING PARTICULARS AND OCCUPATION OF THE RESPONDENT PENDING FURTHER ORDER OF THAT COURT.**

There is a major problem contacting the inferior court to find out if any further order has been made. The Court of Appeal decision is suppressed down to an initial and does not mention the court registry from which the decision at first instance was issued;

---

26 See <http://www.justice.govt.nz/courts/family-court/>. A notable departure from this practice occurred in 2007 when the Chief Family Court Judge authorised the issue of three judgments in relation to a mother who had ignored rulings in relation to her son, kidnapping him and hiding him for several months. See <http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10420746>.

27 See < http://www.justice.govt.nz/courts/youth>.

28 See <http://www.courtsofnz.govt.nz/business/guidelines/suppression-orders-in-high-profile-cases/09-05-05-Notification-of-suppression-orders.pdf>.

- A decision of the Court of Appeal that refers to the fact of still extant non-publication orders and footnotes the fact of 5 different High Court rulings but does not recite their content;
- A decision involving multiple defendants at Court of Appeal level is stated to be "subject to High Court suppression orders" – but the order is not made in the name of the first defendant, so if the publisher tries to track it in terms of the appeal intitulement, it will be difficult to locate.

In early 2011 even the 'official' public disseminator of decisions failed to discharge its obligation to comply with court orders. The Ministry of Justice published sentencing notes through its Judicial Decisions Online database[29] in breach of an order suppressing the identities of 2 victims in the related sexual offence trial. That resulted in the complete cessation of publishing of all High Court decisions by the Ministry, until completion of an inquiry into the systems that failed to protect from such a breach.[30]

Ironically and at the same time, Parliament is considering the Criminal Procedure (Reform and Modernisation) Bill - which will increase substantially increase penalties for suppression order breach.[31] The Bill provides some level of comfort against prosecution of an Internet service provider in terms of breach if it deletes the material or prevents access to it as soon as possible after becoming aware of the infringement. In its current form, the Bill's definition of an 'internet service provider' is arguably wide enough to include, as 'hosts', publishers of judgments who maintain their own web publishing platforms:

> **Internet service provider** means a person who does either or both of the following things:
> (a) offers the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing:
> (b) hosts material on websites or other electronic retrieval systems that can be accessed by a user.

If paragraph (b) is interpreted in a non-technical manner, 'host' might embrace not only digital providers of databases but also those who have organised or ordered the collation of that data - in other words, those without whose activity there would be no data for which to provide access.

---

[29] See above, n 16.

[30] A Report into the breach was issued on 23 April 2011. It calls for better protocols between judges and the Ministry of Justice but also, worryingly, asks whether the Ministry should even be publishing judicial decisions. At the time of writing, there had been no judicial response by the Chief High Court judge. See: <http://www.justice.govt.nz/publications/global-publications/j/judicial-decisions-online-inquiry-report>.

[31] See <http://www.nzherald.co.nz/ministry-of-justice/news/article.cfm?o_id=122&objectid=10706164>.

But that does not confront the wider issue of how the publisher might know or have reason to believe that material infringes the relevant suppression order or provision. Nor does the 'comfort' clause protect individuals whose uploading of a decision resulted in that publication. The Cabinet paper[32] on the proposed legislation states that Cabinet agrees that breach of suppression orders should "continue to be strict liability offences" even though penalties will be substantially increased.[33] NZLII has made a submission[34] to the Select Committee, arguing that strict liability is not appropriate when the penalty is as substantial as proposed and includes imprisonment. Instead NZLII has submitted that intentional or reckless breach of suppression orders is the proper basis for intervention.[35] The Bill is yet to be reported back from the Select Committee process.

RESPONSES TO THE PRACTICAL PROBLEM OF COMPLIANCE

Given the current changes proposed to the penalty for breach of orders, a public access publisher like NZLII needs to look carefully to its supply arrangements, since these largely determine its publication processes and its ongoing viability.

The obvious solution, where there are slim resources, is to publish only decisions supported by a clear process for anonymisation undertaken by the decision generator, even though that would reduce the data flow considerably.[36] This could be twinned with lobbying for a suppression register to enable publishers to ensure that future publication decisions are made in conformity with such orders. Such registers exist in some Australian state jurisdictions: see Appendix 3 of this paper for an overview.[37] The

---

[32] *Suppression names and evidence* <http://www.justice.govt.nz/policy/justice-system-improvements-1/criminal-procedure-simplification-project-1/documents/Name%20Suppression%20Cab%20Paper.pdf>.

[33] Above, n 14.

[34] A copy of the submission is available at: <http://www.parliament.nz/en-NZ/PB/SC/Documents/Evidence/?Custom=00DBHOH_BILL10451_1>.

[35] A recent example of where it would be immensely unfair to treat breach of suppression as a strict liability offence is the nine-day gap between the issue of a decision and a subsequent suppression order, suppressing details from one part of one paragraph of the judgment. All who published acted in good faith and in reliance on the lack of suppression order on the front page of the decision.

[36] For example, the Family Court has issued advice on publication restrictions but does not provide guidance on how to ensure that identifying information is removed and what it is be replaced with in order to render the judgment still comprehensible. For advice on what is restricted, see the Court's guidance at <http://www.justice.govt.nz/courts/family-court/legislation/restrictions-on-publications>. The New Zealand Court of Appeal's guidelines for anonymising judgments were referred to by Mullins J in Judicial Writing for an Electronic Age – Five Years On but these are not publicly available as they form part of the Judges' Manual. See: <http://www.austlii.edu.au/au/journals/QldJSchol/2009/65.pdf>.

[37] The Appendix relies on the Tasmanian Law Society Paper *Suppression and non-publication orders – Proposal for National Register* <http://www.taslawsociety.asn.au/news/SuppressionOrders.pdf>, the New Zealand Law Commission Reports *Access to Court Documents* (2004) and *Suppression Orders* (2009),

New Zealand Law Commission has endorsed the need for such a register[38] and it remains the ultimate goal of the judiciary[39] but in the current economic climate, the prospects of its establishment are negligible.

The halfway house might be to ask for the establishment of some general protocol across all judgment generators (which will obviously need to accommodate specific prohibitions unique to particular jurisdictions). This has been a development in Canada where the Canadian Judicial Council (CJC) in 2005 approved a protocol dealing with the use of personal information in judgments.[40] A general protocol might iron out the difference in anonymisation practices across the court tiers and jurisdictions as much as that is practicable and thereby reduce the pre-publication burden.

Concomitantly, those generating judgments might also look to their practices without departing from the general view that the onus should remain with the publisher to ensure compliance with an order. Encouraging standard orders with clearly settled meanings would reduce the need for interpretation or reference back to earlier decisions in the proceedings.

SUMMARY

The promotion of open justice is the principal and principled foundation of NZLII's very existence. It is also the rationale for its ongoing operation while the State does not provide comprehensive free public access to decisions. NZLII's current challenge therefore is how to ensure compliance with orders that rightly derogate from open justice in the wider public interest, while continuing to remain viable enough to express

---

the New South Wales Attorney General's *Report on Access to Court Documents* (2006) and the associated review of submissions: <www.lawlink.nsw.gov.au/lpd>.

[38] *Suppressing Names and Evidence* NZLC R 109 (2009) – Recommendation 24: "the development of a national register of suppression orders should be advanced as a matter of high priority" (at para 6.59 – 6.65). However the Criminal Procedure (Reform and Modernisation) Bill does not provide for a register since the Cabinet paper notes Ministry concerns about a register moving the onus from media, as well as requiring 'court staff to interpret the judge's decision and keep the register correct and up to date'. See <http://www.justice.govt.nz/.../criminal.../Criminal.../Name%20Suppression%20Cab%20Paper.pdf>. Practical difficulties with currency of orders, determining who should have access to them and, more importantly, the need for funding of the register may be more legitimate concerns.

[39] As stated in 2009 by the (then) Chief High Court Judge, Randerson J: <http://www.courtsofnz.govt.nz/business/guidelines/suppression-orders-in-high-profile-cases/09-05-05-Notification-of-suppression-orders.pdf>.

[40] See http://www.cjc-ccm.gc.ca/.../news_pub_techissues_UseProtocol_2005_en.pdf. It must be noted that the protocol is directed not just to legal prohibitions on publication but also tries to guard against identity theft through the publication of personal data identifiers and expresses privacy considerations in terms of the potential for Internet dissemination to harm innocent persons or subvert the course of justice.

ongoing support for the principle itself. To achieve that, a new approach is needed – and it begins with the courts.

In 2006 in *Mafart and Prieur v TVNZ*,[41] in the context of an application to search court records in criminal proceedings, the Supreme Court observed:

> Public access to Court files, both in respect of current and completed cases, must be considered in the context of contemporary values and expectations in relation to freedom to seek, receive and impart information, open justice, access to official information, protection of privacy interests and the orderly and fair administration of justice.

Nesting of open justice within these wider considerations also applies to judgment publication. Perhaps it is time to reassess how open justice is best expressed in the electronic light. To do that might require a judicial step back to review, in a synthetic way, the consequences of electronic publishing in terms of suppression, anonymisation, and privacy (including identity theft) considerations – as the Canadian Judicial Council has done.[42] The considerations in the quotation above point to that approach being within the current reach of the New Zealand judiciary.

Of course, writing a judgment is difficult enough without having to consider the ramifications of the electronic life of that document – but it may be that if this is not addressed at the outset of judgment creation, the e-publication door might swing further shut as free to air publishers adopt the most risk averse of publication strategies – not to publish at all. And that is the worst possible outcome, damaging the reciprocal relationship of trust between judiciary and public referred to at the beginning of this paper in a way that those judges, 29 years ago, might have been appalled to contemplate.

[41] [2006] NZSC 33 para 7; [2006] 3 NZLR 18 at 24.

[42] Above, n 40.

APPENDIX 1

OPEN JUSTICE PROVISIONS IN NEW ZEALAND

Access to Court Documents in civil cases	**Access to Court Documents in criminal cases**
Governing Provisions for proceedings in the High Court: Judicature Act 1908 Schedule Two: High Court Rules. (There are also identical rules for the District Court which are not covered here, inserted, on 12 June 2009, by rule 4 of the High Court (Access to Court Documents) Amendment Rules 2009 (SR 2009/133).	**Governing Provisions:** Criminal Proceedings (Access to Court Documents) Rules 2009. (Note the decisions under the Rules are classified as being made in the civil jurisdiction – R 5.)
Court's general right to prohibit access to court documents While there are general rights of access (search, inspect and copy) in many instances under R 3.7, these rights are subject to the Court's power under various rules to prohibit inspection of any documents without leave.	**Court's general right to prohibit access to court documents** While there are general rights of access in many instances, any of these rights are subject to the Court's general power under r 6(2)(a) to prohibit inspection of any documents without leave.
Parties to Proceeding Parties and counsel to a civil proceeding have a general right to access any documents in the custody of the Court (Court File) (R 3.8(1)) with the exception of electronic material for which permission to copy is required (R 3.8(2)).	***Parties to Proceeding*** Parties to a criminal proceeding have a general right to access any documents in the custody of the Court (Court File) (R 7(1)) with the exception of electronic material (R 7(2)), and the Crown Book kept under s 353 of the Crimes Act 1961 (R 6(2)(b)), both of which require court permission. If there is more than one defendant, any access to the court file or documents relating to the proceeding must be with the permission of the Court (R 7(4)).
Non-Parties (including media) Non-parties to a civil proceeding have a general right to access the formal court record (R 3.7).	***Non-Parties (including media)*** Non-parties have a general right to access the formal court record (r 6(1)). **Committal Stage** During the committal stage non-parties can access documents filed in the court relating to the committal proceedings (R 8(2)(a)), any written statements (R 8(2)(b)) or documents (R 8(2)(c)) admitted into evidence for the purposes of the committal hearing, or a transcript of any evidence given orally (R 8(2)(d)) during the committal proceeding. This right is subject to a judge's discretion to make an order that access may only occur with the permission of the Court (R 8(3)).

Access to Court Documents in civil cases	**Access to Court Documents in criminal cases**
	Process for gaining access: A person may apply to the registrar under R 8(4), stating the documents they wish to access, with reasons. The registrar must notify the parties/counsel of the request (R 8(5)(a)), and parties can object to access within a specified time frame (R 8(5)(b)). If a party does object, the registrar must refer the matter to the judge (R 8(5)(c)). Rule 8(6) states if there is an objection, the judge may determine that objection in any manner the judge thinks fit. If there is no objection and the document is not subject to any restriction in R 12, the registrar must provide prompt access.
Substantive hearing This period under R 3(9) is regarded as the 'open justice' stage as the matter is being tried in public and commences at the beginning of the hearing and concludes with the expiration of the appeal period. During this stage non-parties have a right to access documents in addition to the formal court record – for example, documents filed and evidence presented in the proceedings. This right is subject to a Judge's discretion to prevent access, or an objection by a party to the proceeding.	**Trial Stage** Similarly, non-parties have a right to access written statements (r 9(2)(a)) or documents (r 9(2)(b)) admitted into evidence for the purposes of the trial, or transcripts of evidence given orally at trial (r 9(2)(c)). Again a judge has discretion under r 9(3) to direct that access must be with permission of court.
Process for obtaining access: Access during the substantive hearing requires an informal application to the Registrar (R 3.9) specifying documents and reasons for access. The registrar will then notify the parties who may object. The application is then referred to a judge. Parties must have good grounds for the objection to be upheld. For example, that it is highly sensitive personal information, or is confidential and should be protected from competitors. Often the court will order a redacted version be made available.	Process for gaining access: The same process that as applies with access at the committal stage (above) also applies to access to documents at trial stage – (however substitute reference to R 8 to R 9).
Access to other documents/ documents restricted during substantive hearing Non-parties can apply for access, with reasons, to otherwise restricted documents: R 3.9 (substantive hearing) or R 3.13. (any other stage). Applications will be determined according to the criteria in R 3.16: a. The orderly and fair administration of justice b. The protection of confidentiality, privacy interests (including of children and other vulnerable members of the community), and any privilege held by/available to any person	**Access to documents, court files and formal court record in other cases** Under R 11 a person ineligible to access specific documents under other rules is able to apply to the court for access under R 13. A judge will determine an application according to the considerations in R16: a. The right of the defendant to a fair trial b. The orderly and fair administration of justice c. The protection of confidentiality, privacy interests (including those of children and other vulnerable members of the community), and any privilege held by/available to any person

<table>
<tr><th><u>Access to Court Documents in
civil cases</u></th><th><u>Access to Court Documents in
criminal cases</u></th></tr>
<tr><td>c. The principles of open justice, namely, encouraging fair and accurate reporting of, and comment on, court hearings and decisions
d. The freedom to seek, receive and impart information
e. Whether a document to which the application or request relates is subject to any restriction under rule 3.12
f. Any other matter that the Judge or Registrar thinks just.

Restricted Proceedings:
Rule 3.12 lists proceedings where parties and their representatives may search files, but non-parties must apply under Rule 3.11 for access. These are generally proceedings that are sensitive or involve vulnerable members of the community:
a. Adoption Act 1955
b. Alcoholism and Drug Addiction Act 1966
c. Arbitration Act 1996
d. Care of Children Act 2004
e. Civil Union Act 2004
f. Family Proceedings Act 1980
g. Family Protection Act 1955
h. Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003
i. Marriage Act 1955
j. Mental Health (Compulsory Care and Treatment) act 1992
k. Property (Relationships) Act 1976
l. Protection of Personal and Property Rights Act 1988
m. Status of Children Act 1969
n. Any former provisions corresponding to provisions of any of the above Acts.

This provision places a presumption against access in such cases. However suppression orders may be available to prohibit publication of specific identifying details, and in such cases the judgment (in an anonymised form) or general information about the proceedings may still be published.</td><td>d. The principles of open justice, namely, encouraging fair and accurate reporting of, and comment on, court hearings and decisions
e. The freedom to seek, receive and impart information
f. Whether a document to which the application or request relates is subject to any restriction under rule 12
g. Any other matter that the Judge or Registrar thinks just.

Restricted Proceedings:
Rule 12(3) specifies documents which may only be accessed with the permission of the Court:
(a) In the case of a proceeding to which s 185A of the Summary Proceedings Act or s 375A of the Crimes Act 1961 applies (cases of a sexual nature):
i. a written statement by, or transcript of the evidence of a person who is a complainant or who gives, or is intended to give, propensity evidence
ii. videotaped records or records in any electronic form of interviews with any person who is a complainant or who gives, or is intended to give, propensity evidence
iii. photographs or images in any electronic form of any person who is a complainant, or who gives, or is intended to give, propensity evidence.
(b) Videotaped records or records an any electronic form of interviews with a defendant
(c) A document that identifies, or enables identification of, a person if the publication of many matter relating to the person's identity (such as the person's name) is forbidden by any enactment or order of the Court
(d) Any written statement or document received, or any record of anything said, in a proceeding which members of the public are excluded from the proceeding by an enactment or by an order of the Court.</td></tr>
</table>

Publishing material relating to a proceeding in civil cases	**Publishing material relating to a proceeding in criminal cases**
There is a presumption of an open courtroom and only exceptional circumstances will result in closure. Thus, any publication prohibition on publication relates not only to documents accessed through the High Court Rules but also to information acquired through attending the Court hearing itself. **High Court Rules** The High Court Rules do not stipulate a test for whether a judge should make a suppression order. The order may be justified where there are specific adverse consequences that publicity would cause, or that the party is a member of a class in respect of which exceptional circumstances are applicable: *Clark v Attorney General* [2005] NZAR 481 (CA). For example: where publication would either prevent a fair trial, or would result in undue hardship for the person seeking the suppression order, or someone connected with the proceedings. **Special position of the Family Court** The Family Court was traditionally closed, the private nature of the matters considered to outweigh any public interest in the proceedings being public. Since the Care of Children Act 2004, accredited media personnel could attend proceedings under that Act. The principle of open justice is given further effect by the 2009 amendments to the Family Courts Act 1980, extending this to all proceedings. Also consistent with open justice is the amended publication regime in s 11B-11D of the Family Courts Act 1980 which allows publication, without leave, of decisions that have identifying material removed. For guidance on restrictions in publications, see http://www.justice.govt.nz/courts/family-court/legislation/restrictions-on-publications	There is a presumption of an open courtroom (s 138 Criminal Justice Act) and only exceptional circumstances will result in closure. Thus, any prohibition on publication relates not only to documents accessed through the Criminal Proceedings (Access to Court Documents) Rules 2009, but also information acquired through attending the Court hearing itself. **Criminal Justice Act 1985** Section 138: Power to clear court and forbid report of proceedings 1) Subject to the provisions of subsections (2) and (3) and of any other enactment, every sitting of any court dealing with any proceedings in respect of an offence shall be open to the public. (2) Where a court is of the opinion that the interests of justice, or of public morality, or of the reputation of any victim of any alleged sexual offence or offence of extortion, or of the security or defence of New Zealand so require, it may make any one or more of the following orders: (a) an order forbidding publication of any report or account of the whole or any part of— (i) the evidence adduced; or (ii) the submissions made: (b) an order forbidding the publication of the name of any witness or witnesses, or any name or particulars likely to lead to the identification of the witness or witnesses: (c) Subject to subsection (3), an order excluding all or any persons other than the informant, any Police employee, the defendant, any counsel engaged in the proceedings, and any officer of the court from the whole or any part of the proceedings. (3) The power conferred by paragraph (c) of subsection (2) shall not, except where the interests of security or defence so require, be exercised so as to exclude any accredited news media reporter. …. (6) Notwithstanding that an order is made under subsection (2)(c), the announcement of the verdict or decision of the court (including a decision to commit the defendant for trial or sentence) and the passing of sentence shall in every case take place in public; but, if the court is satisfied that exceptional circumstances so require, it may decline to state in public all or any of the facts, reasons, or other considerations that it has taken into account in reaching its decision or verdict or in determining the sentence passed by it on any defendant.

Publishing material relating to a proceeding in civil cases	**Publishing material relating to a proceeding in criminal cases**
	Section 139 Criminal Justice Act 1985 prohibits publication of names in specified sexual cases unless the victim is over 16 and the court permits publication. Section 139A Criminal Justice Act 1985 prohibits any publication of the names of, or particulars likely to lead to the identification of child witnesses. Section 140 Criminal Justice Act 1985 empowers the court to prohibit the publication of the names of, or particulars likely to identify, the person accused or convicted of the offence or any other person connected with the proceedings. **When will a court exercise this discretion?** Section 140(4A) states that the judge must take into account the views of a victim or their parent or guardian. Other than this, the legislation does not provide guidelines. The process, as discussed in *R v Liddell* [1995] 1 NZLR 538, begins with the presumption of open justice and thus openness in reporting. The factors usually considered by a court include: whether the person has been acquitted or convicted; the seriousness of the offending; if publication would have an adverse impact on rehabilitation; personal circumstances, including personal professional and financial interests. A 2009 Practice Note details arrangements for notification of suppression orders in high profile cases. Ultimately however, the publisher bears the responsibility to ascertain the existence and terms of such orders.

Appendix 2

IMMIGRATION AND PROTECTION TRIBUNAL PUBLICATION PROTOCOL

Publication principles

1. The statutory provisions relating to the publication of decisions of the Immigration and Protection Tribunal are s.151 and clause 19 of Schedule 2 of the Immigration Act 2009.

2. Subject to certain exceptions, including any appeal by a refugee or protected person, every oral hearing is public (clause 18 of Schedule 2). Where there is a public hearing, *prima facie*, there should be a public decision. Thus, clause 19(1) of Schedule 2 imposes an obligation on the Tribunal to publish research copies of its decisions, subject to specified exceptions.

3. The principle underlying this statutory obligation to publish is promotion of the rule of law, notably the desirability of open justice. Apart from promoting accountability through open justice, the publication of research copies promotes the principle of equal treatment, in terms of ensuring legal certainty and predictability as well as in the sense that persons similarly situated should be treated equally – see *Refugee Appeals 76299 & 76297 (Applications 129T-2009-001 & 002)* (17 July 2009) at [24]-[30].

4. In short, decisions of judicial bodies are generally matters of public interest and research copies should be available to the public.

Application of principles

5. The original decision contains full particulars, without redaction.

6. The original decision is given to the appellant or affected person. A copy of the original decision is given to any other party (s.151(2) also permits it to be shared with certain other classes of persons). A further copy of the original decision is retained by the Tribunal, both in hard copy and electronically, as part of its formal archives.

7. The Tribunal normally makes copies of its decisions available to the public as 'research copies'. The primary vehicle for the publication of such research copies is the Tribunal's own website.

8. There is sometimes good reason, however, for imposing a prohibition on publication of a research copy, in whole or in part. The exceptions to publication specified in clause 19 of Schedule 2 are:

   (a) Refugee and protection decisions must be edited in a way so as to remove the name of the appellant and any particulars likely to lead to the identification of the appellant.

(b) In any other case, the Tribunal may edit the decision in a way so as to remove the name of the appellant and any particulars likely to lead to the identification of the appellant.

9. The obligation in 8(a) is normally exercised by the removal of the appellant's name and the depersonalisation of any facts likely to lead to his/her identification (or which would be likely to endanger the safety of any person – see s.151(1)(b)), from the research copy before publication. The Tribunal tries, however, to avoid issuing research copies with whole sections deleted because readers cannot feel confident that the whole of the decision is understood, including any precedent value. Where possible, decisions should be written in a way that obviates the need to delete sections. As to full restriction from publication, see 15-16 below.

10. Subject to 11-14 below, the discretion in 8(b) is exercised by the Tribunal in the following manner:

(a) Deportation decisions are normally published in full, including the name and description of the appellant.

(b) Residence decisions are normally depersonalised by the removal of the appellant's name and any particulars likely to lead to the identification of the appellant or his/her family, and the names of other persons referred to.

11. Where a deportation or a residence decision involves an appellant who is, or was, a refugee or protected person, or where it discusses the particulars of a refugee or protection claim (whether successful or not), that part of the decision is treated as if it is a refugee or protection appeal and is subject to the limitations on publication at 8(a) above.

12. Where the Tribunal is aware of other proceedings in which there is a Court Order suppressing the name of any person or any other information, the Tribunal will take such steps as are necessary to ensure that the research copy of its decision complies with that Order.

13. Research copies of decisions will not normally identify victims of offending (particularly sexual offending) and the Tribunal will normally remove the names and any particulars likely to lead to the identification of the victim.

14. Unless they were witnesses, the names of children are normally removed from decisions before publication. Where a child was a witness, the Tribunal will determine whether the interests of open justice require publication of the child's name.

'Publication prohibited' status

15. Sometimes, the likelihood of identification of a refugee or protection claimant (or other reason) is such that it is necessary to withhold publication of the substantive decision. In such cases, the Tribunal will normally publish a 'short form' research copy of the decision, stating only the country of nationality, the prohibition on publication and the outcome. The 'publication prohibited' status will be reviewed periodically by the Publication Committee.

16. Where a decision is prohibited from publication:

(a) the full copy will bear a diagonal watermark in faint grey stating PUBLICATION PROHIBITED on every page and will have, on the first and last pages, a footnote stating, for example:

> **Publication of this decision is restricted pursuant to s.151 and cl. 19 of Schedule 2 of the Immigration Act 2009. It is not to be released, copied or disseminated in any form.**

(b) The 'short form' research copy should identify the source of the power to prohibit publication, unless to do so would itself amount to a breach of s.151 and/or clause 19. In such cases, the source of the power to prohibit publication should be identified in the original decision.

Responsibility for depersonalisation

17. The depersonalisation of a decision is the responsibility of the member(s) issuing the decision.

Publication Committee

18. The Tribunal maintains a Publication Committee, whose functions include:

    (a) Ratifying recommendations by members for prohibition on publication.

    (b) Monitoring all 'Publication Prohibited' decisions annually for possible release.

    (c) Considering correspondence from appellants relating to confidentiality issues.

    (d) Formulating publication policy.

    (e) Maintaining and supervising 'Publication Prohibited' endorsements on decisions.

19. The Committee reports to the Chair.

20. Queries from parties about publication issues should be referred to the Publication Committee in the first instance for discussion.

Dated this 29th day of November 2010
Judge W Hastings
Chair, Immigration and Protection Tribunal

APPENDIX 3

OVERVIEW OF SUPPRESSION MANAGEMENT REGIMES IN AUSTRALIA

NSW	VIC	QLD	ACT	SA	WA	NT	TAS
Administration of suppression orders *The Public Information Officer (PIO) of the Supreme Court manages suppression order information.* *Judges' associates must notify the PIO when a suppression order is made, varied or revoked. Ideally, this is done by email to persons registered on a group email list. The list includes both journalists and media lawyers. The PIO keeps copies of the orders on file. The PIO is also*	**Administration of suppression orders** *Suppression orders (and revocations) in all jurisdictions are logged on a central database managed by the Supreme Court's Media/Publication Manager.* *Hard copies of orders made since 1993 have also been kept.*	**Administration of suppression orders** *No formal data is collected about suppression orders made by Queensland Courts.*	**Administration of suppression orders** *The ACT does not collect or store information about suppression orders. Nor is there an established system for advising the media about suppression orders.*	**Administration of suppression orders** *There is a register of orders kept under ss 69A(10) of the Evidence Act 1929. It is maintained by the Registrar of the District Court and held at the Sheriff's office.* *The Register is an index showing the names of parties, the file number and kind of order (eg original, variation or revocation).*	**Administration of suppression orders** *Western Australia has a comprehensive system of paper orders that go to the registry, automatic alerts that go into computer databases, and the Suppression Order Registry.* *The Sheriff's Office maintains a registry of suppression orders made in all SA courts except for the Supreme Court which maintains its own record. The Manager of Media and Public Liaison also receives a copy order.* *Hard copies are also kept on each court*	**Administration of suppression orders** *Suppression orders are added to the electronic Integrated Justice Information System database, but there is no separate register.* *Hard copies of the orders are included in folders at the counters of the Supreme and Magistrates Courts. Supreme Court orders are distributed to the media electronically.*	**Administration of suppression orders** *The Tasmanian Supreme Court does not issue suppression orders.*

responsible for keeping records of suppression orders made in the District Court. Judges' associates in that Court must advise the Supreme Court PIO of orders made. There is no such process for suppression orders in local, Children's or Coroners' Courts. *How do media and others interested inspect the register?* *Media can contact the PIO to be registered on the email distribution list. Otherwise, media contacting the court registry will be informed of the details of any relevant suppression order in particular proceedings on request.*				*How do media and others interested inspect the register?* *The register can be inspected, free of charge, by the public during office hours at the Sheriff's office.*	*file, including when the matter transfers between jurisdictions, to ensure that judicial officers handling that file are aware that an order has been made. Automatic alerts are also set on the courts' computer databases.* *How do media and others interested inspect the register?* *The media contact either the Manager of Media and Public Liaison or the Sheriff's Office directly to obtain details and a copy of the order. No fee is charged.*	*How do media and others interested inspect the register?* *Access to the folders kept at the court counters is subject to approval by the Registrar of the Court. There is no fee for access or inspection.*	

Is the media notified of changes? *The PIO uses the email distribution list to advise on the revocation of orders. There is no other formal mechanism to advise on removal or variation of publication restrictions.*	*Is the media notified of changes?* *The media has been routinely notified of all suppression orders since 1993 and scanned copies are sent via a dedicated email service.*			*Is the media notified of changes?* *Registrars must send electronic information on orders (including variations/revocations) to the authorised representatives of media organisations There is an annual fee.*	*Is the media notified of changes?* *If a suppression order is lifted, a form is attached to the original order so that it is clear when it is no longer operational. There is no automatic notification about an order being lifted. But if a suppression order is receiving media attention, the media would be alerted.*	*Is the media notified of changes?* *The media receives electronic notification of Supreme Court orders.* *The Magistrates Court is considering a similar system, but is having difficulties in developing a useful email address book for all media agencies. Supreme Court experience has shown that it is difficult to keep the address book current.*	